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# **THE DIRE WOLF COLLECTS HIS DUE WHILE THE BOYS SIT BY THE FIRE:<sup>1</sup> WHY MICHIGAN CANNOT AFFORD TO BUY INTO THE DEATH PENALTY**

JUSTIN BROOKS AND JEANNE HUEY ERICKSON<sup>2</sup>

During the late 1890's Emperor Menelik II of Ethiopia was told of the new method of executing criminals in the United States by electrocution. In his haste to emulate this punishment in his own country he ordered three electric chairs, forgetting that electricity had yet to be introduced in Ethiopia. To save his investment, he appropriated one of the chairs as his royal chair.<sup>3</sup>

"For which of you, intending to build a tower, does not first sit down and estimate the cost, to see whether he has enough to complete it? Otherwise, when he has laid a foundation and is not able to finish, all who see it will begin to ridicule him, saying, 'this fellow began to build and was not able to finish.'"

Luke 14:28-30

"From a welfare state to society murder, bring back the noose is always heard whenever the swine are under attack. But, it won't make you even, it won't bring them back."

Elvis Costello<sup>4</sup>

"The death penalty in criminal justice is a kind of luxury item. It's an add on: it's an optional item when you buy your criminal justice vehicle."

Vincent Perini, Texas Bar Association<sup>5</sup>

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1. THE GRATEFUL DEAD, *Dire Wolf*, on WORKINGMAN'S DEAD (Ice Nine Publishing Company, Inc. 1970).

2. Justin Brooks is an Associate Professor of Law at the Thomas M. Cooley Law School and was the Chair of the law school's Death Penalty Symposium Commemorating the 150th Anniversary of the Abolition of the Death Penalty in Michigan. Jeanne Huey Erickson is a Senior Law Student at Thomas M. Cooley Law School. Both authors wish to thank Craig Erickson, Mark Hilal, Tricia Kirkby, Cindy Hurst, John Michaud, and the Thomas M. Cooley Law Review staff for their assistance in completing this article.

3. ENCYCLOPEDIA OF 7,700 ILLUSTRATIONS: SIGNS OF THE TIMES (Paul Le Tan ed., 1979).

4. ELVIS COSTELLO, *Let Him Dangle*, on SPIKE (Warner Bros. 1989).

5. RICHARD C. DIETER, DEATH PENALTY INFORMATION CENTER, MILLIONS MISSPENT: WHAT POLITICIANS DON'T SAY ABOUT THE HIGH COSTS OF THE DEATH PENALTY 7 (1994) (quoting C. Hoppe, *Executions Cost Texas Millions*, THE DALLAS MORNING NEWS, Mar. 8, 1992, at 1A).

## I. INTRODUCTION

The state of Michigan proudly stands apart from other states that follow like sheep to embrace capital punishment and pay the "dire wolf his due." As a result, for one hundred and fifty years Michigan has avoided incurring the high costs associated with the death penalty.<sup>6</sup> Ironically, costs have become an integral part of the death penalty debate because they have been put forth by death penalty proponents in support of the death penalty. The argument is often put in the form of a simple question: "Why should my tax dollars be spent taking care of inmates for the rest of their lives when it would be much cheaper to execute them?" This question presumes the falsehood that, in the long run, fewer tax dollars are spent when prosecutors pursue the death penalty than when they pursue life imprisonment. Although the cost argument is one of the least compelling arguments against the death penalty, because whether the death penalty is cost-effective or cost-prohibitive should not determine whether the death penalty is an appropriate, just, or moral sanction, the purpose of this article is to explain why the cost argument belongs to the abolitionists.<sup>7</sup>

Beyond simply responding to empty rhetoric, the cost argument against the death penalty is also relevant because there are limited resources within the federal and state criminal justice systems.<sup>8</sup> If there was an unlimited amount of money to spend on the criminal justice system, the high cost of the death penalty would be irrelevant. However, when looking at the criminal justice system holistically and pursuing the goal of getting the most bang for our criminal justice bucks, it is clear that the death penalty is a sanction that we cannot afford.<sup>9</sup>

Unfortunately, many politicians like to support criminal sanctions that grab headlines and show tangible results in the polls, even if they show no tangible results in terms of improving the criminal justice system. As the Democrats learned with the Willie Horton issue in the 1988 Presidential election, "tough-on-crime" stances win elections and

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6. See 1994 INFORMATION KIT, MICHIGAN DEP'T OF CORRECTIONS, CAPITAL PUNISHMENT, L (Nov. 1994).

7. See *infra* Part IV.

8. See *infra* Part V.

9. See *infra* Part V.

the perception that a candidate is "weak on crime" loses elections.<sup>10</sup> Under the guise of victims' rights, and as alleged participants in the "war against crime," politicians have been successful in selling the death penalty to their constituents. Bill Clinton learned this lesson well, and his pro-death penalty stance was part of his successful 1992 presidential campaign. Clinton emphasized that he presided over executions as the Governor of Arkansas and supervised the execution of a severely brain damaged death-row inmate.<sup>11</sup> The 1996 presidential election featured Bill Clinton and Bob Dole falling over each other to be the "tougher on crime" candidate,<sup>12</sup> and as politicians like Clinton and Dole sit by the fire telling stories about the death penalty "solution," state after state falls prey to its shortcomings as a criminal sanction, including its cost.<sup>13</sup> As of 1996, thirty-eight states, the federal government, and the United States military have adopted capital punishment legislation, and in all of these jurisdictions, the dire wolf is collecting his due.<sup>14</sup>

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10. See DIETER, *supra* note 5, at 10-11. The state of Tennessee provides a more recent example of the electoral ramifications of being perceived to be insufficiently pro-death penalty; Kirk Loggins & Duren Creek, *GOP Kicks Off Big Plan to Oust White*, TENNESSEAN, July 26, 1996, at 2A. Conservative organizations targeted Justice Penny White, and capitalized on voter frustration with a lack of executions. *See id.* Activists accused Justice White of being "more concerned with the scum's rights than she is with victims and the citizens of this state." *Id.* Voters responded in force, with 55% of them voting against Justice White in the primary election. *See Kirk Loggins, State Turns Out Justice White*, TENNESSEAN, Aug. 2, 1996, at 1A.

11. See Nat Hentoff, *Celebrating Death With Pataki the Executioner*, VILLAGE VOICE, Feb. 14, 1995, at 20. The death row inmate was Ricky Ray Rector. His mental capacity was clearly in question when he left a piece of pie from his last meal, explaining he'd be back for it later. *See id.*

12. See John King, *Dole Talks Tough on Crime During Visit to California*, COMMERCIAL APPEAL (Memphis, TN), Mar. 24, 1996, at A16. Dole even conducted a "photo op" at San Quentin to argue that death row inmates should only receive one appeal. *See id.*

13. See Erik Kriss, *Death Penalty Could Cost Millions*, SYRACUSE HERALD-J., Jan. 19, 1996, at A1. A spokesperson for New York's Governor Pataki said that "[e]conomic factors are not the issue. The governor wants to see justice served." *Id.* New York Attorney General Dennis Vacco's spokesman explained "[W]e believe you can't put a price on justice . . . It may be expensive, but ultimately society benefits by making the punishment fit the crime." *Id.*

14. New York and Kansas are the two most recent states to pass death penalty statutes, New York in 1995, and Kansas in 1994. *See STATE OF WISCONSIN LEGISLATIVE REFERENCE BUREAU, CAPITAL PUNISHMENT IN WISCONSIN AND THE NATION* 25 (Apr. 1995). So far in 1996, Alaska, Michigan, Rhode Island, and Wisconsin have defeated legislative measures which would establish the death penalty. *See Janet Pearson, The Death Penalty: Killing Killers Leaves Nagging Questions*, TULSA WORLD, Aug. 11, 1996, at G1. Other jurisdictions

As with any cost argument where two options are compared, there is always the question of whether costs can be cut in order to make an option more economical. When the option under consideration is the death penalty, the typical response to the cost argument is: "If you trim away the appellate rights of death row inmates, then the death penalty will not cost as much." This response is flawed for two reasons. First, it assumes that the death penalty would remain a constitutional sanction without appellate rights, and second, it is based on the false premise that most of the costs associated with the death penalty are incurred at the appellate level. This article will also address these issues.

