COMMENT

The Cost of Taking a Life: Dollars and Sense of the Death Penalty

INTRODUCTION

The moral legitimacy of capital punishment polarizes society. Individuals advance countless ethical and practical arguments either supporting or opposing the punishment.[1] Both supporters and opponents espouse moral justifications for their positions, and both are equally adamant in their beliefs.[2] In an effort to garner public support for the

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[1] For representative examples, see THE DEATH PENALTY IN AMERICA 305-82 (H. Bedau 3d ed. 1982) [hereafter DEATH PENALTY]; THE DEATH PENALTY IN AMERICA 120-231 (H. Bedau rev. ed. 1968) [hereafter DEATH PENALTY 1968].

[2] For supporters' view of the death penalty, see, e.g., W. BERNS, FOR CAPITAL PUNISHMENT 164-76 (1979) (criminals are punished principally for retribution; the worst are executed out of moral necessity); van den Haag, *In Defense of the Death Penalty: A Legal—Practical—Moral Analysis*, 14 CRIM. L. BULL. 51, 66 (1978) ("If there is nothing for the sake of which one may be put to death, can there be nothing worth dying for? If there is nothing worth dying for, is there any moral value worth living for?"); *id.* ("No society can profess that the lives of its members are secure if those who did not allow innocent others to continue living are themselves allowed to continue living — at the expense of the community."). For opponents' view of the death penalty, see, e.g., C. BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE (2d ed. 1981) (the process of choosing who dies continues to be standardless and mistake-prone); Amnesty International, *Proposal for a Presidential Commission on the Death Penalty in the United States of America*, in DEATH PENALTY, *supra* note 1, at 375-82 (the death penalty is a violation of human rights); Amsterdam, *Capital Punishment*, in DEATH PENALTY, *supra* note 1, at 346-58 (capital punishment does not undo the wrong done by the murderer, kills some people in error, and is discriminatorily imposed); Black, *Death Sentences and Our Criminal Justice System*, in DEATH PENALTY, *supra* note 1, at 359-64 (capital punishment is too final, brutal, and subject to human fallibility to be tolerated); Schwarzschild, *In Opposition to Death Penalty Legislation*, in DEATH PENALTY, *supra* note 1, at 364-70 (public that argues for the death penalty is generally uninformed about social facts surrounding the penalty and often merely responds to seemingly insoluble problem of crime; human judgment and human institutions are too fallible to have absolute certainty needed before considering executing a person); Yoder, *A Christian Perspective*, in DEATH

death penalty, some proponents also argue that the death penalty saves money because the cost of executing convicted murderers is less than the cost of imprisoning them.[3] This argument is disturbing since it reduces the moral complexity of state imposed killing to a debate over dollars and cents. However, since simplistic arguments often sway public opinion,[4] the factual merit of this "cost-effective" justification for the death penalty warrants examination.

Assessing the financial cost of capital punishment requires an examination of the special features of capital prosecutions and judicial review of capital convictions. Constitutional safeguards that guide the state and ensure a fair process for the defendant are of heightened importance in capital cases. As the United States Supreme Court repeatedly has stated, "death is different."[5] Consequently, the Supreme Court has required that states accord capital defendants procedural and substantive protections beyond those required for noncapital defendants.

Part I of this Comment examines the due process safeguards required for a constitutional system of state imposed execution. Part II outlines the financial costs of maintaining a constitutional execution process. Part III concludes that the execution process costs more than

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PENALTY, *supra* note 1, at 370-75 (one way government can keep society's violence at a minimum is to proclaim human life inviolate and prohibit killing even though secular justice may seem to sanction killing).

[3] *See, e.g.*, U.S. DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS — 1983, at 278 (1984) (In fact, 9% of the persons who explained why they support the death penalty stated that jail sentences cost society too much money.); WASHINGTON RESEARCH PROJECT, THE CASE AGAINST CAPITAL PUNISHMENT 61 (1971) (copy on file with *U.C. Davis Law Review*).

