

**THE COST
OF THE DEATH PENALTY
IN MARYLAND**

**Testimony Before
The Maryland Commission on Capital Punishment**

*Jonathan E. Gradess
Executive Director
New York State Defenders Association*

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Introduction

My name is Jonathan Gradess, and I am executive director of the New York State Defenders Association. Our Association was founded as a not-for-profit corporation in 1967, and since 1981 has been funded by the State of New York to function as a backup center and clearinghouse to improve the quality of public defense representation. In addition to our day-to-day work providing direct support services to lawyers, we have a contractual obligation to review, assess, and analyze the public defense system of New York State and to make recommendations for improvement to the Governor, the Judiciary, the Legislature, and others. In 1981, we commenced a nationwide study to examine the type of public defense system New York would need in the event it chose to reinstate the death penalty. We quickly discovered that cost was a major issue to consider and provided a report in 1982 to New York's Division of Budget, Assembly Ways and Means Committee, and Senate Finance Committee.

I was the lead author of *Capital Losses: The Price of the Death Penalty for New York State*,¹ one of the first empirical studies of cost and the death penalty published in this country. More than 5,000 copies of *Capital Losses* have been distributed to budget analysts, legislators, government officials, bar associations, the media, state associations of counties, prosecutors, judges, defense lawyers, and scholars. It has been widely cited and broadly used as a model for analyzing the costs of capital litigation.

I have continued to collect data and study the question of the cost of capital litigation. I have appeared as an expert witness before the United States Senate Committee on the Judiciary, the Missouri Legislature, and the Kansas Legislative Research Service. I have been a consultant to the United States General Accounting Office in its required study of the cost of the implementation of the federal death penalty. I was also consulted by the American Bar Association's Ad Hoc Committee to Assess the Cost Impact of the Death Penalty on the Justice System. Our staff, under my supervision, assisted the American Bar Association in its efforts to assess the cost of post-conviction representation. I have presented testimony to the New York State Assembly Standing Committee on Codes, Judiciary and Correction, the New Jersey Death

¹ *Capital Losses: The Price of the Death Penalty for New York State*, a report from the Public Defense Backup Center to the Senate Finance Committee, the Assembly Ways and Means Committee and the Division of Budget (NYSDA, April 1982) [hereinafter *Capital Losses*].

Penalty Study Commission, and the New Jersey Senate Budget and Appropriations Committee. I have also been an expert witness on the cost of the death penalty in two capital cases, and have published several articles on cost in both the popular and academic press.

I come to you from a state that in many respects has functioned for 30 years as a laboratory for the question that is before your commission. From 1977 until 1994, our state did not have a death penalty. Then, in 1995, New York reinstated capital punishment. It remained on the books for nine years. Finally, in 2004, the death penalty was struck by the courts pending a rewrite of part of the statute. Our Assembly held extensive hearings much like the hearings being held by this commission, and it decided New York was better off without the death penalty. We have now been without a functioning death penalty for four years, and life imprisonment without parole is the most severe punishment for first degree murder. New Yorkers are generally happy with this result, as indicated in poll after poll revealing that they prefer life imprisonment to the death penalty.

In short, New York's experience both having and not having the death penalty during the last three decades provides a clear example of the ways that the presence or absence of capital punishment impacts the criminal justice system.

When it comes to costs, our experience parallels that of virtually every other state in the country. During the decade that New York allowed capital punishment to divert money and resources from local and State treasuries, conservative estimates are that New York spent more than \$200 million to obtain seven death sentences, none of which were carried out. Each death sentence thus cost more than \$28 million to achieve.

This experience – inordinately high expenditure for minimal return – has been the experience of states throughout the nation during the last 30 years of the modern death penalty. Today Maryland too confronts this reality.

This reality and the reasons for it are what I wish to address.

Conclusions about cost generally

Earlier this year, I co-authored a review of all of the existing literature on the cost of the death penalty.² This literature spans 50 years and a majority of the 50 states. Studies that vary in their sophistication and methods have been conducted by academics, media organizations, private research organizations, and governments themselves. Their conclusions, which confirm my own, are virtually universal.

- Capital cases cost more than non-capital cases.
- There is a widespread misconception among the general public that life in prison is more expensive than the death penalty.
- Capital systems cost more than non-capital systems.
- Criminal justice systems with death penalties face higher design and maintenance costs than criminal justice systems without capital punishment.
- The main costs of capital litigation occur *up front*, during trial and penalty phases of capital proceedings, rather than during the appeals process as commonly believed.
- The exorbitant costs of the death penalty drain resources from other critical governmental functions.