## II. DEATH IS DIFFERENT<sup>15</sup>

The Supreme Court has recognized that death is different from all other punishments.<sup>16</sup> In *Gardner v. Florida*<sup>17</sup> the Court noted:

[F]ive Members of the Court have now expressly recognized that *death* is a *different kind* of punishment from any other which may be

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have passed legislation expanding the use of the death penalty by broadening the definition of capital crimes and adding additional aggravating factors that would justify imposition of the death penalty. See JAMES J. STEPHAN & TRACY L. SNELL, CAPITAL PUNISHMENT, U.S. DEP'T OF JUSTICE 1994, at 2-3 (1996).

15. See *Gregg v. Georgia*, 428 U.S. 153 (1976). In the judgment of the Court and opinion of Justice Stewart, Powell and Stevens, Justice Stewart wrote:

While *Furman* did not hold that the infliction of the death penalty *per se* violates the Constitution's ban on cruel and unusual punishments, it did recognize that the *penalty of death is different* in kind from any other punishment imposed under our system of criminal justice. Because of the uniqueness of the death penalty, *Furman* held that it could not be imposed under the sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. Mr. Justice White concluded that "the death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." Indeed, the death sentences examined by the Court in *Furman* were "cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of [capital crimes], many just as reprehensible as these, the petitioners [in *Furman* were] among a capriciously selected random handful upon whom the sentence of death has in fact been imposed . . . [T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."

*Id.* at 188 (alteration in original) (citations omitted) (emphasis added).

16. See *id.*; *Gardner v. Florida*, 430 U.S. 349, 357 (1977) (citing *Gregg*, 428 U.S. at 181-88 and *Furman v. Georgia*, 408 U.S. 238, 286-91 (1972)).

17. 430 U.S. 349 (1977).

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.<sup>18</sup>

In the landmark 1972 case of *Furman v. Georgia*,<sup>19</sup> the United States Supreme Court struck down the death penalty statute in Georgia<sup>20</sup> and those of thirty-eight other states that did not recognize that death is different.<sup>21</sup> In *Furman*, the Court held that the death penalty statute in Georgia violated the Eighth Amendment cruel and unusual punishment clause and that without such protections the death penalty was an unconstitutional sanction.<sup>22</sup> In striking down the death penalty statutes, the Court sent a message to those states wishing to reinstate the death penalty. The message was that capital defendants must be granted additional due process rights and protections beyond those granted to defendants in non-capital cases.<sup>23</sup>

Because death is different, the Court has held that defendants charged with capital offenses must be afforded what has been termed "super due process."<sup>24</sup> This process was articulated in *Gregg v. Georgia*.<sup>25</sup> In *Gregg*, the Supreme Court reviewed a revised Georgia death penalty statute that set up a bifurcated process of independent guilt and sentencing phases for capital cases.<sup>26</sup> Further, the statute allowed for additional evidence and argument to be presented to the sentencing jury, and mandated that this jury be instructed on the statutory factors of aggravation and mitigation before sentencing a

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18. *Id.* at 357-58 (citations omitted) (emphasis added).

19. 408 U.S. 238 (1972).

20. *See id.* at 239-40.

21. *See id.*

22. *See id.*

23. *See id.*

24. See Margaret Jane Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143 (1980).

25. 428 U.S. 153 (1976).

26. *See id.* at 195.

defendant to death.<sup>27</sup> The Georgia statute also required that the "State Supreme Court review every death sentence to determine whether it was imposed under the influence of passion, prejudice, or any other arbitrary factor, . . . and '[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.'"<sup>28</sup> Taken together, these processes were found to satisfy the Court's desire to afford capital defendants due process reflecting the severity of capital punishment, and the statute was held to be constitutional.<sup>29</sup>

The recently passed Federal Terrorism Act has created some major limitations on post-conviction review of death sentences.<sup>30</sup> Among other changes, this new legislation will shorten the length of time state and federal capital inmates have to file habeas petitions and mandate that federal judges defer greatly to state court decisions.<sup>31</sup> These new limitations may cut the cost of post-conviction review, but considering *Furman*, only so much cost-cutting can be done in terms of limiting a capital defendant's due process rights. How many cuts could be made without violating the capital defendant's constitutional rights is a subject for debate. However, it should be noted that at some point, such cuts will render the death penalty unconstitutional.

### III. THE COST OF LIFE IMPRISONMENT

In order to put the cost of the death penalty in perspective, one must first consider the costs of life imprisonment. Nationally, only nine percent of capital cases end in a death sentence.<sup>32</sup> Of those defendants that do receive a death sentence, it can be assumed that

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27. *See id.* at 163-66. The statutory aggravating and mitigating factors serve to limit the jury's discretion. *See id.* at 189. "*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Id.*

28. *Id.* at 204 (citation omitted).

29. *See id.* at 206-07.

30. *See Harvey Berkman, Habeas Restricted in Terrorism Bill, NAT'L L. J., Dec. 18, 1995, at A12.*

31. *See Holly Idelson, Senate Passes Bipartisan Bill to Combat Terrorism, CONG. Q. WKLY. REP., June 13, 1995, available in Westlaw, CONGQTWR database.*

32. *See LAWRENCE A. GREENFELD & JAMES J. STEPHAN, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT 1992, 10, appendix table 1 (1993), cited in DIETER, supra note 5, at 20 n.86 (1994) (citation omitted).*

only about ten percent will actually be executed.<sup>33</sup> Thus, for ninety-nine percent of capital defendants, except for the few that are acquitted at trial, society bears the costs associated with a capital trial, as well as the costs of long-term incarceration. Even with the resurging political fervor for the death penalty, and the likelihood that execution rates will increase, for a significant portion of capital defendants society will always bear the cost associated with the death penalty as well as long-term incarceration.

It is difficult to compare the costs of the death penalty from state to state because each state has different costs for incarceration. For example, in the early 1990's, Alabama estimated that it spent \$11,400 annually per death row inmate for housing, versus \$10,550 per inmate serving life without parole.<sup>34</sup> Wisconsin spent \$22,256 for fiscal year 1993-94 to house each maximum security inmate.<sup>35</sup> California spends \$20,760 annually for ordinary inmates and \$22,400 per year for each inmate in San Quentin's death row.<sup>36</sup> North Carolina estimates that it spends \$16,000 a year per inmate in minimum security and \$23,000 a year on each inmate in maximum security.<sup>37</sup> For fiscal year 1994-95, Michigan paid an average of \$23,625 for each of its inmates.<sup>38</sup>

Another variable is the life expectancy of inmates from state to state, or the definition of "life." One could conclude that with the high incidence of HIV and other diseases in prison, coupled with poor diets and health conditions and the high incidence of violence, the average inmate would not reach the life expectancy of an average American. One estimate is that an inmate sentenced to natural life would survive an average of thirty-one years in prison.<sup>39</sup>

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33. See PHILLIP J. COOK & DONNA B. SLAWSON, THE COST OF PROCESSING MURDER CASES IN NORTH CAROLINA 97-98 (1993) (discussing why this is a reasonable assumption based on post-*Furman* statistics).

34. See THE REPORT OF THE GOVERNOR'S COMMISSION ON THE DEATH PENALTY, AN ANALYSIS OF CAPITAL PUNISHMENT IN MARYLAND: 1978 TO 1993, 148 (1993).

35. See STATE OF WISCONSIN LEGISLATIVE REFERENCE BUREAU, *supra* note 14, at 18.

36. See JAMES J. STEPHAN & PETER BRIEN, U.S. DEP'T OF JUST. CAPITAL PUNISHMENT 1993, at 1 (citing CALIFORNIA DEP'T OF CORRECTIONS, CDC FACTS 1 (Sep. 1, 1994); CALIFORNIA DEP'T OF CORRECTIONS, CAPITAL PUNISHMENT IN CALIFORNIA 3 (Sep. 1993)).

37. See COOK & SLAWSON, *supra* note 33, at 3.

38. See 1994 INFORMATION KIT, MICHIGAN DEP'T OF CORRECTIONS, QUESTIONS COMMONLY ASKED ABOUT CORRECTIONS, M2 (Nov. 1994).

39. See STATE OF WISCONSIN LEGISLATIVE REFERENCE BUREAU, *supra* note 14, at 18 (citing a Florida estimate that has been used by California in developing life imprisonment cost estimates).

