CAPITAL PUNISHMENT

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On May 11, 1988, as a young lawyer in an upscale Washington, D.C., law firm, I felt uncomfortable—to say the least—when I first interviewed Fred, my new client. Fred was locked into a steel and glass cage, and we communicated through a heavy wire mesh opening just above a counter. Fred had been sentenced to die in 1984 for a particularly brutal and bloody machete murder of an elderly El Paso couple. The couple had been bound, hands and feet, and hacked to death as they lay on their living room floor. Along with nearly 300 other men and women, Fred awaited lethal injection on Texas’ death row.

Just two days earlier Fred had learned that his death—scheduled for May 13—had been postponed for at least 60 days. Although he obviously was relieved, he was nonetheless suspicious, and our conversation was strained. Like virtually all condemned persons, at the time of his trial Fred was poor. He had been represented by a court-appointed lawyer who was paid by the state of Texas. Four years on Texas’ death row had not improved Fred’s financial condition.

Our discussion became almost surreal when Fred told me that, notwithstanding his predicament, he actually believed in capital punishment. When asked to explain, Fred said, with a slight twinkle in his eye, “I believe if you don’t have capital, you’re sure gonna get some punishment.” At the time, I failed to appreciate the significance of Fred’s joke. Seven years later, I have a much fuller understanding of the enormous costs—emotional, moral and economic—that the death penalty imposes on society. This article explores the financial costs of capital punishment.

“IF YOU DON’T HAVE CAPITAL, YOU’RE SURE GONNA GET SOME PUNISHMENT.”

Both supporters and opponents of the death penalty invoke economic cost considerations to support their positions. Some death penalty proponents claim that executing prisoners is cheaper than alternative punishments such as life imprisonment or life without parole. The notion of law-abiding taxpayers having to financially support convicted murderers for the rest of their lives is likely to influence jury deliberations. A juror weighing alternative punishments for capital murder might ask colloquially, “You mean we should provide free food, shelter and television to this killer?”

If death row were really a row, it would stretch for more than three miles, cell after six-foot-wide cell. Statistics published recently by the NAACP Legal Defense and Education Fund show that there are 3,028 inmates awaiting execution in the United States. Nearly 50 percent (1,469) have had their convictions or sentences reversed due to serious constitutional errors. Retrials can quickly double the cost of a capital case. Continued
According to most death penalty opponents, the cost of capital punishment is far greater than the cost of warehousing inmates, even those serving sentences of life without parole. Because the Supreme Court has decreed that "death is a different kind of punishment from any other," greater procedural safeguards are constitutionally required in capital cases. Ronald Tabak and Mark Lane, who have examined the cost added to the U.S. criminal justice system by capital punishment, state, "[w]hat this means in practical terms is very long, complex and extremely expensive litigation.

One must recognize, at the outset of this analysis, that the state must incur the enormous expenses of a capital trial whenever the death penalty is sought, no matter what the trial's outcome may be, even in the many cases where the defendant is found not guilty or is not sentenced to death. The enormous expense frequently can be avoided where the death penalty is not sought, because clearly guilty defendants often plead guilty when not facing the death penalty. But, if the state insists on seeking the death penalty, very few defendants will plead guilty and agree to a death sentence, even when their guilt is clear, and some sort of trial usually occurs even when the defendant wants to be executed.

The added complexity and expense of capital trials begins well before trial. It is much more costly for both the prosecution and the defense to investigate death penalty cases for two reasons. First, the 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). Second, because there is a separate penalty phase where any mitigating evidence may be presented, the defense should develop evidence, which the prosecution may endeavor to rebut, concerning the defendant's entire background—including childhood, mental and psychological conditions, family relations, employment history, prior arrests and convictions, medical history, and much more. This often entails the employment of social scientists, psychologists, psychiatrists, and various forensic experts, all of whom must be paid by the state in many instances. For example, in some situations, the Constitution requires the state to pay for expert witnesses for the defense as well as the state.

"The inclusion of a separate sentencing phase in capital trials makes such trials longer than non-capital trials, quite apart from the additional complexities of pretrial proceedings and jury selection. "Not only are capital trials more lengthy and expensive, but, because the defendant's life is at stake, more retrials will likely be conducted. In some instances, one Supreme Court decision may mandate retrial of large segments—even the entire population—of the state's death row. These costs, both of the initial trial and the retrials, will be incurred even in the many cases where the jury does not return a death verdict upon retrial.

