

DECODING THE LAW



FINANCIAL IMPLICATIONS OF THE DEATH PENALTY

- Mark Larrañaga, defense attorney and partner at Walsh & Larrañaga Law in Seattle
- Peter Collins, assistant professor, Seattle University's Criminal Justice Department
- Robert Boruchowitz, professor and director of The Defender Initiative, Seattle University School of Law



DECODING THE LAW

Financial Implications of the Death Penalty

Wednesday, March 8, 2017

WASHINGTON STATE
BAR ASSOCIATION

Overview

- Introductions
- Previous Studies
- Experience from other States
- Washington Study and Other Findings
- Takeaways & Suggestions

The Washington Study

- ACLU-WA Funded Study.
- First time Social Scientists and Qualified Legal Counsel partnered to conduct empirical study of the costs of seeking the death penalty.
- First comprehensive empirical study regarding the costs associated with seeking the death penalty in WA.

Study Purpose

- To estimate the economic costs associated with cases where the death penalty was **sought** (DPS); compared to cases where the death penalty was **not sought** (DPNS).

Previous Studies I

- What all empirical economic studies have found, each to a varying degree, is that seeking and imposing the death penalty is more expensive than life in prison.
- It is a simple fact that seeking the death penalty is more expensive.
- There is not one credible study, to our knowledge, that presents evidence to the contrary.

Previous Studies II

Table 1. Past Economic Studies Summary of Main Findings (N= 15).

Year	Author/Organization	State	2017 Dollars
2001	Williams Inst	Arizona	\$136,003
2003	State of CT Commission	Connecticut	\$346,540
2004	State of Tenn.	Tennessee	\$926,239
2008	ACLU	California	\$1,277,452
2008	Roman et al.	Maryland	\$1,972,680
2009	Cook	North Carolina	\$359,936
2010	Sen. Boots	Indiana	\$380,904
2012	Miethe	Nevada	\$246,013
2013	Marceau & Whitson	Colorado	\$135,778
2014	State of Nevada	Nevada	\$579,365
2014	Death Penalty Ad Comm.	Kansas	\$439,916
2014	OPE; Idaho Leg.	Idaho	\$159,710
2015	Collins et al.	Washington	\$1,214,127
2016	Goss et al.	Nebraska	\$1,520,644
2016	Kaplan et al.	Oregon	\$935,597
avg. per case:			\$708,727

Experience from Three States I

- Costs are dependent on overall investment in criminal justice system – especially with public defense.
- Data matter.

Experience from Three States II

- Good data. Bad data. Both tell a interesting story!
- Good data: tied to modern IM systems and quality practices, increased transparency, accountability, coordination, etc.
 - ▣ Example: PDs/DAs tracking time/effort (per case).
- Bad data: outdated IM (paper), decreased transparency, accountability, coordination, etc.
 - ▣ Example: PDs/DAs not tracking time/effort (per case).
- Agency to agency ability varies, but whole state systems can be defined as poor, average, above average.

WA Cost Study I

- Used techniques illustrated in previous studies.
- Sample Frame: all aggravated murder cases that resulted in a trial report (were adjudicated) from 1981-2014.
 - ▣ N = 339
- Two main concerns from beginning:
 - ▣ 1) Sample Frame – two stages: a) identify all eligible cases; and, b) map chronology of a typical capital case.
 - ▣ 2) Data Availability – once the cases/chronology were documented, main data points were identified.

WA Cost Study II – Data Sources

- Data were requested using a variety of techniques, including:
 - ▣ Existing records: Trial Reports Database
 - Case numbers – DOC/Jails
 - ▣ Freedom of Info. Act (FOIA) – requests for budget documents from defenders, def. assoc., state def. office.
 - Extraordinary Criminal Justice Act (ECJA, 1999) petitions.
 - ▣ Through existing open channels: Prosecutors, AOC, State Auditors Office.

WA Cost Study III – Categories

- Analysis contains 6 main categories, but each category could contain many cost sub-categories.
 - ▣ Categories include: Jail Costs, Defense Costs, Prosecutor Costs, Court/Police/Sheriff/Misc. Costs, Appeals (state-level).
- Example – Def. = salaries, expert witnesses, & investigation costs.

Main Findings I

- Aggravated murder cases, where the prosecutor seeks the death penalty, cost an average of between \$800,000 to just over \$1 million dollars per case, compared to non-DP-sought aggravated murder cases.
- These findings are in-line with previous state-level studies. Moreover, they are conservative estimates, as recent data indicate growing and significantly higher expenses for more recent and future cases.

Main Findings II

- Pursuit of the Death Penalty in Washington has become significantly less probable over the last 40 years.