"As of October, 1994, there were 215 prisoners (in Michigan) who had served at least twenty years without parole [with] [t]he average time served [being] twenty-five years, [and] the longest period . . . served [being] forty-nine years."<sup>40</sup> Although some of these numbers may increase because the average age of an inmate at the time of incarceration for a life sentence is going down,<sup>41</sup> states like Indiana are increasingly using life sentences as an alternative to the death penalty because it is more cost-effective.<sup>42</sup>

In calculating cost comparisons in North Carolina, Phillip J. Cook and Donna B. Slawson in their study "The Costs of Processing Murder Cases in North Carolina," determined that the average death row defendant spends ten years on death row and the average lifer serves twenty years in prison.<sup>43</sup> Based upon the comparative costs they estimated a savings of \$166,000 per execution over what it would cost to incarcerate that inmate for another ten years.<sup>44</sup> Maryland estimates correctional savings of \$250,000 per execution.<sup>45</sup> However, in order to realize these savings, a significant number of executions are necessary,<sup>46</sup> and although these numbers may seem to support the notion that the death penalty saves the state money, incarceration costs are just the tip of the iceberg in a capital case.

When the total picture is taken into consideration, the North Carolina study<sup>47</sup> found that the extra cost of a capital case over a non-capital case that resulted in a twenty-year life sentence was more than \$216 thousand per death penalty imposed.<sup>48</sup> Furthermore, the

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40. See MICHIGAN DEP'T OF CORRECTIONS, *supra* note 6.

41. The median age of a death row inmate at the time of arrest in 1994 was 27. See STEPHAN & SNELL, *supra* note 14, at 8. By comparison, the median age of a death row inmate in 1987 was 32.7 years. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT 1987, 7 (1988).

42. See *No-Parole Option Leads to Fewer Death Sentences*, COURIER-J. (Louisville, Ky), Mar. 11, 1996, at 2B.

43. See COOK & SLAWSON, *supra* note 33, at 3.

44. See *id.*

45. See THE REPORT OF THE GOVERNOR'S COMMISSION ON THE DEATH PENALTY, *supra* note 34, at 158.

46. See *id.*

47. See COOK & SLAWSON, *supra* note 33, at 97-99 (taking into consideration only those costs that are a direct burden on state and local governments, and not including any federal or private costs).

48. See *id.* at 97-98. This cohort perspective is based on the following numbers: trial \$194,000; direct appeal \$13,561 (this estimate assumes that the jury will impose the death penalty and that the appellate court will return the case to Superior Court for retrial or resentencing); postconviction>>\$25,500 (the authors admit there is little basis for estimating

study found that if ten percent of those sentenced to death were actually executed, the total cost per execution would exceed \$2.16 million.<sup>49</sup> If the execution rate went up to twenty percent, the cost per execution would be \$1.08 million, and even if an unprecedented thirty percent of all prisoners sentenced to death were executed, the cost would still exceed \$800,000 per execution.<sup>50</sup>

#### IV. THE COSTS ASSOCIATED WITH THE DEATH PENALTY

The costs associated with the death penalty fall into basically six categories: start-up costs; pre-trial costs; trial costs; appellate costs; post-conviction costs; and security costs.<sup>51</sup> Obviously, not all of the costs discussed below are incurred in every death penalty case, but they represent the costs incurred in each case that goes to execution.<sup>52</sup>

##### A. *Start-Up Costs*

In 1995, those charged with appropriating the funds for reinstatement of the death penalty in New York State chose to ignore the financial ramifications when writing their capital punishment bill.<sup>53</sup> Instead of adding the five to fifteen million dollar estimated cost of capital punishment to the budget, both the Governor and the Legislature chose to defer the major costs.<sup>54</sup> As a result, only \$1.5 million in start-up costs was budgeted.<sup>55</sup> Other states have been similarly shortsighted. In Kansas, in the first year of reinstatement, the Governor vetoed legislation that appropriated \$800,000 to fund the

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this number. The single case perspective in the study had \$255,000 in postconviction costs--thus, this estimate is extremely conservative); imprisonment savings upon execution \$16,600 (based on the assumption that 10% of death row inmates are ultimately executed after 10 years imprisonment, and that death-sentenced defendants who are not executed will serve 20 years in prison on average, the last five of which are in minimum security--thus, no savings for those not executed).

49. *See id.* at 98.

50. Note that at the time of the study, only 5.8% of those sentenced to death in North Carolina between 1979 and 1985 had been executed. *See id.* at 101 n.2.

51. *See infra* parts IV.A-F.

52. *See infra* parts IV.A-F.

53. *See Daniel Wise, Doubts Emerge Over Death Penalty Costs: Defenders, Prosecutors Apprehensive About Advocacy of State Appropriations*, 213 N.Y.L.J. 51 (1995).

54. *See id.*

55. *See id.*

newly-created Capital Defender's office--leaving the office to function without a budget in its first year.<sup>56</sup>

If Michigan were to introduce the death penalty, there would be significant costs in bringing about the mechanisms necessary for the death penalty when they have not existed in Michigan for 150 years.<sup>57</sup> Any state that considers reinstatement of the death penalty must consider start-up costs because they are substantial. Three major categories of cost are: building and facility costs; judicial and attorney training costs; and equipment costs.

### 1. Building and Facility Costs

In considering reintroduction of the death penalty, the Wisconsin Department of Corrections estimated in 1993 that it would cost that state \$1.4 million to build a new twelve-unit death row, including a lethal injection<sup>58</sup> death chamber.<sup>59</sup> The size of the death row was based on an estimate that each year three people would be sentenced to death.<sup>60</sup> The Department also estimated a one-time start-up overhead cost of \$144,600 and operational costs for security personnel of approximately \$500,000 annually.<sup>61</sup>

The New York legislature budgeted a conservative \$1,054,000 in construction costs as part of its reinstatement plan.<sup>62</sup> By comparison, in 1992, Florida spent \$9.5 million to construct a 336-unit death row facility to house the twenty-five capital prisoners that Florida condemns each year.<sup>63</sup> Recently \$500,000 was spent in constructing the lethal injection chamber in the new federal death row in Terre

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56. Telephone interview with Ron Wurtz, Capital Defense Coordinator for the State of Kansas Death Penalty Defense Unit (Nov. 13, 1995).

57. *See supra* parts IV.A-F.

58. *See Memorandum from Bob Lang, Director of the Wisconsin Legislative Fiscal Bureau, to the Joint Committee on Finance, Wisconsin State Legislature, 1* (Oct. 13, 1993).

59. *See id.* at 14. Note that this is at a per unit cost of \$116,666. *See id.*

60. *See id.*

61. *See id.*

62. *See Jennifer Gonnerman, A Shot in the Arm: The Costs of Lethal Injection*, VILLAGE VOICE, Nov. 7, 1995, at 9. The breakdown included \$389,000 to construct a twelve-cell death row, \$190,000 to transform part of an old correctional hospital into a three-cell death row for women, and \$475,000 to build a death chamber, injection room, and three holding cells. *See id.*

63. *See State Must Fund New Prison*, MIAMI HERALD, Apr. 14, 1992, at 18A (pointing out that the state did not allocate the \$5.8 million needed to staff the prison). Note that this is at a cost of \$28,273 per unit. *See id.*

Haute, Indiana.<sup>64</sup> Obviously building and facility costs vary from state to state depending on need, and it is difficult to estimate costs. But, since Michigan does not have a Death Row it is certain that building and facility costs would be substantial if Michigan were to introduce the death penalty.

## 2. Judicial and Attorney Training Costs

Capital cases involve complex issues and procedures that are unique to the capital system. This necessitates special training for lawyers and judges. In Maryland, the Court of Appeals will only assign capital cases to judges who have undergone special training.<sup>65</sup> Furthermore, both prosecutors and defense attorneys need to be trained to handle death penalty cases. In 1995, New York's reinstatement law created a state-funded office to coordinate defense attorneys who have expertise in handling capital cases.<sup>66</sup> This office is also responsible for training capital defense attorneys in the future.<sup>67</sup> New York allocated nearly \$3.5 million to establish this program and to train the capital defense attorneys; it also allocated nearly \$2 million to capital prosecutors.<sup>68</sup> In the same year the Kansas legislature created a capital defender's office.<sup>69</sup> This office sends attorneys around the country to attend seminars on representing a capital defendant.<sup>70</sup> Wisconsin reinstatement proposals suggest bringing in national experts for a one-time seminar to train 50-100 attorneys at a cost of \$60,000-\$70,000.<sup>71</sup> It also expected to pay \$400,000 in total training costs for each of the first two years

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64. See *Seeking a Death Penalty She Hates; Duty: Attorney General Janet Reno Has Been Able to Keep Her Opposition to the Death Penalty Quiet While Serving a President Who Fervently Supports It*, BALTIMORE SUN, May 7, 1996, at 2A.