"Additional areas of considerable expense are the constitutionally mandated appeals process and the often extensive collateral proceedings. The appeals process requires appointment of counsel where the defendant is indigent, which usually occurs. Of course, the state must always bear the cost of at least the prosecution's participation in all proceedings.

"In addition to litigation per se, state clemency hearings entail further expense and complexities. Assuming these clemency hearings do not result in relief for a death row inmate, the state must then incur the cost of the execution itself.

"Two other points, frequently ignored in the studies..., should also be constitutional concerns regarding pretrial publicity, racial prejudice, and other areas of possible juror bias. Where pretrial publicity has affected potential jurors, the considerable additional costs of a change of venue may have to be incurred. Moreover, jurors should be asked a series of questions designed to determine whether they are excludable either because they could not impose the death penalty due to moral convictions, or because they would automatically impose the death penalty if guilt were found.
considered. First, maintaining a death row, even in lamentably poor condition, is more expensive than keeping the same prisoners in other forms of custody—into which many death row inmates will go when their death sentences are overturned. Second, the extra costs of the capital punishment system are all incurred ‘up front’ or within a few years, as compared to the savings from capital punishment, which do not arise, in the few cases where executions do occur, for a great many years. Hence, the savings from not having to incarcerate people following their executions must be discounted back to the present through the application of a discount rate reflecting the same amount of interest which a dollar saved today could earn over the many years before the execution occurs.”

An October 1992 report by the Death Penalty Information Center (DPIC) summarized some rather alarming findings on the cost of capital punishment. The DPIC concluded that the cost of capital punishment is increasing, and, because scarce financial resources are being diverted from more effective crime control measures, the public is actually less safe.

Across the country, police are being laid off, prisoners are being released early, the courts are clogged, and crime continues to rise. The economic recession has caused cutbacks in the backbone of the criminal justice system. In Florida, the budget crisis resulted in the early release of 3,000 prisoners. In Texas, prisoners are serving only 20 percent of their time and rearrests are common. Georgia is laying off 900 correctional personnel and New Jersey has had to dismiss 500 police officers. Yet these same states, and many others like them, are pouring millions of dollars into the death penalty with no resultant reduction in crime.

“The exorbitant costs of capital punishment are actually making America less safe because badly needed financial and legal resources are being diverted from effective fighting strategies. Before the Los Angeles riots [which followed the acquittals of the police officers charged with beating Rodney King] for example, California had little money for innovations like community policing, but was managing to spend an extra $90 million per year on capital punishment. Texas, with over 300 people on death row, is spending an estimated $23 million per case, but its murder rate remains one of the highest in the country.

“The death penalty is escaping the decisive cost-benefit analysis to which every other program is being put in times of austerity. Rather than being posed as a single, but costly, alternative in a spectrum of approaches to crime, the death penalty operates at the extremes of political rhetoric. Candidates use the death penalty as a facile solution to crime which allows them to distinguish themselves by the toughness of their position rather than its effectiveness.

“The death penalty is much more expensive than its closest alternative—life imprisonment with no pa-
role. Capital trials are longer and more expensive at every step than other murder trials. Pre-trial motions, expert witness investigations, jury selection, and the necessity for two trials—one on guilt and one on sentencing—make capital cases extremely costly, even before the appeals process begins. Guilty pleas are almost unheard of when the punishment is death. In addition, many of these trials result in a life sentence rather than the death penalty, so the state pays the cost of life imprisonment on top of the expensive trial.

“The high price of the death penalty is often most keenly felt in those countries responsible for both the prosecution and defense of capital defendants. A single trial can mean near bankruptcy, tax increases, and the laying off of vital personnel. Trials costing a small country $100,000 from unbudgeted funds are common and some officials have even gone to jail in resisting payment.

“Nevertheless, politicians from prosecutors to presidents choose symbol over substance in their support of the death penalty. Campaign rhetoric becomes legislative policy with no analysis of whether the expense will produce any good for the people. The death penalty, in short, has been given a free ride. The expansion of the death penalty in America is on a collision course with a shrinking budget for crime prevention. It is time for politicians and the public to give this costly punishment a hard look.”

News stories tend to support the position of death penalty opponents. For example, the $2.3 million Texas taxpayers spend for each capital prosecution is three times the cost of incarcerating an inmate for 40 years in a single cell in a maximum security prison. Florida is reported to spend $3.2 million per execution. According to one report, abolishing capital punishment in California would save that state $90 million each year. Before reinstating the death penalty in 1995, New York estimated that the cost would be $118 million each year. Likewise, Kansas, which in 1994 reinstated the death penalty, estimated that the annual cost would be $11.4 million.