[4] *See* Sarat & Vidmar, *Public Opinion, The Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis*, 1976 WIS. L. REV. 171, 195 (finding that when death penalty supporters were more informed about capital punishment, especially its utilitarian aspects, a substantial portion changed their opinion); Thomas, *Eighth Amendment Challenges to the Death Penalty: The Relevance of Informed Public Opinion*, 30 VAND. L. REV. 1005, 1029-30 (1977) (much of public support for death penalty stems from utilitarian belief in its deterrent effect — the strong support appears to result from uninformed opinion, and given the lack of evidence of the death penalty's deterrent effect, a far too generous assessment of deterrence; public support frequently lacks a detailed factual understanding of the criminal justice system and generally reflects attitudes and beliefs).

[5] *See, e.g.*, Gardner v. Florida, 430 U.S. 349, 357-58 (1977) (citations omitted) ("[D]eath is a different kind of punishment from any other which may be imposed in this country. . . . From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action.").

imprisoning a person for life and notes the ramifications of the death penalty for the criminal justice system. Acknowledging that "death is different," the system attempts to adapt accordingly. However, it must be remembered that the death penalty is an alternative punishment; life imprisonment, with or without parole, is another punishment. If the goal is a more effective criminal justice system, retentionists should reassess the overall practicality and desirability of continuing capital punishment when its costs, both financially and morally, undermine the system.

I. Death Penalty Safeguards: A Scheme to Prevent Unconstitutional Executions

The spectrum of alternatives available to the Supreme Court when assessing the constitutionality of the death penalty, as with all spectra, has two extremes. At one extreme, the Court could rule that the the death penalty is per se an unconstitutional punishment. Although some members of the Court favor this view,[6] a majority of the Justices has never embraced this interpretation.[7] At the other end of the spectrum, the Court could declare that the death penalty is per se constitutional and a matter to be left to the states' political leaders.[8] The Court has

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[6] Justices Marshall and Brennan took such an approach in *Furman*. They concluded that the death penalty was per se unconstitutional as it is always cruel and unusual punishment. Furman v. Georgia, 408 U.S. 238, 305-06 (1972) (Brennan, J., concurring); *id.* at 360-61 (Marshall, J., concurring); *see also* Enmund v. Florida, 458 U.S. 782, 801 (1982) (Brennan, J., concurring); Godfrey v. Georgia, 446 U.S. 420, 433 (1980) (Marshall, J., concurring, joined by Brennan, J.); Lockett v. Ohio, 438 U.S. 586, 619 (1978) (Marshall, J., concurring); Gardner v. Florida, 430 U.S. 349, 364-65 (1976) (Brennan, J., separate opinion); *id.* at 365 (Marshall, J., dissenting); Woodson v. North Carolina, 428 U.S. 280, 306 (1976) (Marshall, J., concurring); Gregg v. Georgia, 428 U.S. 153, 230-31 (1976) (Brennan, J., dissenting); *id.* at 231 (Marshall, J., dissenting).

[7] In *Furman* three of the five Justice plurality concluded that the death penalty was unconstitutional as applied in the cases before the Court, but did not believe that the death penalty was unconstitutional per se. 408 U.S. at 253, 256-57 (Douglas, J., concurring), *id.* at 309-10 (Stewart, J., concurring), *id.* at 312-13 (White, J., concurring); *see also* Enmund v. Florida, 458 U.S. 782, 798 (1982); Godfrey v. Georgia, 446 U.S. 420, 428 (1980); Lockett v. Ohio, 438 U.S. 586, 601 (1978); Gregg v. Georgia, 428 U.S. 153, 169 (1976).

[8] In *Furman* the four dissenting Justices concluded that judicial restraint in reviewing the death penalty statutes should be exercised, and changes in death penalty law should be left to the legislators. 408 U.S. at 405, 410, 466, 468; *see also* Enmund v. Florida, 458 U.S. 782, 801-02 (1982) (O'Connor, J., dissenting); Lockett v. Ohio, 438 U.S. 586, 633 (1978) (Rehnquist, J., dissenting).

never endorsed this approach[9] and implicitly has rejected it by holding mandatory imposition of the death penalty unconstitutional.[10] Between these extremes lies the Supreme Court's current approach to death penalty adjudication.