These generalizations are backed up by state studies ranging from California to Alaska, from Kansas to Georgia, from Florida to Indiana. Maryland has had at least two studies of the costs of the death penalty, the findings of which are in line with these and others done throughout the country.

Why is the death penalty so expensive?

Death cases are more elaborate at every point in the legal process. And they are required to be so not because of governmental generosity, but by constitutional decree. The costs which therefore accrue do so as a mandatory ingredient in maintaining a constitutionally permissible system of executions. Capital cases typically involve:

- more pretrial preparation;
- a greater number of pre-trial motions;
- the utilization of more experts;

² Jonathan Gradess and Andrew Davies, “The Cost of the Death Penalty in America: Directions for Future Research” in Lanier, Bowers & Acker (eds.) *Capital Punishment: The Defining Issues for the Next Generation* (Durham, NC: Carolina Academic Press, forthcoming October 2008).

- in-depth investigation into the background of the defendant to prepare mitigation for the sentencing phase and to inform trial strategy;
- more defense attorneys appointed and prosecutors assigned;
- a longer and more complicated jury selection process;
- more frequent juror sequestration;
- both a guilt phase and a penalty phase trial;
- trials which are typically 3 to 5 times longer than in non-capital cases.

Costs associated with all these additional demands are accrued before a single appeal is filed.

The fundamental difference between death penalty cases and all others is that a unique jurisprudence has developed governing capital punishment. The list above is a reflection of this jurisprudence.

The law requires a unique jury selection process to weed out those who hold indelible scruples either for or against the imposition of the capital sanction. Jury pools are larger, sequestration is common, individualized *voir dire* often required. None of this is so in the non-capital case.

Because “death is different” two or more lawyers are required on capital case teams. This is not the case in non-capital murder cases.

The penalty phase of a capital case, constitutionally required since 1976, is unique. It asks the defense to explore and document every aspect of a client’s life, to follow the hills and valleys of that life, to search from before the instant of birth to the moment the proceeding begins, and to establish to any juror’s satisfaction a reason to spare that life. This comprehensive mitigation investigation, recently reaffirmed by the Supreme Court as essential and constitutionally compelled,³ provides jurors with the information that allows them to exercise mercy, a decision that rests within their exclusive province. Nothing like this investigation or the penalty phase in capital cases exists anywhere else in American criminal jurisprudence.

³ *Wiggins v. Smith*, 539 U.S. 510 (2003).

These and many other constitutional requirements are the engines that drive capital punishment's high cost; there is no means by which these demands can be eliminated in a death penalty system and every reason to presume they will continue to increase as long as the death penalty remains in place.

Empirical studies of the cost of capital punishment

For many years not much was known about the high cost of capital punishment. Practitioners surmised that capital costs were higher than the cost of non-capital prosecutions but their views were impressionistic. The earliest empirical examination of the question confirmed their viewpoint⁴ but little other research immediately took place. In 1972, Mr. Justice Marshall stated in his opinion in *Furman v. Georgia*, "... there can be no doubt that it costs more to execute a man than to keep him in prison for life."⁵ This inspired some inquiry, but real concern didn't begin until after the re-emergence of the modern death penalty in 1976 when *Gregg v. Georgia* opened the floodgates for new statutes. State by state, slowly, the picture of the cost of capital punishment began to emerge.

We conducted our 1982 study, *Capital Losses*, when New York began to contemplate reinstatement of the death penalty. The study was an attempt to anticipate the impact of a death penalty bill which promised funding for high quality defense representation in capital cases. It reviewed the constitutional and practical reasons why death is different and capital case costs are higher. The report presented a model charting system covering 144 cost centers at 11 state and federal judicial levels. It then attached national survey cost data to the first three of these levels: trial (guilt and penalty phases), appeal to the state Court of Appeals, and first *cert* petition review in the United States Supreme Court. *Capital Losses* concluded that these first stages of capital

⁴ The earliest empirical study of the cost of the death penalty dates from 1951. The analysis it presents shows that the death penalty is more costly than life imprisonment. See Hartung, F., *On Capital Punishment*, unpublished manuscript, Wayne University (1951).