65. See THE REPORT OF THE GOVERNOR'S COMMISSION ON THE DEATH PENALTY, *supra* note 34, at 72.

66. See *Capital Costs: Who Pays for Death Penalty?*, SYRACUSE HERALD-J., Mar. 8, 1995, at A12.

67. See *id.*

68. See Gonnerman, *supra* note 62, at 9. The exact figures were: \$3,450,000 for establishment of Capital Defender's Office and training of attorneys; \$1,800,000 for prosecutors; \$90,000 as salary to George Quinlan, principal death penalty prosecutor. See *id.*

69. See Telephone interview with Ron Wurtz, *supra* note 56.

70. See *id.*

71. See Fiscal estimate from the Wisconsin Office of the State Public Defender (July 25, 1995)(available from the Wisconsin Legislative Bureau).

following reinstatement, and \$200,000 a year thereafter.<sup>72</sup> Attorney and judicial training is expensive and is incurred both as a start-up cost, and as an ongoing cost in order to train new attorneys and judges and to keep attorneys and judges updated on new changes in the law.

### 3. Equipment Costs

Finally, there is the cost of the execution equipment itself. In the true spirit of capitalism there are companies that manufacture this equipment and offer it at reasonable costs. Fred A. Leuchter's company, which designs and manufactures execution equipment, estimated the following costs in 1992:

At \$30,000, Leuchter's modular lethal injection system is the least expensive piece of execution machinery. (The chemicals required for the execution cost between \$600 and \$700.) [sic] At the other end of the spectrum, Leuchter's gas chamber sells for approximately \$300,000. (The cyanide [sic] required costs approximately \$10 per execution.) [sic] An electric chair, Leuchter's preferred means of execution, sells for \$35,000. (Leuchter estimates that the electricity required costs thirty-one cents per execution.) [sic] A gallows sells for \$85,000. For states which have no execution machinery or which have not carried out executions in years, Leuchter manufactures an "Execution Trailer." At roughly \$100,000, this mobile execution delivery system includes a lethal injection machine, a secure holding cell for the condemned inmate, and separate areas for the witnesses, chaplain, prison officials and medical personnel. In addition to this equipment, Leucher offers various services, including equipment certification, certified training and execution support.<sup>73</sup>

### B. Pre-Trial Costs

Death penalty cases involve significant pre-trial costs.<sup>74</sup> Some

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72. See James Rowen, *Death Penalty Would Cost State Millions, Agencies Say; \$2.7 Million Would Be Needed Just to Build and Operate Death Row*, MILWAUKEE J. SENTINEL, Sep. 5, 1995, at B5.

73. STEPHEN TROMBLEY, THE EXECUTION PROTOCOL: INSIDE AMERICA'S CAPITAL PUNISHMENT INDUSTRY 38-39 (1992), quoted in RANDALL COYNE & LYN ENTZEROTH, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS 11-12 (1994).

74. See COOK & SLAWSON, *supra* note 33, at 15-17.

costs are not significantly greater than in non-capital cases.<sup>75</sup> Other costs, such as motion costs and investigative costs, can be much higher.<sup>76</sup>

"Motions play a crucial role in every death penalty case."<sup>77</sup> There are the usual motions that are filed in non-capital cases, as well as an array of motions unique to capital cases.<sup>78</sup> The main difference between motions practice in non-capital cases and motions practice in capital cases is the number of motions.<sup>79</sup> The estimated number of pretrial motions filed in a capital case ranges from two to four times the number filed in non-capital cases.<sup>80</sup> A New York Study reported that "[t]he usual number of pretrial motions in non-capital cases vary between five and seven."<sup>81</sup> Experienced attorneys state that the typical capital case requires filing between 10 and 25 motions.<sup>82</sup> Also, in death penalty cases, every motion will be critical, requiring substantially more time to prepare. As an example of how expensive these motions can be, in one North Carolina case, the cost of motions alone totaled \$115,257.<sup>83</sup> In a Nebraska capital trial with two defendants, pre-trial costs amounted to a bill of \$129,995.<sup>84</sup>

In looking at investigative costs, there are both pre-trial costs and trial costs. In preparation for a capital case, psychiatrists and psychologists spend many hours with defendants, their families, their co-workers, and school teachers. The mental state of the defendant is typically relevant to both the guilt phase of the trial and the sentencing phase. The fees for psychologists range from \$500 to \$1000 per day, with the average being \$700.<sup>85</sup>

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75. See *id.* at 17.

76. See *id.* at 15-16.

77. *Id.* at 16.

78. See *id.*

79. See NEW YORK STATE DEFENDER'S ASS'N, INC., CAPITAL LOSSES: THE PRICE OF THE DEATH PENALTY FOR NEW YORK STATE, 12 (1982).

80. See *id.*

81. *Id.*

82. See *id.* (citing SOUTHERN POVERTY LAW CENTER, MOTIONS FOR CAPITAL CASES 2 (1981)).

83. See COOK & SLAWSON, *supra* note 33, at 81.

84. See MARTHA CARTER, L.R.D. REP. NO. 95-2, *Cost of the Death Penalty: An Introduction to the Issue*, at 22 (Jan. 1995).

85. See NEW YORK STATE DEFENDER'S ASS'N, INC., *supra* note 79, at 15. One example of psychiatric experts and their expenses in 1982 is Professor Robert Buckhout, an expert in the sufficiency of eyewitness identifications and juristic psychological surveys, who charges

### C. Trial Costs.

Before we consider trial costs, it is important to note that they can usually be completely avoided in non-capital cases because the vast majority of non-capital cases are resolved by guilty pleas and there is no trial.<sup>86</sup> On the other hand, very few defendants will plead guilty and agree to a death sentence.<sup>87</sup> The capital trial of Susan Smith in South Carolina demonstrated this point. Smith was prepared to offer a guilty plea in exchange for a sentence of life without parole.<sup>88</sup> Nonetheless, the prosecutor decided to seek the death penalty, therefore, burdening the state with the cost of a capital trial.<sup>89</sup> The resulting sentence was no greater than Smith was willing to plea-bargain to without the cost of the trial: life in prison.<sup>90</sup> Thus, the state of South Carolina paid both the costs of Susan Smith's trial and will now pay the costs for her life in prison.<sup>91</sup>

An argument can be made that the existence of a death penalty statute strengthens a prosecutor's ability to reach a plea bargain in cases where he or she might otherwise not have been able to do so.<sup>92</sup> This would save the state the cost of a non-capital or possibly a capital trial. However, the death penalty is not typically used in this manner. It is more typical that a prosecutor's office automatically seeks the death penalty for certain types of cases, and thus the greater impact of the death penalty on pleas is that it discourages them. For example, in Maryland, out of 104 defendants charged with first-degree

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\$500 per day for in-courtroom testimony with a consulting fee of \$100 per hour. *See id.* at 13. In 1977, Professor Buckhout submitted a \$25,000 bill in a death penalty trial for a juristic psychological survey. *See id.*

86. *See Margot Garey, The Cost of Taking A Life: Dollars and Sense of the Death Penalty*, 18 U.C. DAVIS L. REV. 1221, 1246-47 n.110 (1985) (citing Nakell, *The Cost of the Death Penalty*, 14 CRIM. L. BULL. 69, 71 (1978)). Note that between 85% and 90% of criminal cases result in a plea. *See id.*

87. *See Ronald J. Tabak & J. Mark Lane, The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty*, 23 LOY. L.A.L. REV. 59, 133 (1989).

88. *See Family: End of Life for Smith*, HERALD (Rock Hill, S.C.), July 3, 1995, at 1A.

89. *See id.* Solicitor Tommy Pope told the press that he would go to trial, despite the estimated \$400,000 it would cost, because "[p]unishment in these cases is not about how much it costs." *Id.*

90. *See Margaret N. O'Shea, Mother Gets Two Life Terms; Boys' Father Tries to Forgive the State*, STATE (Columbia, S.C.), July 29, 1995, at A1.