A. Adjudication in Death Penalty Cases: Conflicting Tensions in the Supreme Court

The Supreme Court's concern about the constitutionality of the death penalty derives from the nature of the penalty and the criminal justice system. Death differs from other state imposed punishments in its finality and irrevocability.[11] After the sentence is carried out, a factual mistake[12] or change in the law is irremediable. Because of the severity of the death penalty, a critical concern in the Court's determination of the punishment's constitutionality is its moral and ethical ramifications.[13] Consequently, the Court reviews the appropriateness of death as punishment, as well as the constitutionality of the process, within the pa-

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[9] The right to be free from cruel and unusual punishments requires judicial enforcement of the eighth amendment. " 'The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.' " *Furman*, 408 U.S. at 268-69 (Brennan, J., concurring) (quoting West Virginia State Board of Educ. v. Barnette, 319 U.S. 624, 638 (1943)); *see also* Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1782 (1970) (statutory authorization is not sufficient to constitutionally authorize a punishment).

[10] *See* Woodson v. North Carolina, 428 U.S. 280 (1976) (mandatory imposition of the death penalty for first degree murder unconstitutional).

[11] *See* Gregg v. Georgia, 428 U.S. 153, 187 (1976) (death penalty unique in its severity and irrevocability); Furman v. Georgia, 408 U.S. 238, 289 (1972) (Brennan, J., concurring) (unusual severity of death manifested by its finality and enormity); *id.* at 306 (Stewart, J., concurring) (penalty of death unique in its total irrevocability).

[12] *See generally* Bedau, *Murder, Errors of Justice, and Capital Punishment*, in DEATH PENALTY 1968, *supra* note 1, at 434; *see also* L.A. Daily J., Sept. 4, 1984, at 4, col. 4 (in 1974, four of the seven men on New Mexico's death row were later found to be innocent — they had been convicted on perjured testimony).

[13] Coker v. Georgia, 433 U.S. 584, 597 (1977) ("[T]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment."); Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishment Clause*, 126 U. PA. L. REV. 989, 1030-33 (1978) (majority of Court has adopted the view that meaning of "cruelty" is variable and is dictated by society's present view of cruelty); Tao, *Beyond* Furman v. Georgia: *The Need For a Morally Based Decision on Capital Punishment*, 51 NOTRE DAME LAW. 722, 736 (1976) (moral value of capital punishment should determine the penalty's constitutionality).

rameters of our society's "evolving standards of decency."[14] The Court's goal is a fair process that scrupulously safeguards a capital defendant's constitutional rights. Without the safeguards and judicial review, imposition of the death penalty is unconstitutional.[15]

As a theoretical punishment, the death penalty has been held constitutional.[16] The practical application of the punishment, however, may violate constitutional protections. Our evolving standards of decency, and the Court's mandate against excessive punishments and arbitrarily and capriciously imposed death sentences, may sometimes render the death penalty invalid. For example, in *Coker v. Georgia*,[17] the Court held that the death penalty for rape was an excessive and therefore an unconstitutional punishment. *Coker* also illustrates the potentially discriminatory application of the death penalty. From 1930 until the 1977 *Coker* decision, 455 men had been executed for rape; 405 of those men were black.[18] Although not addressed in *Coker*, the fact that eighty-nine percent of those executed for rape were black clearly indicates the potential for discriminatory imposition of the punishment.[19] The likelihood for unjust death has led to the Supreme Court's rules governing the specific application of the sentence.

The Court's restrictions on the death penalty were developed only recently and require significant judicial involvement. From 1966 to

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[14] *See* Trop v. Dulles, 356 U.S. 86, 101 (1958) (eighth amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society"); *see also* Lockett v. Ohio, 438 U.S. 586, 620 (1978) (Marshall, J., concurring); Woodson v. North Carolina, 428 U.S. 280, 301 (1976); Gregg v. Georgia, 428 U.S. 153, 173 (1976); Furman v. Georgia, 408 U.S. 238, 242 (1972) (Douglas, J., concurring); Comment, *The Impact of a Sliding Scale Approach to Due Process on Capital Punishment Litigation*, 30 SYRACUSE L. REV. 675, 681 (1979) (to satisfy due process, capital sentencing must meet "evolving standards").