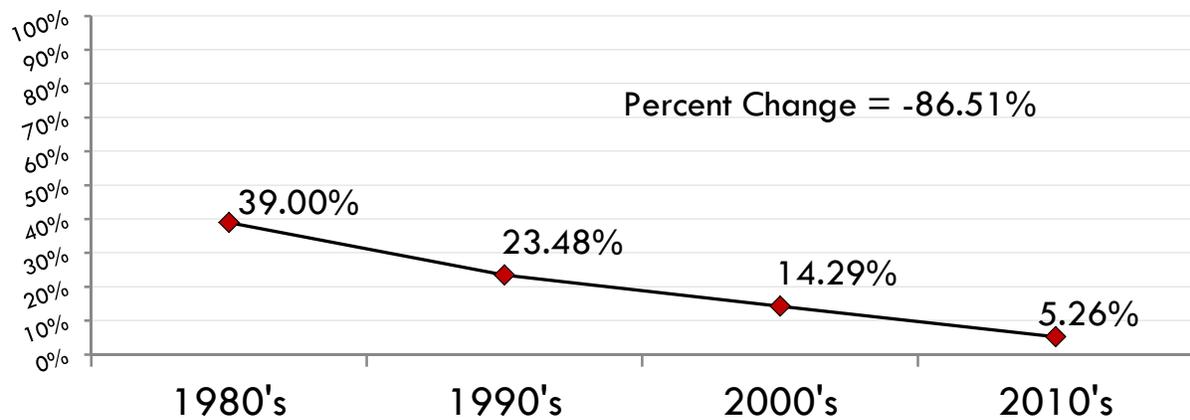
Main Findings III

Percent of Cases where Death Penalty was Sought, by Decade (N= 328).

		Decade Trial Began				
		1980's	1990's	2000's	2010's	Total
Death Penalty Sought	No	61	101	66	18	246
	Yes	39	31	11	1	82
Total		100	132	77	19	328
Percent by Decade		39.00%	23.48%	14.29%	5.26%	

Main Findings IV

Percent of Death Penalty Cases Sought, By Decade



Main Findings V

- Additionally, for the last 3 King Co. DP Cases, which had been ongoing for many years and have cost well over \$15,000,000 – juries split and sentenced to LWOP.

- Since 1981, 75 percent of death penalty cases that have completed their review have resulted in reversal compared to a 7.5 percent reversal rate of the 201 non-death penalty appeals.

Reasons why cases are more expensive

Court Rule

- The need for defense counsel in aggravated homicide cases to be specially trained and certified, to be “learned in the law of capital punishment”

Special Proceedings Rule

- All counsel for trial and appeal must have demonstrated the proficiency and commitment to quality representation which is appropriate to a capital case. Both counsel at trial must have five years’ experience in the practice of criminal law be familiar with and experienced in the utilization of expert witnesses and evidence, and not be presently serving as appointed counsel in another active trial level death penalty case.

Comprehensive Work Required

- For example, the Court reversed a death penalty verdict because the trial lawyers did not fully investigate the mental health of their client.

Can Take Years

- Sometimes it has taken many years and several levels of court review before the reversal has occurred. For example, in *In re Pers. Restraint of Stenson*, 174 Wn.2d 474 (2012), **the Supreme Court reversed a conviction and death penalty sentence because the prosecutor violated the defendant's due process rights in not disclosing exculpatory evidence. Prior to that 2012 decision, the Court had denied Mr. Stenson's appeal and four personal restraint petitions.**

Fundamentally Different Cases

- Capital cases are profoundly different than all other types of criminal cases, including non- capital homicide cases. Besides the irrevocable punishment, capital cases are factually more detailed, legally more complex, and procedurally more involved.

ABA Comment

- ...a host of issues that are unique to capital cases. These include: special voir dire of jurors; presentation of evidence going to guilt or innocence and punishment; special penalty procedures, including additional factual findings by the jury.

WSBA Standard

- In 2007, the Washington State Bar Association (WSBA) Final Report of the Death Penalty Subcommittee of the Committee on Public Defense (WSBA Report) also recommended that **the defense team in a death penalty case should include, at a minimum, two attorneys, a mitigation specialist and fact investigator, and “psychiatrist, psychologists and other experts and support personnel should be added as needed”**. WSBA Report, Recommendation 2, pg. 33.123 This recommendation was subsequently enacted as a court rule. See Criminal Rule 3.1 – Standard 14.2 A.