⁵ Marshall cited four sources for his opinion in *Furman v. Georgia*, 408 U.S. 238, 358 at n.140 (1972): Caldwell, Robert G., "Why is the Death Penalty Retained?" 284 *Annals of the American Academy of Political and Social Science* (1952) at 45-53; Eshelman, Byron E. and Frank Riley, *Death Row Chaplain* (Englewood Cliffs, NJ: Prentice-Hall, 1962); McGee, Richard A., "Capital Punishment as Seen by a Correctional Administrator," 2 *Federal Probation* (1964) at 11-16; Sellin, Thorsten, "Capital Punishment," 25 *Federal Probation* (Issue 3, 1961) at 3-11.

litigation would be significantly more expensive than a life sentence, though it turned out that the actual costs were much higher than we had predicted.⁶

Most relevant to this commission is the fact that *Capital Losses* sparked a renewed interest in the question of the cost of capital punishment by state governments. The report became a model for a flurry of new studies, generating significant data on the cost of capital punishment. In 1983, the Public Defender and Chief Judge of the Court of Appeals in Maryland were asked by the House Appropriations Committee to provide information on the fiscal impact of processing death penalty cases. Foreshadowing the findings of your most recent study by The Urban Institute, which I shall shortly address, the study found that among cases where death was sought, those resulting in sanctions of death cost more than those resulting in non-death sentences, not including appeals (*Final Report, The Committee to Study the Death Penalty in Maryland*, 1985).

Other states followed Maryland's lead. A review of some of the nation's studies makes clear that across time and the multifaceted diversity of states, capital cases cost more than non-capital cases, capital systems cost more than non-capital systems, and life imprisonment is less expensive than capital punishment.

Findings in other states

North Carolina: Duke University's study of the cost of North Carolina's death penalty remains one of the most comprehensive in the country. It found that based on the number of executions at the time, the state was spending \$2.16 million more per execution over the costs of a system where the maximum sentence was life imprisonment. (Cook & Slawson, "The Costs of Processing Murder Cases in North Carolina," Duke University, May 1993.)

Florida: For years, Florida has been plagued with its effort to implement a death penalty. In 1988, a study of the cost of the death penalty in Florida revealed that the per case cost for execution was \$3.1 million per case, while the cost of life imprisonment under then extant

⁶ The report found specifically that "... the costs of the first three stages of capital litigation will total no less than \$1,828,100. *** By the time the first 40 New York death cases have been tried to verdict, over \$59 million will have been expended." *Capital Losses* at 26. As the actual costs of the death penalty (re-established in New York in 1995) showed, the *Capital Losses* estimates were very conservative.

actuarial tables was \$515,964. (Von Drehle, “The Death Penalty, A Failure of Execution,” *The Miami Herald*, July 10-13, 1988.) More recently, the *Palm Beach Post* found that Florida spends \$51 million a year additional on its death penalty, compared to what it would cost to punish all first-degree murderers with life in prison without parole. Based on the 44 executions Florida had carried out from 1976 to 2000, the cost for each execution was \$24 million. (S. V. Dáte, “The High Price of Killing Killers,” *Palm Beach Post*, Jan. 4, 2000, at 1A.)

California: Twenty-three years ago, Margot Garey, after a statewide survey, concluded in a well-researched and well-written law review article that, “A criminal justice system that includes the death penalty costs more than a system that chooses life imprisonment as its ultimate penalty.” (M. Garey, “The Cost of Taking a Life: Dollars and Sense of the Death Penalty,” 18 *U.C. Davis L. Rev.* 1221, 1985.) A study by the *Sacramento Bee* concluded that the death penalty costs California an extra \$90 million per year and that over 80 percent of those costs (\$78 million) are spent on initial trials. (S. Maganini, “Closing Death Row Would Save State \$90 Million a Year,” *Sacramento Bee*, March 28, 1988, at 1.) And the recent report by the California Commission on the Fair Administration of Justice found that California could save more than \$100 million per year by replacing the death penalty with life without parole, and that the state would have to spend an *additional* \$95 million per year just to reduce delays to the national average of about 10 years. (California Commission on the Fair Administration of Justice, *Report and Recommendations on the Administration of the Death Penalty in California*, June 2008.)⁷

Texas: According to the *Dallas Morning News*, a single death penalty case costs an average of \$2.3 million, about three times the cost of imprisoning someone in a single maximum security cell for 40 years. (C. Hoppe, “Executions Cost Texas Millions,” *Dallas Morning News*, March 8, 1992, at 1A.)