[15] *See, e.g.*, Goodpaster, *Judicial Review of Death Sentences*, 74 J. CRIM. L. & CRIMINOLOGY 786, 796-802 (1983) (judicial review implicit in concept of cruel and unusual punishment; circumscribes potential arbitrariness; is required to ensure equal protection).

[16] In *In re* Kemmler, 136 U.S. 436, 447 (1890), the Court reasoned that the death penalty did not violate the eighth amendment since the death penalty had a long history of acceptance in this country. The Court concluded that execution was not torture, basically on the theory that the death penalty was not considered cruel and unusual when the Bill of Rights was framed.

[17] 433 U.S. 584, 598 (1977).

[18] *See* Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1158 n.54 (1980).

[19] *See* Furman v. Georgia, 408 U.S. 238, 256-57 (1972) (Douglas, J., concurring) (death penalty statutes in *Furman* were unconstitutional in their operation since death sentences were imposed discriminatorily).

1976, largely due to the efforts of the NAACP Legal Defense and Educational Fund, there was a ten-year hiatus in executions.[20] Because death sentences were not carried out, the Court was not pressured to develop a constitutional framework for imposing the sentence. However, as the public outcry against crime and violence increased,[21] the Supreme Court again broached the emotional question: when may the state constitutionally impose death as a punishment? In answering this question, the Court has adopted an ad hoc system of constitutional interpretation.[22] The countless possible constitutional challenges[23] and the infinite variety of circumstances surrounding a murder warrants a case-by-case approach. Although careful drafting of death penalty statutes can eliminate some arbitrariness, implementation of these statutes is subject to much discretion by prosecutors, judges, and juries. Thus, while statutes may specify the special circumstances justifying a death sentence,[24] only a reviewing court can determine if the sentencer cor-

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[20] There was a de facto moratorium from 1966 to 1976. The decline in executions, however, began in the 1940's due to various social forces. For example, doubts about the morality of capital punishment, the fact that most of Western Europe had abandoned the death penalty, empirical evidence that undermined the belief that capital punishment was effective as a deterrent, and empirical evidence that indicated the racially discriminatory imposition of the death penalty resulted in the Court's willingness to delay executions and consider constitutional challenges. *See* Bedau, *Background and Developments*, in DEATH PENALTY, *supra* note 1, at 24-25.

[21] *See* Bedau, *American Attitudes Toward the Death Penalty*, in DEATH PENALTY, *supra* note 1, at 67 (national consciousness regarding increase in crime rate began with 1968 elections, when "law and order" and "crime in the streets" became important political issues).

[22] A defendant sentenced to death receives an automatic direct appeal to the state supreme court. *See* Gregg v. Georgia, 428 U.S. 153, 198 (1976). Although it is unclear whether the Court approved judicial review or constitutionally required it, the Court has subsequently concluded that one aspect of the death penalty statute in *Gregg* is not constitutionally required. In Pulley v. Harris, 104 S. Ct. 871 (1984), the Court held that proportionality review, a comparison of the defendant's sentence with sentences imposed in similar cases, is not constitutionally required. *See infra* notes 74-77 and accompanying text.

[23] Possible constitutional challenges include: The punishment of death is excessive to the crime, *see* Coker v. Georgia, 433 U.S. 584 (1977); mitigating evidence was excluded, *see* Lockett v. Ohio, 438 U.S. 586 (1978); the language of death penalty statutes is vague and ambiguous, *see* Godfrey v. Georgia, 446 U.S. 420 (1980); the punishment is not penologically justifiable, *see* Enmund v. Florida, 458 U.S. 782, 798-801 (1982).

[24] For example, California's special statutory circumstances, some of which are listed below, specify how the line should be drawn in Penal Code § 190.2:

> (a) The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in state prison for a term of life without the possibility of parole in any case in which one or more of the fol-

rectly and constitutionally applied those circumstances in any particular

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lowing special circumstances has been charged and specially found under Section 190.4, to be true:

(1) The murder was intentional and carried out for financial gain.