Motion Practice

- **Pretrial motions and legal challenges are more complex and expansive in death penalty cases.** In addition to challenges surrounding homicide cases generally - such as inclusion or exclusion of forensic evidence, challenges to searches or statements - capital cases require an additional layer of challenges not found in non-capital cases. In order to preserve the defendant's rights be reviewed on appeal, should a review become necessary, defense counsel has a duty to raise all legal challenges in the trial court. Because capital jurisprudence changes dramatically, defense counsel must still raise and litigate constitutional challenges that have been previously decided.

Jury Selection

- Capital cases take longer to try, likely attract a large amount of pre-trial publicity, and require the attorneys and the court to extensively inquire into jurors' opinions about the death penalty. These unique aspects of death penalty cases result in a significantly prolonged and more expensive jury selection than the jury selection process in a non-capital aggravated murder case.

Two Phases of Trials

- **The penalty trial often runs days or weeks**, dictated by the amount of evidence, witnesses and arguments each side presents. In a non-capital case, a judge rather than a jury imposes sentence after a brief hearing (less than a few hours).

Capital Appeals: State (Direct Appeal)

- Special Rules: At least one counsel on appeal must have three years experience in the field of criminal appellate law and be learned in the law of capital punishment by virtue of training or experience.
- Longer Record – every hearing must be transcribed
- Length of briefs:
 - Non-capital 50 pages opening / 25 pages reply
 - Capital: 250 pages opening / 75 pages reply
- Argument:
 - Non-capital: 20 minutes per side
 - Capital: 120 minutes per side

Capital Appeals: Personal Restraint Petition (PRP)

- Non-capital: No right to PRP counsel
- Capital: Right to PRP counsel
 - Two attorneys / one must be qualified and experience
 - May seek funds for expert services
- PRP Counsel must review:
 - Trial record
 - Direct appeal record

Length of Appeals: Approx. Average

- Capital Appeals:
 - Currently on Death row: 11 years
 - Reversal: 7 years
 - Executions: 7 years

- Non-capital aggravated murder: 2 years

Result of Appeals I

- 33 death sentences imposed:
 - Pending appeals: 9 (appeals pending in either state or federal courts);
 - Appeals completed: 23 (1 individual committed suicide while appeal pending):
 - 5 individuals executed (3 of whom voluntarily waived appeals and requested to be executed);
 - 18 cases have resulted in either the conviction and/or death sentence reversed (75% reversal rate)

Result of Appeals II

- 298 non-death sentenced trial reports:
 - ▣ 201 non-death penalty appeals located:
 - 186 were affirmed;
 - 15 reversed (7.5% reversal rate)

The Role of Race I

THE ROLE OF RACE IN WASHINGTON STATE CAPITAL SENTENCING, 1981-2012*

Katherine Beckett, Ph.D.
Heather Evans, M.A., Ph.D. Candidate
Law, Societies & Justice Program and Department of Sociology
University of Washington

January 27, 2014

The Role of Race II

Key findings pertaining to race include the following:

- Prosecutors sought the death penalty in a larger share of aggravated murder cases involving white defendants than they did in cases involving non-white defendants.
- By contrast, juries imposed a death sentence in a notably larger share of cases involving black defendants than in cases involving white or other defendants.
- The results of regression analyses indicate that neither the race of the victim(s) nor the race of the defendant influenced whether prosecutors sought the death penalty.
- By contrast, the results of regression analyses indicate that *juries were three times more likely to impose a sentence of death when the defendant was black than in cases involving similarly situated white defendants.*

The Role of Race III

Other key findings include the following:

- The proportion of death-eligible cases in which prosecutors sought the death penalty varied notably by county, from a high of 67% in Thurston County to a low of 0% in Okanogan County. Among larger counties with more aggravated murder cases, the proportion of cases in which prosecutors sought death also varied markedly, from a high of 48% in Kitsap County to a low of 0% in Yakima County.
- Prosecutors were nearly three times more likely to seek death in cases that received extensive publicity than in cases that did not.

Conclusions

- Main question: is it worth the extra expense?
- Costs are not the only consideration and likely not the most important. But still important, as:
 - ▣ Cited as reason not to pursue, ties in with geography, which leads to issues with constitutionality.
 - ▣ Cited as a reason to abolish the DP in several states.

Thank You! and Questions?

DECODING THE LAW



FINANCIAL IMPLICATIONS OF THE DEATH PENALTY

- Mark Larrañaga, defense attorney and partner at Walsh & Larrañaga Law in Seattle
- Peter Collins, assistant professor, Seattle University's Criminal Justice Department
- Robert Boruchowitz, professor and director of The Defender Initiative, Seattle University School of Law



DECODING THE LAW

Financial Implications of the Death Penalty

Wednesday, March 8, 2017

WASHINGTON STATE
BAR ASSOCIATION