91. *See Official: Cuts Create Problems for Courts*, HERALD (Rock Hill, S.C.), July 7, 1995, at 2B. Extensive cuts in the local criminal justice system coincided with the high costs of the Smith prosecution. *See id.*

92. *See COOK & SLAWSON, supra* note 33, at 37.

murder since 1978, only two have pled guilty to the charge.<sup>93</sup> The North Carolina death penalty statute actually prohibits the district attorney from plea bargaining in capital cases.<sup>94</sup> The North Carolina Supreme Court has held that such plea bargaining would render the death penalty statute unconstitutional because it would grant too much prosecutorial discretion.<sup>95</sup>

Without the benefit of plea bargaining, death penalty trials are long and expensive. The North Carolina study found that the average length of a non-capital murder trial in North Carolina is 3.8 days, while the average length of a capital trial is 14.6 days--10.3 days for the guilt phase and four days for the sentencing phase.<sup>96</sup> The North Carolina study surveyed ninety-four capital defendants over two years.<sup>97</sup> Of the ninety-four defendants, twenty-nine were sentenced to death. The ninety-four capital trials would have cost the state and counties about \$4.3 million less if they had proceeded non-capi tally. If the twenty-nine death-sentenced defendants followed a post-conviction track similar to cases from previous years, the cost would total \$2.8 million for appeals and post-conviction, and \$1.4 million for retrials and resentencing proceedings ordered by the appellate courts.<sup>98</sup>

Other studies report great differences in capital trial costs between the states. For example, one study in New York estimates that a death penalty trial costs approximately \$1.5 million,<sup>99</sup> while a study in Maryland estimates that a death penalty trial costs approximately \$57,000.<sup>100</sup> Nonetheless, there is no doubt that capital trials cost a great deal more than non-capital trials. In California, a capital trial is on average \$201,510 more expensive than a non-capital trial.<sup>101</sup>

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93. See THE REPORT OF THE GOVERNOR'S COMMISSION ON THE DEATH PENALTY, *supra* note 34, at 64.

94. See N.C. GEN. STAT. §§ 15A-2000-02 (1988).

95. See State v. Case, 410 S.E.2d 57, 58 (N.C. 1991)(citing State v. Britt, 360 S.E.2d 660 (N.C. 1987)).

96. See COOK & SLAWSON, *supra* note 33, at 61.

97. See *id.* at 99. The study followed 94 capital defendants during 1991-92. See *id.*

98. See *id.*

99. See THE REPORT OF THE GOVERNOR'S COMMISSION ON THE DEATH PENALTY, *supra* note 34, at 148 (estimating both defense and prosecution costs and the costs of experts).

100. See *id.* (estimating public defender, prosecution, and court costs).

101. See COOK & SLAWSON, *supra* note 33, at 8 (citing Margot Carey, Comment, *The Cost of Taking a Life: Dollars and Sense of the Death Penalty*, 18 U.C. DAVIS L. REV. 1221, 1269 n.245 (1985)). This Comment is cited in many writings regarding the cost of the death penalty.

And in Kansas, there is a \$116,700 difference between a capital and a non-capital murder trial.<sup>102</sup> The high costs of capital cases are due primarily to high prosecution and defense costs, expert witness costs, jury selection costs, bifurcated trial costs, sentencing, resentencing and re-trial costs.

### 1. Prosecution and Defense Costs

Capital murder cases are less likely than non-capital cases to involve a retained attorney.<sup>103</sup> Therefore, in most capital cases, the state pays the fees for both the prosecution and the defense. In terms of defense costs, every capital defendant is constitutionally guaranteed representation at his/her criminal trial and for the first statutory appeal as of right.<sup>104</sup> Additionally, some death penalty statutes require two defense attorneys in capital cases.<sup>105</sup> Another factor to consider is that "some defendants who could afford retained counsel in a non-capital case would not be able to afford the extra cost of defending a capital case."<sup>106</sup> The North Carolina study found that defense attorneys spend an average 613 hours on a capital case while prosecutors spend 282.<sup>107</sup> For non-capital cases, the numbers are 150 and 61, respectively.<sup>108</sup> In Maryland, the state public defender's office estimated that it spends \$1.19 million on capital cases.<sup>109</sup> Considering plea bargains, the Connecticut Public Defender's Office reports spending \$138 to defend an average criminal case, as opposed to \$200,000 to defend each death penalty case.<sup>110</sup>

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102. See DIETER, *supra* note 5, at 3.

103. See COOK & SLAWSON, *supra* note 33, at 58.

104. See *Douglas v. California*, 372 U.S. 353 (1963) (drawing upon the equal protection and due process guarantees of the Fourteenth Amendment to hold that a state must provide counsel for an indigent's first statutory appeal as of right).

105. See COOK & SLAWSON, *supra* note 33, at 15, 22 (noting that the North Carolina statute requires two defense attorneys through trial and direct appeal). See N.C. GEN. STAT. § 7A-450(b)(1) (1989); see also THE REPORT OF THE GOVERNOR'S COMMISSION ON THE DEATH PENALTY, *supra* note 34, at 72.

106. COOK & SLAWSON, *supra* note 33, at 58-9.

107. See *id.* at 61 (the 613 hours exclude private defense attorneys).

108. See *id.*

109. See THE REPORT OF THE GOVERNOR'S COMMISSION ON THE DEATH PENALTY, *supra* note 34, at 153-54.

110. See DIETER, *supra* note 5, at 22 (citing E. Simon, *Death Be Not Cheap*, CONN. L. TRIB., at 1, 12 (Nov. 29, 1993)).

A capital trial is very costly for both the prosecution and defense teams. First of all, additional costs are incurred in the investigatory stages of the case.<sup>111</sup> "[T]he crime itself is likely to be investigated more thoroughly by both the prosecution (who must prove aggravating circumstances in order to seek the death penalty) and the defense (who must be prepared to argue the same issues)."<sup>112</sup> Not only must extra investigatory work be done, but it must be done with the utmost care, as the evidence will be highly scrutinized.<sup>113</sup> A great deal of this work is done by attorneys, but some of the work necessitates other experts.

Another unique and costly aspect of death penalty litigation is the lack of availability of capital defense attorneys and the fees private capital defense attorneys are paid.<sup>114</sup> The 1995 figures from North Carolina indicate that state agencies who provide counsel to indigent death row defendants do so at a cost of about \$50 per hour.<sup>115</sup> Those states without such resource centers must contract with private attorneys who are likely to cost \$85 an hour or more.<sup>116</sup> If Michigan were to reinstate the death penalty, a state-funded resource center would be the prudent choice. How much might this cost? In Kansas, which reinstated the death penalty in 1994, the legislature budgeted \$1.4 million in the second year after reinstatement for a Death Penalty Defense Unit.<sup>117</sup>

A state-funded resource center faces political obstacles as some states are cutting the funding to their own centers, and recently, the United States House of Representatives voted to prohibit funds from the federal public defender programs from going to these centers.<sup>118</sup> Instead Congress has proposed to allocate federal funds to pay private attorneys.<sup>119</sup> This movement away from state resource centers and toward paying private attorneys appears to be one that will further

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111. See Tabak & Lane, *supra* note 87, at 133.

112. *Id.*

113. See Robert L. Spangenberg & Elizabeth R. Walsh, *Capital Punishment or Life Imprisonment? Some Cost Considerations*, 23 LOY. L.A. L. REV. 45, 48 (1989).

114. See *Capital Costs: Who Pays For Death Penalty?*, *supra* note 66, at A12.

115. See *A Final Responsibility By Law, Death Row Inmates Must Be Provided With Lawyers. Why Make It More Expensive To Do So?*, CHARLOTTE OBSERVER, Sept. 7, 1995, at 10A.

116. See *id.*

117. See Telephone interview with Ron Wurtz, *supra* note 56.

118. See *A Final Responsibility By Law, Death Row Inmates Must Be Provided With Lawyers. Why Make It More Expensive To Do So?*, *supra* note 115, at 10A.

119. See *id.*

raise the cost of defending the capital defendant, both at trial and in the appeals process.<sup>120</sup>

How much does it cost to defend a capital defendant at trial? A recent trial for three capital defendants in California cost the state \$1.1 million in private defense fees.<sup>121</sup> In that case, one of the defendants was given a death sentence and the other two defendants were given life terms without the possibility of parole.<sup>122</sup> The lead defense attorney in that case estimated that costs would have been half as much if the prosecution had not sought the death penalty, and another of the attorneys pointed out that about half of the defense cost was due to the length of the trial.<sup>123</sup>

It is impossible to calculate what it would cost to defend a capital defendant in Michigan if the death penalty were reinstated. However, it is obvious that the additional costs would be significant.