Indiana: Fiscal notes in the state of Indiana going back to the late 1980s project state savings of millions of dollars per year by the elimination of the death penalty. More recently, the Indiana Criminal Law Study Commission projected that with a 20 percent reversal rate (which is

⁷ Available at <http://www.ccfaj.org/documents/reports/dp/official/FINAL%20REPORT%20DEATH%20PENALTY.pdf>.

extremely low), lifetime costs for maintaining the state's 84 death-sentenced inmates would total over \$51 million, 38 percent more than if they had been sentenced to life without parole. (Janeway, Kathryn, 2002, *The Application of Indiana's Capital Sentencing Law: Findings of the Indiana Criminal Law Study Commission.*)⁸

Iowa: In 1991, the Iowa Legislative Fiscal Bureau calculated the cost of executing the first defendant under new death penalty legislation at approximately \$2.1 million. (Iowa Legislative Fiscal Bureau, 1991.)

Kansas: In 1987, the Kansas Legislative Research Department concluded that the cost of re-imposition of the death penalty in Kansas would be \$11,419,932 per year, excluding post-conviction review following direct appeals. (Memorandum from the Kansas Legislative Research Department regarding "Costs of Implementing the Death Penalty-House Bill 2062," February 11, 1987.) Sixteen years later a legislative study commission found that a single death penalty case would cost \$1.26 million, or 70 percent more than a comparable non-death penalty case. The study also looked at trial and appeal costs and found that death trials cost 16 times more than non-death trials (\$508,000 instead of \$32,000), and that appeals cost 21 times more in death cases. (*Performance Audit Report: Costs Incurred for Death Penalty Cases: A K-GOAL Audit of the Department of Corrections, State of Kansas, December 2003.*)

Missouri: In 1990, a five-year moratorium bill was under legislative review and the question at issue was the scope of a study to be performed during the moratorium. I was asked to testify concerning the addition of a cost analysis to the bill after it was determined that Schuyler and Texas counties in Missouri were threatened with bankruptcy as a result of certain death penalty prosecutions. This phenomenon of course is not unique to Missouri, and there is evidence of local governments concerned about property taxes in California, Nevada, and the Deep South urging prosecutors to defer capital prosecutions because of their cost.

Federal: The cost of the death penalty has not escaped the attention of the federal government. As I mentioned earlier, I was called to testify before the Senate Judiciary Committee and also to assist the U.S. General Accounting Office. For the last 20 years, the

⁸ Available at http://www.in.gov/cji/files/law_book.pdf (accessed Sept. 4, 2008).

federal government has been concerned about the increasing costs of the death penalty. The Judicial Conference of the United States looked at the question and concluded that defense costs in federal death penalty cases would be four times higher than in non-death cases. The report also found that prosecution costs were 67 percent higher than defense costs, *without* counting investigation. (See, *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation*, Judicial Conference of the United States, May 1998.)

Prosecutors address the impact of the cost of the death penalty

Criminal justice professionals all over the country – whether they use the death penalty a lot or a little – now confront the reality that the death penalty results in additional costs and drains resources from other much needed services within criminal justice and beyond. Chief among such professionals are local prosecutors. Those who support the death penalty and use it and those who oppose the death penalty preferring LWOP agree about the death penalty’s high cost and resource drain.

One of America’s best known prosecutors and the dean of New York’s district attorneys, Robert Morgenthau, stated, “The death penalty exacts a terrible price in dollars, lives and human decency. Rather than tamping down the flames of violence, it fuels them while draining millions of dollars from more promising efforts to restore safety to our lives.”⁹ A proponent of New York’s death penalty, Monroe County District Attorney Mike Green, commented, “If they want to fix it so we have a death penalty, that works great. If they take it off the books so taxpayers aren't paying million of dollars, that's great too.”¹⁰ One rural New York prosecutor (former Warren County District Attorney Sterling Goodspeed) was quoted, “I think I could prove to you that I could put someone in the Waldorf Hotel for 60 to 70 years and feed them three meals a day cheaper than we can litigate a single death penalty case;”¹¹ another (former Delaware County District Attorney Paul Eaton) reported that, “In our county, if we had a death penalty case, it would virtually shut us down.”¹²

⁹ Manhattan District Attorney Robert Morgenthau, Testimony before the New York State Assembly Standing Committee on Codes, Judiciary and Correction, December 15, 2004.