In 1993 separate, comprehensive studies on the cost of capital and non-capital murder prosecutions in North Carolina and Maryland were published. According to the North Carolina study, North Carolina taxpayers pay $163,000 more to convict and execute an inmate than they do to convict a defendant and keep him in prison for 20 years. Considering the cost of prosecuting successful and unsuccessful death penalty cases, each execution in North Carolina cost approximately $2.16 million. According to the study, the average cost of a bifurcated capital trial in North Carolina is $84,000. The average cost of a non-capital murder trial in North Carolina is $17,000. The study concluded: “The death penalty is usually justified on the basis that it offers public benefits in the form of greater deterrent and retributive value than life imprisonment. These benefits, if they exist, are not free, but rather come at a substantial cost to the public.”

Similarly, the 1993 Maryland study estimated that the cost of a fully-litigated capital case in that state was between $300,000 and $400,000. A bifurcated trial and sentencing proceeding cost roughly $90,000; direct appeal cost $25,000; and state postconviction and federal habeas corpus cost $250,000. As of 1993, Maryland spent approximately $2 million each year on capital cases.

Nor is death any cheaper in Oklahoma. The state reportedly spent well over $1 million to kill Roger Dale Stafford, who received nine death sentences for the 1978 murders of six
Sirloin Stockade employees and three members of the Lorenz family. Mr. Stafford spent more than 15 years on death row before his July 1, 1995, execution. And the most notorious criminal prosecution in American history—the Oklahoma City bombing trial—will undoubtedly make Mr. Stafford's execution appear to be a bargain. As of September 30, 1995, the end of the fiscal year the cost of the bombing investigation alone was estimated at $10.6 million. When the expenses of prosecutors, defense lawyers, judges and witnesses are added, the cost to taxpayers will, of course, increase dramatically.

One certain way to reduce substantially the cost of capital cases would be to restrict opportunities for death-sentenced individuals to appeal their convictions and sentences. China, for example, reportedly executes its condemned inmates soon after conviction. In what is more a symbolic gesture than an attempt to recover costs of capital punishment, the Chinese government then sends a bill to the family of the executee for the cost of the ammunition used in the execution.

Fred Leuchter, who designs and sells execution machinery, knows well the cost of various methods of execution. Only two states (Idaho and Utah) kill by firing squad, the cheapest of execution systems. Other methods cost considerably more. The electric chair—in use currently (no pun intended) in Alabama, Arkansas, Connecticut, Florida, Georgia, Indiana, Kentucky, Nebraska, Ohio, South Carolina, Tennessee and Virginia—costs roughly $35,000. The actual electricity consumed during the three jolts costs only pennies.

States that prefer hanging (Delaware, Montana and Washington) can expect to pay $85,000 for a gallon. At the high end of execution systems is chemical asphyxiation. A gas chamber (used in Arizona, California, Maryland, Mississippi and North Carolina) will set you back $300,000. The cyanide pellets, which turn lethal when dropped into a chemical bath under the executee's chair, cost $10.

Oklahoma and all other states, along with the federal government and the U.S. military, opt for lethal injection. The three chemicals used to kill cost between $600 and $700 per execution. However, for states enamored with technology, Leuchter offers a push-button modular lethal injection system for $30,000.

Fred never did suffer death in Texas' death chamber. In 1993, after nine years on death row, Fred walked out of the El Paso County Jail, one of three innocent persons released from death row that year. Fred was freed, thanks to the work of his legal team, when a newly-constituted grand jury refused to indict him. According to the court of appeals decision which ultimately set him free, Fred's court-appointed trial lawyer did an inadequate job for which he was paid $11.84 per hour. The court wryly noted, "Unfortunately, the justice system got only what it paid for."

As part of Fred's legal team, I spent more than 4,000 hours working on his case, both during and after my tenure at the law firm. If Fred were a paying client, the firm would have billed him $718,864 for my services alone. Ultimately, Texas paid $7.76 per hour for my work on Fred's case.

ABOUT THE AUTHOR: Professor Coyne has represented capital defendants since 1988. He is married to Lyn Entzeroth, a judicial law clerk for Judge Charles Chapel of the Oklahoma Court of Criminal Appeals. They have one child, Marley Brennan. Along with his wife, Coyne is co-author of Capital Punishment and the Judicial Process, the first law school casebook devoted entirely to issues surrounding the death penalty.