## 2. Expert Witness Costs

Typically death penalty cases involve crime scenes that need to be thoroughly investigated by experts for both the defense and the prosecution.<sup>124</sup> Also, expert and auxiliary services are necessary for

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120. For a discussion of the large increase in capital defense costs which will occur as a result of Congress' decision to eliminate federally-funded death penalty resource centers, see Roscoe C. Howard, Jr., *The Defunding of the Post Conviction Defense Organizations as a Denial of the Right to Counsel*, 98 W. VA. L. REV. 863 (1996). About half of all death row inmates were represented by federally-funded post-conviction defense organizations (previously called death penalty resource centers) at a cost of about \$17,200 each. *See id.* at 916. By contrast, death row inmates represented by appointed counsel cost \$37,000 each on average. *See id.* (citing Carol J. Casteneda, *Death Penalty Centers Losing Support, Funds*, USA TODAY, Oct. 24, 1995, at 3A).

121. *See* Tom Kertscher, *Death Penalty Blamed for Cost of Fresno Trial*, FRESNO BEE, June 16, 1995, at A1 (noting that the hourly rates broke down to \$60 an hour, about half of what the attorneys normally charge private clients).

122. *See id.*

123. *See id.*; *see also* COOK & SLAWSON, *supra* note 33, at 61. The North Carolina study found that the length of the average bifurcated capital trial was 14.6 days compared to 3.8 days for a noncapital trial. *See id.* The defense attorneys in the capital trial spent an average of 613 hours compared to 150 on a noncapital trial, and the prosecution spent an average of 282 hours on a capital trial compared to 61 for a noncapital trial. *See id.* In a Connecticut capital case which resulted in the prosecutor accumulating between 1000 and 1500 hours in preparation, the defense attorney noted that his client would have accepted an offer of life without parole "in a heartbeat." *See* DIETER, *supra* note 5, at 21. The defense attorney said that the entire case "would have been over in 15 minutes . . . No one would have spent a penny." *Id.* (citation omitted).

124. *See* NEW YORK STATE DEFENDER'S ASS'N, INC., *supra* note 79, at 13-15.

a capital trial in both the guilt phase and the sentencing phase, including psychiatrists, mitigation specialists, medical examiners, polygraph experts, and experts on juror bias.<sup>125</sup>

A typical death case will use these [psychologists and psychiatrists] experts or others just like them. A hypothetical case can easily be designed. Let us assume a case in which three days of crime scene reconstruction, a juristic psychological survey and a polygraph examination are required. Let us further assume a *Witherspoon* jury challenge that takes three days of work and four hours of testimony and the use of one psychiatrist who has conducted a five-hour exam and testifies for two hours. This relatively modest use of experts will run up a bill for the state of more than \$30,000 in just the guilt phase of a capital case. These costs are real. They will be paid by the state [assuming a statute like New York's]. They will be present in every capital trial.<sup>126</sup>

Experts are hired to investigate and testify at a high cost.<sup>127</sup> For instance, Professor Robert Buckhout, an expert in the sufficiency of eyewitness identifications and juristic psychological surveys, charges \$500 per day for in-courtroom testimony with a consulting fee of \$100 per hour.<sup>128</sup> In 1977, Professor Buckhout submitted a \$25,000 bill in a death penalty trial for a juristic psychological survey.<sup>129</sup> One commentator has explained that it is not at all unreasonable to expect more than \$40,000 in defense expert witness expenses alone.<sup>130</sup> A recent California trial of three capital defendants racked up defense expert fees of \$500,000.<sup>131</sup> A typical California death penalty defense incurs "\$25,000 to \$50,000 in special investigation costs and \$15,000 for psychiatrists or other expert witnesses."<sup>132</sup> In Kentucky, some counties have refused to pay some costs for expert witnesses for the defense and the state legisla-

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125. See Margot Garey, *The Cost of Taking a Life: Dollars and Sense of the Death Penalty*, 18 U.C. DAVIS L. REV. 1221, 1253 (1985).

126. NEW YORK STATE DEFENDER'S ASS'N, INC., *supra* note 79, at 16.

127. *See id.* at 15.

128. *See id.*

129. *See id.*

130. See Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 392 (1995).

131. *See Kertscher, supra* note 121, at A1.

132. State v. Marshall, 613 A.2d 1059, 1145 (N.J. 1992) (citing Stephen Magagnini, *Closing Death Row Would Save State \$90 Million a Year*, SACRAMENTO BEE, Mar. 28, 1988, at A14 (quoting a San Francisco Public Defender)); NEW YORK STATE DEFENDER'S ASS'N, INC., *supra* note 79, at 15.

ture has been forced to create a special fund to pay experts' fees for capital defendants.<sup>133</sup>

### 3. Jury Selection Costs

Individual voir dire motions are filed in nearly every capital case, along with motions for sequestration of the petit jury. There are reported cases of individual examination of potential jurors that have lasted up to eight weeks,<sup>134</sup> and the cost of sequestering a capital jury, when the average trial is four to six weeks, is substantial.<sup>135</sup>

The jury selection process has been estimated to take up to 5.3 times longer in a capital case than in a non-capital case.<sup>136</sup> In some states, like California, attorneys are given significantly more peremptory challenges in capital trials than in non-capital ones.<sup>137</sup> Also, voir dire is lengthened due to Supreme Court decisions concerning the circumstances under which potential jurors can be excluded based upon their views on capital punishment.<sup>138</sup> The United States Supreme Court, in *Witherspoon v. Illinois*,<sup>139</sup> decided that excluding venire members for cause at the sentencing phase because they personally objected to the death penalty denied capital defendants an impartial jury.<sup>140</sup> Allowing such challenges for cause, the Court explained, would create juries made of those individuals "uncommonly willing to condemn a man to die."<sup>141</sup> However, the Court modified the *Witherspoon* rule in *Wainwright v. Witt*,<sup>142</sup> when it decided that potential jurors who had reservations about the death penalty could be excluded for cause if the prosecution could show that their beliefs might prevent them from being able to fully perform their

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133. See Joseph Gerth, *Counties Balk at Paying Experts to Testify for Indigents*, COURIER-J. (Louisville, Ky.), Apr. 4, 1994, at 1A.

134. See DIETER, *supra* note 5, at 21 n.95 (citing E. Simon, *Death Be Not Cheap*, CONN. L. TRIB., Nov. 29, 1993, at 1, 13); see also Magagnini, *supra* note 132, at A14 (finding jury selection to routinely take six weeks).

135. See NEW YORK STATE DEFENDER'S ASS'N, INC., *supra* note 79, at 13.

136. See *id.* at 16.

137. See STATE OF WISCONSIN LEGISLATIVE REFERENCE BUREAU, *supra* note 14, at 17. Attorneys in non-capital cases in California receive ten peremptories per side, while attorneys in capital cases receive 26 peremptories each. *See id.*

138. See COOK & SLAWSON, *supra* note 33, at 18.

139. 391 U.S. 510 (1968).

140. See *id.* at 518-23. The Court did not find similarly-based exclusions for cause at the guilt phase of the trial to result in the construction of an unrepresentative jury. *See id.*

141. *Id.* at 521.

142. 469 U.S. 412 (1985).

duties as jurors.<sup>143</sup>

Further costs will be incurred if the defense counsel or prosecutor raises a *Batson* challenge, which necessitates investigating the use of peremptory challenges.<sup>144</sup> The Supreme Court in *Batson* held that peremptory challenges could not be used to discriminate based upon race,<sup>145</sup> and in *J.E.B. v. Alabama*<sup>146</sup> the Court extended the *Batson* doctrine to claims of gender discrimination.<sup>147</sup> These processes add to the cost and length of jury selection.

#### 4. Bifurcated Trial Costs

All expenses incurred by each side during the guilt phase could be duplicated during the penalty phase.<sup>148</sup> Depending on state law, there could be two separate juries to decide the separate issues--adding the cost of seating a second jury--or the same jury could be used for both phases. It should also be noted that, for the sentencing phase of the bifurcated trial, the U.S. Supreme Court has held that states cannot statutorily limit the scope of the mitigating evidence that the defense may offer.<sup>149</sup> Thus, the costs for the sentencing phase cannot be cut back by tighter regulation by the state.

The sentencing phase of a capital trial adds significant costs that are not incurred in non-capital trials. For example, in North Carolina the average cost of a bifurcated capital trial is \$84,000, while the cost of a non-bifurcated, non-capital murder trial is just \$17,000.<sup>150</sup>

#### 5. Sentencing, Re-sentencing, and Re-trial costs

In Maryland, estimates are \$3000 to \$5000 per capital sentencing proceeding.<sup>151</sup> However, "[t]he extra costs to the trial courts of capital adjudication do not end with the original disposition of the case . . . . [T]here is a substantial probability that a death-sentence

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143. See *id.* at 431.