¹⁰ WROC TV News, Jan 7, 2005.

¹¹ *Bergen Record*, April 23, 1995 (“Capital Cases Likely to Elude Eager Prosecutors – Upstate Counties Short on Killings, Trial Money,” Associated Press).

¹² *Id.*

Schenectady County District Attorney Robert Carney placed much of the sentiment of the state's less vocal prosecutors on the record of a New York Assembly hearing by declaring:

“Continuing to spend millions of dollars to take a murder defendant who has already been caught and subject him to death rather than life without parole will not prevent the next murder. Redirecting money to more vigorously apprehend and prosecute armed robbers, rapists, burglars, and those who commit gun crimes will prevent murders and save lives. Expanding funding for IMPACT, Road to Recovery, and other equally compelling crime reduction strategies is a much wiser way to spend scarce public resources.”¹³

Prosecutors in Alabama, Montana, New Jersey, Massachusetts, North Carolina, and Texas have all echoed the very same sentiment.¹⁴ Thomas Sullivan, former United States Attorney for the Northern District of Illinois and Co-Chair of the Illinois Commission on Capital Punishment, has summed up the cost argument, stating:

“Lawmakers and the public must address the question of costs and the allocation of our limited state resources. *** I have come to the view that the state will make the best use of public funds by substituting life imprisonment for capital punishment.”¹⁵

No doubt these opinions are echoed in many quarters throughout Maryland.

Lost opportunity costs in Maryland (1985-2008)

Like all states with the death penalty, Maryland has two trials, longer and more complicated jury selection, more lawyers dedicated to cases for longer periods of time, and all the other things that have been proven to increase costs in other states. You also have some features that would make your death penalty more expensive than some of the states I just listed – a dedicated capital defender office and a more attentive court. More than half the people on your death row have been there for over two decades, serving what amounts to a life without parole sentence with all the additional costs their death penalty trials and retrials have brought. Logic compels that Maryland's death penalty cost experience should mirror that of other states.

¹³ Schenectady County District Attorney Robert M. Carney, Testimony before the New York State Assembly Standing Committee on Codes, Judiciary and Correction, February 8, 2005.

¹⁴ See, Death Penalty Information Center website at <http://www.deathpenaltyinfo.org/article.php?did=1948>.

¹⁵ Id. See also, Mr. Sullivan's testimony before the New York State Assembly Standing Committee on Codes, Judiciary and Correction, December 15, 2004 [analyzing twenty states and finding the costs of death penalty cases higher than non-death cases in each].

Both the Maryland legislative study (1985) referred to earlier and the Urban Institute's study, *The Cost of the Death Penalty in Maryland* (2008), back up this logic. These studies are efforts to capture and quantify the opportunities lost as a result of devoting considerable time and effort to imposing the death penalty in the state of Maryland. Each represents an effort to provide data that can answer the question, "What might we have done had we not had capital punishment?" We have examined the study closely and determined that its lead author, John Roman (who testified here in August), used sophisticated statistical methods to compare the cost of capital and non-capital prosecutions conducted in Maryland between 1978 and 1999. The report estimated that the cost for a death-eligible non-capital prosecution totaled \$1.1 million. The additional cost arising in death-noticed cases was \$670,000. And the additional cost in cases which received death sentences was \$1.2 million dollars per case, a total lifetime cost of \$3 million for every case ending in a death sentence.

The Institute's conclusions were reached only after an elaborate sequence of statistical controls were applied to the question of whether or not the aggravated nature of these cases might be the real reason for their high cost. The researchers were relatively thorough in the enumeration of the potential sources for the generation of additional costs in capital cases and meticulous in their measurement methodology. The researchers gathered realistic data from professional informants and institutional data sources to generate reliable estimates of the cost of each stage of case processing.

That said, the report has limitations. The researchers calculate the costs of 162 death-noticed cases begun between 1978 and 1999. In doing so, they exclude 11 death-noticed cases brought during that period which ended in verdicts other than guilty. They also exclude more than 100 cases where a death notice was filed but was later withdrawn. Moreover, the 24 death-noticed cases begun since 1999 (six of which ended in sentences of death) are omitted entirely from the study.¹⁶ The effect of the omission of more than 135 cases and the failure to study other

¹⁶ These 24 cases alone are instructive to show the underreporting of Maryland costs. Assuming the costs for these death-noticed cases to be the same as the costs of the cases the Institute studied, lifetime costs for death-noticed cases in Maryland since 1978 would increase by nearly \$28 million (24 x \$670,000 + 6 x \$1.2 million + 8.16 x \$563,575 [8 years and 2 months funding for Capital Defense Division 2000-2008] = \$27,882,529).

relevant costs¹⁷ results in a massive underestimation of the actual cost of capital punishment in Maryland.

Independent of these limitations, the study remains an important contribution to our knowledge on the cost of the death penalty. By carefully quantifying the precise amount of time and other resources dedicated to death penalty case processing, it offers a way to measure the dollar value of the resources used in the pursuit of capital prosecutions. Their conclusion that an additional \$186 million will have been expended over the lives of 162 death-noticed cases is a conservative estimate of the scope and level of commitment to carrying out Maryland's capital punishment scheme. In essence the Urban Institute study assigns dollar values to time and resources known to be expended in the pursuit of these cases and adds them up for a total.

A note about challenges to the Urban Institute methodology

We are aware from press reports that the Urban Institute report has been dismissed by some who have suggested that the death penalty creates no additional costs, that its extra time and resources are absorbed in normal budgets, and that if and when capital punishment is replaced with life in prison without parole, current resources will simply be transferred to handle those cases generating no savings. I put aside for the moment that in my opinion these conclusions are neither plausible nor possible and address rather what seems to be a genuine misunderstanding about the Urban Institute methodology.

John Roman and his researchers did not make up numbers. They did not unilaterally estimate time, nor guess about what was happening. They excluded every case for which uniform information was not available. Then they surveyed the professionals of the state of Maryland about the amount of time and resources spent on death cases and reviewed official records generated by those professionals. If the numbers are wrong, then the judges, prosecutors, and defense lawyers of Maryland are wrong. The estimates represent the collective judgment of the professionals in your state who are daily implementing the death penalty.

¹⁷ Despite its relatively comprehensive approach, the Urban Institute omitted several cost centers in its calculations. In all cases, costs prior to the filing of the death notice were not calculated despite evidence (collected by the authors themselves) demonstrating that these costs were higher in death cases. All Maryland state costs associated with the federal appeals process were excluded. Costs associated with clemency, the higher costs of local jail security during the pendency of death cases, increased costs for state and local police, and the cost of designing and constructing death row were also not calculated.

If you do not trust them with this question, you should not trust them with questions concerning the disposition of human lives.

One could have studied the death penalty in Maryland in other ways, but the Urban Institute chose to assess the question from the point of view of *lost opportunity costs* using data derived from professionally-involved informants and other official sources. This is a traditional and time-credited tool both for planning and for determining governmental waste and resource utilization.

Understanding this methodology is essential if one is to adequately assess the cost of Maryland's death penalty and to adequately utilize the study to help the Commission answer questions 5 and 6 of the Commission study bill – the comparative effects of prolonged court cases and costs of both death and life imprisonment cases. The contribution made by the study to the resolution of this question lies in its assessment of the greater time spent for death-noticed and death-sentenced cases than that spent on death-eligible cases prosecuted non-capitally. The attendant costs of these cases are shown to increase because the time and resources are shown to be greater.

The study informants – all of whom were Maryland criminal justice and judicial professionals implementing the Maryland death penalty in real time *on the ground* – determined that across the stages of capital case processing in Maryland certain things take longer in capital cases, many of them substantially longer. When Maryland lawyers said they took three times longer to handle an aspect of a capital trial, the value of that time was calculated by the Institute researchers. When Maryland appellate litigators said capital appeals took twice as long as non-capital appeals, the Urban Institute dutifully calculated the money associated with the time spent. And when the courthouse was used for death qualification *voir dire* or death penalty trials, the cost of that was also calculated. What emerges is a picture of the economic value of the cost associated with implementing current Maryland death penalty policy.

The resources spent on capital cases are greater than those spent on noncapital cases everywhere in America that has studied the question, and here in Maryland. By knowing the value of the time and resources spent, this commission and Maryland's governments are

empowered to determine where the same resources might more usefully have been expended and what greater value could be achieved by police, prosecutors, defense, and courts if the time and resources were not being spent on capital cases.