144. See *Batson v. Kentucky*, 476 U.S. 79 (1986).

145. See *id.* at 90.

146. 511 U.S. 127 (1994).

147. See *id.* at 129.

148. See NEW YORK STATE DEFENDER'S ASS'N, INC., *supra* note 79, at 11-19.

149. See *Lockett v. Ohio*, 438 U.S. 586, 606 (1978) (holding that the Ohio death penalty statute did not permit the type of individualized consideration of mitigating factors required by the 8th and 14th Amendments in capital cases).

150. See COOK & SLAWSON, *supra* note 33, at 2.

151. See THE REPORT OF THE GOVERNOR'S COMMISSION ON THE DEATH PENALTY, *supra* note 34, at 75.

case will be remanded for re-sentencing, which requires much the same cost and effort as a re-trial.<sup>152</sup> Also, because of the high stakes in a capital case, more re-trials are likely to be conducted.<sup>153</sup> For example, the North Carolina study found that there were sixty-nine death sentences imposed between the years of 1979 and 1985.<sup>154</sup> By 1992, these sixty-nine cases had undergone "a total of 33 new sentencing hearings and 12 new trials--*two such events for every three death sentences imposed.*"<sup>155</sup> In comparing these numbers to similar non-capital trial activity, the researchers found that, of the 161 life sentences imposed during the same time period, only nine were remanded for a new trial.<sup>156</sup>

Of "the approximately 4,500 defendants sentenced to death nationwide since 1973, only twenty-six have died as 'volunteers,' waiving some or all of their legal remedies."<sup>157</sup> Although the states are not constitutionally required to provide appellate review of criminal convictions,<sup>158</sup> every state provides some form of appeal of right.<sup>159</sup> The cost of the appeals process depends on how many stages a case undergoes. In 1995, the attorney general of Pennsylvania informed the state appropriations committee that the cost of defending death penalty appeals in that state could reach \$1 million per case.<sup>160</sup> New York estimates \$330,000 per case, without considering all available stages in the appellate process.<sup>161</sup>

The trend is toward streamlining the process, both in terms of limiting the number of appeals, and in shortening the time line within which the appeals must be filed. However, it remains to be seen how effective these strategies will be. Although the federal courts are limiting the issues for which habeas corpus relief is available to the

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152. COOK & SLAWSON, *supra* note 33, at 69.

153. See Tabak & Lane, *supra* note 87, 134.

154. See COOK & SLAWSON, *supra* note 33, at 69.

155. *Id.*

156. *See id.*

157. THE REPORT OF THE GOVERNOR'S COMMISSION ON THE DEATH PENALTY, *supra* note 34, at 76 (1993) (citing Jane Gross, *Inmates Volunteering for Execution: California Killer's Case Fans Debate*, N.Y. TIMES, Aug. 20, 1993, at B8).

158. See *McKane v. Durston*, 153 U.S. 684, 687 (1894).

159. See R. COYNE & L. ENTZEROTH, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS 463 (1994).

160. See *Death Penalty Cases Costly, Legislators Told*, PHILADELPHIA INQUIRER, Mar. 30, 1995, at B3.

161. See THE REPORT OF THE GOVERNOR'S COMMISSION ON THE DEATH PENALTY, *supra* note 34, at 148.

capital defendant this may simply cause these issues to be litigated more thoroughly at the state level.<sup>162</sup> In 1994, Ohio voters approved a state constitutional amendment that provides direct appeal of capital cases from the trial court to the state supreme court--thereby eliminating one step in their capital proceedings.<sup>163</sup> However, reform attempts such as these must reckon with the fact that state Supreme Court justices in California<sup>164</sup> and Florida<sup>165</sup> have spent at least half of their work hours in recent years reviewing death penalty appeals.<sup>166</sup> Despite recent efforts at trimming back the appeals process, the North Carolina study concluded that ten years is a reasonable estimate of the average time lag from trial to execution.<sup>167</sup> Another consideration is that cutting back appeals will also increase the number of innocent defendants who are executed. A 1991 study found that forty percent of state death penalty convictions are overturned in the federal courts, indicating that the drawn-out appeals in these cases are not merely frivolous.<sup>168</sup>

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162. See COOK & SLAWSON, *supra* note 33, at 20-21.

163. See *Death Penalty: The Issue in Ohio Isn't Cost-It's Justice*, COLUMBUS DISPATCH, Apr. 10, 1995, at 6A.

164. See Sam Howe Verhovek, *Death Penalty Is Costly and Complicated Undertaking*, NEW ORLEANS TIMES-PICAYUNE, Feb. 24, 1995, at G10.

165. See Fred Grimm, *State Paying a Heavy Price to Kill Killers*, MIAMI HERALD, Apr. 23, 1995, at 1B.

166. See COOK & SLAWSON, *supra* note 33, at 75-76.

There are several reasons why adjudicating direct appeals of death cases might consume more of the [state] [S]upreme [C]ourt's time than would life cases. First, appellate briefs in death cases tend to be more lengthy than those filed in life cases, in part because defense attorneys raise and brief more issues in order to preserve them for review on both direct appeal and in collateral post-conviction proceedings. Second, proportionality review by the [c]ourt is a step required in death cases but not life cases. Third, certain issues, such as the death-qualification procedures required during jury selection in capital trials, are typically not subjects for review in cases where the defendant received a life sentence at the trial level.

*Id.*

167. See *id.* at 90 (estimating the cost of capital punishment using both the 10-year figure and a five-year figure); but see THE REPORT OF THE GOVERNOR'S COMMISSION ON THE DEATH PENALTY, *supra* note 34, at 157 (arguing that the North Carolina study's use of 10 years between trial and execution is too long a time period if post-conviction reform measures take place in the future).

168. See Linda R. Monk, *Executing the Guilty Costs Too Much*, BALTIMORE SUN, Nov. 9, 1993, at 11A (citation omitted); see STATE OF WISCONSIN LEGISLATIVE REFERENCE BUREAU, *supra* note 14, at 7. Comparatively, only five percent of non-capital convictions are overturned. See *id.*

In 1995, the California Office of Public Defendant had a budget of \$8 million to handle indigent capital defendants' appeals.<sup>169</sup> Despite the size of the budget, the office can only handle a fraction of the caseload.<sup>170</sup> Nearly one-third of all the people on California's death row have no one to represent them, and until they have representation, they are almost assured of not being executed.<sup>171</sup>

#### D. Post-Conviction Proceedings Costs

Once a capital defendant has exhausted all of his or her appeals, the defendant may still collaterally attack the conviction through post-conviction proceedings. A habeas corpus petition can be filed, as a separate civil action, to challenge the validity of the conviction. With the recent restrictions on federal habeas corpus, money may be saved at the federal level. Overall though the savings may be illusory as more costs will be shouldered by the states because post-conviction motions will be litigated more extensively in state courts.<sup>172</sup>

"It is in post-conviction proceedings that the greatest difference in costs may exist between capital and non-capital cases."<sup>173</sup> Post-conviction costs in capital cases are extensive: In two North Carolina cases, \$293,339 and \$216,387 were incurred at this stage alone.<sup>174</sup>

The North Carolina post-conviction process illustrates the many stages of post conviction.

- Stage 1: Direct appeal to the Supreme Court of North Carolina.
- Stage 2: Petition for writ of certiorari in the United States Supreme Court to review decision of the Supreme Court of North Carolina.
- Stage 3: Motion for appropriate relief filed in Superior Court; hearing on this motion.
- Stage 4: Petition for certiorari filed in Supreme Court of North Carolina to review denial of motion by

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169. See Verhovek, *supra* note 164, at G10.

170. *See id.*

171. *See id.*

172. See COOK & SLAWSON, *supra* note 33, at 20-21.

173. *Id.* at 19 (citation omitted). See John Kaplan, *The Problem of Capital Punishment*, 1983 U. ILL. L. REV. 555, 573 (1983)).