Even if one assumes that the naysayers who suggest that extra costs associated with the time expended on death cases are absorbed into prosecution, defense, and judiciary budgets, the question remains: How much better could their non-capital work product be without the extra death obligations that are concededly associated with capital punishment?

- Would it mean for prosecutors fewer dismissals in an office with a high dismissal rate? Relief for thinly-stretched prosecutors in complex non-capital cases? The ability to penetrate more deeply into organized crime? New opportunities to prosecute environmental crime? A cold case unit? Improved motion practice, brief writing, or diversionary decision-making?
- Would it mean for the police more officers on the force? More officers paired in squad cars? The expansion or introduction of community policing? Reducing the DNA backlog? Pension assistance?
- Would it mean for courts speedier non-capital dispositions? Smaller backlog? The expansion of court parts? The addition of needed judges? Other forms of docket relief? More time to contemplate, write, decide, and issue opinions?
- Would it mean for the defense the ability to reduce non-capital caseloads? To use more experts in ordinary cases? To expand defense investigations? To boost needed motion practice? To allow for greater time to build rapport with clients and their families?

People in Maryland, closer to their own needs, know better than I which of these questions should be answered “yes.”

One final point. There is a reason we talk about “spending *time*” and “spending *money*,” and about “saving *time*” and “saving *money*.” In many of the most important aspects of our lives these two expenditures are interchangeable surrogates for each other. The adage “time is money” arises from the common experience of choosing. Its first use more than 400 years ago was actually “time is precious” (C. Ammer, *The American Heritage Dictionary of Idioms: The Most Comprehensive Collection of Idiomatic Expressions and Phrases*, 1997, at 432), a truth we all intuitively appreciate – especially you who have already devoted countless hours to this important commission process and are undoubtedly not doing other things because of it.

The Urban Institute study gives Maryland an opportunity to think about where it might find the resources to do the *precious* things the state needs to do with the money now being spent for the death penalty.

Who pays?

One nationwide study found that the costs of the death penalty are primarily borne by counties and most often paid for by raising taxes. The study estimated that over 20 years the death penalty would cost counties across the nation more than \$5.5 billion. (K. Baicker, “The Budgetary Repercussions of Capital Convictions,” 4 *Advances in Economic Analysis and Policy*, 2004.)

The emphasis on county budgets means the decision to seek death in any case is directly affected by the county’s ability to afford the process. This economic disparity is one of the factors that leads to arbitrariness in the death penalty system. You already have that factor operating within your state. Elsewhere, administrators across the nation have raised taxes, squabbled over borders, withheld paychecks to their employees, cut ambulance and fire services, and even gone to jail over the need to meet the costs of capital trials¹⁸

In Maryland there have been local struggles to save the Prince George’s Hospital Center right alongside efforts to increase the size of the police force to keep up with the population. Veteran homicide prosecutors in that county and the City of Baltimore have supported repeal of the death penalty over the issue of resources; and counties across the State, already feeling the pinch of their own budget cuts, face bleak prospects for help in your state budget.

As states, counties, and communities face billion or multi-billion dollar holes in their budgets, they are painfully recognizing that there are not two spigots from which money flows forth. States cannot have a death penalty with all its unnecessary attendant costs and all the other things citizens need. States must choose.

¹⁸ Brooks, Justin and Jeanne H. Erickson, “The Dire Wolf Collects his Due while the Boys Sit by the Fire: Why Michigan Cannot Afford to Buy into the Death Penalty,” 13 *Thomas M. Cooley Law Review* (1996) at 877-905; Costanzo, Mark, *Just Revenge: Costs and Consequences of the Death Penalty*, 3rd ed. (New York: St. Martin’s Press, 2001); Dieter, Richard C., *Millions Misspent: What Politicians Don’t Say About the High Costs of the Death Penalty*, 2nd ed., Washington DC: Death Penalty Information Center (1994).

Your state has a reported projected \$1 billion deficit ahead of it in the coming fiscal year. You already face higher taxes, hiring freezes, and service reductions to solve the problem. (“Maryland May Face \$1 Billion Shortfall,” Washingtonpost.com, August 29, 2008.) In the months ahead, as the Maryland “Beg-a-thon” begins, and efforts to fully fund the Thorton educational initiative are frustrated, as the cost of drug treatment beds is debated, and the needs of domestic violence victims assessed, Maryland’s commitment to capital punishment needs to be factored into the discussion. As counties struggle to pay pensions and the correctional officers’ union seeks additional staffing and upgraded safer facilities to protect their members from assaults, the shortsightedness of the capital punishment system in Maryland needs to be presented front and center. That shortsightedness buys guns and discards butter. It trades the needs of the homeless on Maryland streets to purchase judicial time to hear death penalty cases. It barter away police services to pay for hours of appellate review in the Court of Appeals. It trades the distant possibility of an execution for the tangible present *reality* of highways, homes, and comprehensive police services.