174. See COOK & SLAWSON, *supra* note 33, at 83.

- Superior Court.
- Stage 5: Petition for writ of certiorari filed in United States Supreme Court to review denial of certiorari by Supreme Court of North Carolina.
- Stage 6: Petition for writ of habeas corpus filed in United States District Court; hearing, in some cases, on this motion.
- Stage 7: Appeal of decision of United States District Court to Fourth Circuit Court of Appeals.
- Stage 8: Petition for writ of certiorari filed in United States Supreme Court.
- Stage 9: Briefing and argument in United States Supreme Court.<sup>175</sup>

Because each step extends the life of a defendant there is great incentive to use each one.<sup>176</sup> Furthermore, several of these steps are often repeated.<sup>177</sup>

#### E. Security Costs

Security is tighter and therefore more costly for the capital prisoner.<sup>178</sup> "The prisoner is maintained in a maximum security correctional setting throughout the [trial] process, until a death sentence is imposed, [upon which he] . . . is moved to death row."<sup>179</sup> Extra costs for heightened security during periods of incarceration are obvious. What is not so obvious is the extra costs accrued during the trial and appeals process, as the prisoner must be transported and guarded to and from the courthouse each day. There are also extra security costs incurred at the courthouse itself. In a high-profile case, as many capital trials are, these costs are even higher.

#### V. WHO PAYS FOR THE DEATH PENALTY?

The obvious answer to the question of who pays for the death

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175. *Id.* at 19 (citation omitted).

176. *See id.* at 20.

177. *See id.* at 19 (footnote omitted).

178. *See* Spangenberg & Walsh, *supra* note 113, at 48 (footnote omitted).

179. *Id.* at 55.

penalty is the taxpayers. However, at what level of government would costs be incurred if Michigan were to introduce capital punishment. At the state level or at the county level? Texas, which has the highest number of executions in the country in the past 20 years,<sup>180</sup> depends on its local counties to pay for its capital trials.<sup>181</sup> Consequently, counties often find themselves forced to choose between raising taxes and/or siphoning money from other services or declining to seek the death penalty altogether.<sup>182</sup> New York requires its counties to pay for their own capital cases.<sup>183</sup> However, state reimbursement is provided upon approval if the local district attorney can show that the local resources have been significantly overburdened.<sup>184</sup> There is a caveat to this picture of state and county cooperation. When the death penalty is not given, either because of the prosecution's failure to meet its burden of proof or the jury does not vote for a death sentence, the trial costs would remand to the county.<sup>185</sup> Likewise, the California legislature responded to the strain on its local county budgets with legislation that reimburses part of the costs of prosecuting a capital case in smaller counties.<sup>186</sup>

Nevertheless, the impact on the local counties can be devastating.<sup>187</sup> One Georgia county needed a state bailout to avoid bankruptcy when three murderers won new trials 15 years after their convictions.<sup>188</sup> Two Mississippi counties battled over the location of their county line in an attempt to show that a murder occurred in the other county and should be prosecuted there.<sup>189</sup> Commissioners from another Georgia county went to jail for a day to protest the

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180. See STATE OF WISCONSIN LEGISLATIVE REFERENCE BUREAU, *supra* note 14, at 26-27.

181. See *Counties Pay Price on Prosecutions; High-Profile Cases Linked to Tax Hikes*, DALLAS MORNING NEWS, May 3, 1995, at 33A.

182. See *id.* One county tried to raise taxes in 1994 to pay for a high-profile capital trial and the taxpayers revolted and voted for a tax rollback, which forced the county commissioners to cut funding to fire and ambulance services in the county in order to get the money that they needed. See *id.* The story goes on to discuss counties who are plea bargaining and reducing charges rather than face the cost involved in a capital trial. See *id.*

183. See Wise, *supra* note 53.

184. See *id.*

185. See *Capital Costs: Who Pays for Death Penalty?*, *supra* note 66.

186. See Sam Howe Verhovek, NEWS, ORANGE COUNTY REGISTER, Feb. 26, 1995, at A16. The legislation is called the Rural Homicide Act. See *id.*

187. See DIETER, *supra* note 5, at 5.

188. See *id.*

189. See *id.* at 6.

county having to pay for one capital prisoner's retrial.<sup>190</sup>

At the county level, the cost of a capital trial can determine how often the death penalty is sought. Manhattan District Attorney Robert M. Morgenthau predicts that the death penalty will be a "major impediment to law enforcement, because of the cost, time spent and diversion of resources" away from the prosecution of other crimes.<sup>191</sup> Although most state capital punishment laws specify those crimes for which the prosecutor should seek the death penalty, ultimately it is still the prosecutor's choice.<sup>192</sup> Cost considerations can color that choice.

Similarly, the choice of how to pay for the trial once the prosecutor has decided to seek the death penalty can impact local politicians. They must choose between raising additional taxes or taking money away from programs that provide a positive benefit to the community, such as parks, health, and law enforcement.<sup>193</sup> The District Attorney of Sierra County, California, lamented this dilemma:

If we didn't have to pay \$500,000 a pop for Sacramento's murders, I'd [instead] 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. The sewage system at the courthouse is failing, a bridge collapsed, there's no county library, no county park, and we have volunteer fire and volunteer search and rescue.<sup>194</sup>

## VI. CONCLUSION

In a 1993 Maryland study, the Governor's Commission concluded

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190. See *The High Price of Justice: Cost Being Weighed in Death Penalty Cases*, ATLANTA CONST., July 10, 1995, at B4. This points out the conflict between state and local officials over who should pay for capital trials. See *id.* Last year a state senator unsuccessfully introduced a bill that would have forced the state to pick up most of the tab for capital trials. See *id.*

191. See Daniel Wise, *DAs on the Death Penalty, Prosecutors Want Death Penalty, Qualms Voiced About Costs, Time, Training of Lawyers*, 213 N.Y.L.J. 41 (1995).

192. See Duane D. Stanford, *Officials Fret Over Costs of Murder Case*, ATLANTA CONST., May 18, 1995, at 1R; but see COOK & SLAWSON, *supra* note 33, at 23-25 n.8. (pointing out that the North Carolina Supreme Court has held that a DA does not have the discretion to decide whether a first degree murder case should be tried as a capital or non-capital offense).

193. See *Not Worth it if Reason Prevails, County Legislators Will Save the Cost of Financing Death Penalty Cases*, POST-STANDARD (Syracuse, N.Y.), July 25, 1995, at A6.

194. DIETER, *supra* note 5, at 5.

that the approximately \$2 million that the state spent on the death penalty that year did not seem excessive in comparison to the overall costs associated with the criminal justice system.<sup>195</sup> The study further concluded that although significant changes needed to occur in the implementation of capital punishment, none of the factors that the commission considered, excessive costs among them, required abandoning the death penalty at that time.<sup>196</sup>

In analyzing this conclusion the question must be asked: What is the goal of the death penalty? If it is to put to death those charged and convicted of a capital offense, then the Maryland system is a failure. By 1993, the capital punishment system had cost Maryland citizens roughly \$12 million over the fifteen years since reinstatement, and the state had yet to execute one prisoner.<sup>197</sup> It must be questioned whether this is a desirable allocation of state and local tax dollars.

The North Carolina study concluded that the death penalty, as implemented in North Carolina at the time of the study, could not be justified on economic grounds.<sup>198</sup> The evidence is overwhelming that the death penalty comes at a substantial economic cost to the public.<sup>199</sup>

Even if future lawmakers succeed in making the capital punishment system more efficient, any system of capital punishment in this country will demand a disproportionate amount of energy, resources and political attention.<sup>200</sup> As noted in the introduction, the cost argument is one of the least compelling arguments against the death penalty. Standing by itself, the high financial cost of the death penalty may not be reason enough to reject the death penalty in Michigan. However, when the issues of appropriateness, justice, and

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195. See THE REPORT OF THE GOVERNOR'S COMMISSION ON THE DEATH PENALTY, *supra* note 34, at 194-95.

196. *See id.*

197. *See id.* at 193, xv. In the first 15 years after the reinstatement, 57 death sentences had been imposed and 778 capital cases were tried that did not result in a death sentence. *See id.* at xv; *see also* Peter Jensen, *Death Row Speed-Up Is Favored*, BALTIMORE SUN, Feb. 23, 1995, at 1B (reporting that the Maryland commission recommended, among other things, that measures should be taken to cut the time it takes from arrest to execution, yet in the two years since the report was published, only one minor recommendation--replacing the gas chamber with lethal injection--has been approved and has become law).

198. *See COOK & SLAWSON*, *supra* note 33, at 3.

199. *See id.* at 3-4.

200. *See* Fred Grimm, *State Paying a Heavy Price to Kill Killers*, MIAMI HERALD, Apr. 23, 1995, at 1BR (citation omitted).

morality are added to the cost arguments, it is clear that the price to be paid by the state for the death penalty is too high.