As Judge Dale Cathell of the Maryland Court of Appeals has framed the issue:

“A relevant question, it seems to me, is whether the country would be better served by using the money [expended on capital punishment] for education, or for other aspects of need in this country than it is now being served by the process we put ourselves through putting a few murderers to death?”
Oken v Maryland, 367 Md. 618 (2002) [Judge Cathell dissenting].

There is only one money spigot, and Maryland has to decide whether it will turn it on for human services, enhanced law enforcement, or for the death penalty.

The impact of converting to life imprisonment without parole (LWOP)

Though “death is different,” LWOP is not. The unique procedural protections that apply when taking a life have not been held to apply in LWOP cases.

Some of the reasons for this are obvious. There is no jury qualification asking searching questions of jurors about their predilections regarding long term incarceration. A single lawyer is deemed sufficient to handle LWOP trials and individual lawyers are assigned on appeal. There is no penalty phase in LWOP cases, and no Eighth Amendment argument yet propounded supports such a procedure. In short, the greater procedural protections applicable in death cases and their attendant costs do not translate to LWOP cases.

But there are other less obvious reasons why less time and less money will be spent on these cases. Experience with LWOP cases in many jurisdictions demonstrates that they are treated more like 2nd degree murder cases than death penalty cases.

In the four years since New York has had LWOP as the exclusive punishment for first degree murder, this has been the case. There has been no revision of our statutes to provide for specialized services in LWOP cases. Nor has any broader right to counsel emerged. No more extensive right to appeal has been recognized, and no greater procedural protections have been articulated by courts.

The experience in Massachusetts and Michigan, both of which have only LWOP as the most severe penalty for murder, is similar.

Private counsel in Massachusetts are certified, screened, assigned, and paid for appeals in the identical manner in both first and second degree murder cases. They also spend about the same amount of time preparing, perfecting, and arguing each. And while cross-jurisdictional comparisons are fraught with complications, it is noteworthy that Massachusetts appeals in LWOP and second degree murder cases each take about ten times less than the amount estimated for Maryland death penalty appeals.

The same situation applies in Michigan. LWOP cases take no more or less time than any other life case. A minimal percentage of these cases (hovering around 10 percent) go all the way to federal *habeas*. The appellate reversal rate is no greater than for non-LWOP cases and that is just under 10 percent also.

While LWOP cases are tried, they are not tried like death cases. And while they are sentenced, they are not sentenced like death cases. LWOP cases get appealed but the results in these cases do not appear to vary from the result in ordinary murder cases. The appeals are not taken as seriously as death penalty appeals; they are shorter; there are many fewer of them; and they have a much smaller success rate. Moreover, there is no greater right to counsel for discretionary review in LWOP cases, and there is no cadre of *pro bono* lawyers eager to volunteer to prevent lifetime incarceration for LWOP clients.

If Maryland decides to eliminate capital punishment and replace it with life imprisonment, the State will save money and need anticipate no heightened costs associated with its new LWOP regime.

Conclusion

The cost of the death penalty will continue to increase in Maryland and across the nation. With every new death penalty development more costs are imposed on the system. And no matter how much time and effort are expended, there will still always be another needed protection that makes the system more convoluted and expensive. High cost is a permanent graft on the death penalty itself. Tinker as we will, we cannot make it swift, efficient, or effective; nor can we reduce its cost. Executions are irreversible and as such the death penalty can never escape its constitutionally complicated and costly nature. And therein lies the choice you face as you decide whether or not to keep it.

At the core of this debate is a harsh reality. There is not a bottomless pit of funding from which to keep the public safe and serve the needs of your communities. For the millions of dollars Maryland has spent to have a death penalty, you have succeeded in executing five people in 30 years, all while monopolizing your courts, underserving victims' families, and diverting crime-fighting hours that could have saved lives and protected the public. As you deliberate on the future of the death penalty in Maryland, ask yourself: Is this really the best answer for the next 30 years as well?