(2) The defendant was previously convicted of murder in the first degree or second degree . . . .

(3) The defendant has in this proceeding been convicted of more than one offense of murder in the first or second degree . . . .

(5) The murder was committed for the purpose of avoiding or preventing a lawful arrest or to perfect, or attempt to perfect an escape from lawful custody . . . .

(7) The victim was a peace officer . . . who, while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties . . . and was intentionally killed in retaliation for the performance of his official duties . . . .

(10) The victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding, and the killing was not committed during the commission, or attempted commission or the crime to which he was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his testimony in any criminal proceeding . . . .

(14) The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity, as utilized in this section, the phrase especially heinous, atrocious or cruel manifesting exceptional depravity means a conscienceless, or pitiless crime which is unnecessarily torturous to the victim.

(15) The defendant intentionally killed the victim while lying in wait.

(16) The victim was intentionally killed because of his race, color, religion, nationality or country of origin.

(17) The murder was committed while the defendant was engaged in or was an accomplice in the commission of, attempted commission of, or the immediate flight after committing or attempting to commit the following felonies:

(i) Robbery in violation of Section 211.

(ii) Kidnapping in violation of Sections 207 and 209.

(iii) Rape in violation of Section 261.

(iv) Sodomy in violation of Section 286.

(v) The performance of a lewd or lascivious act upon person of a child under the age of 14 in violation of Section 288.

(vi) Oral copulation in violation of Section 288a.

(vii) Burglary in the first or second degree in violation of Section 460.

(viii) Arson in violation of Section 447.

(ix) Train wrecking in violation of Section 219.

(18) The murder was intentional and involved the infliction of torture. For the purpose of this section torture requires proof of the infliction of extreme physical pain no matter how long its duration.

(19) The defendant intentionally killed the victim by the administration of poison.

case.[25] The Supreme Court's approach recognizes that only the courts can fully maintain the constitutionally required dividing line between capital and noncapital defendants.[26]

To provide for a constitutional execution system while protecting the rights of capital defendants, the Court has placed a burden upon the judicial system to review individual claims with exacting scrutiny. Yet unless one adopts the extreme positions of the spectrum — per se unconstitutional or per se constitutional — the ad hoc approach is essential. The following section describes the Supreme Court's attempt to constitutionalize the penalty: to limit its scope and to prevent its arbitrary and capricious application.

B. Due Process for Death

Recognizing the inherent problems in imposing the death penalty, the Supreme Court has adopted what has been called a "super due process"[27] approach to capital punishment procedures. This approach

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> (b) Every person whether or not the actual killer found guilty of intentionally aiding, abetting, counseling, commanding, inducing, soliciting, requesting, or assisting any actor in the commission of murder in the first degree shall suffer death or confinement in state prison for a term of life without the possibility of parole, in any case in which one or more of the special circumstances enumerated in paragraphs (1), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), (17), (18), or (19) of subdivision (a) of this section has been charged and specially found under Section 190.4 to be true . . . .

CAL. PENAL CODE § 190.2 (West Supp. 1985).

[25] A recurring issue is whether a jury can sufficiently understand a statute, its accompanying instructions, and then subsequently conclude fairly that a defendant falls within the class of individuals that the legislature has deemed eligible for execution. As the Court concluded in Godfrey v. Georgia, 446 U.S. 420, 433 (1980), the aggravating factor that death qualified the defendant could not be applied in a principled way to distinguish the defendant's case from the many cases in which the death penalty was not imposed.

Additionally, studies generally conclude that the language of jury instructions is very difficult for jurors to understand and can frequently lead to improper verdicts. *See, e.g.* Severance, Greene & Loftus, *Toward Criminal Jury Instruction That Jurors Can Understand*, 75 J. CRIM. L. & CRIMINOLOGY 198, 202 (1984) (studies find that jurors understand only about one-half of legal instructions they are given; many criminal trial verdicts reflect misunderstandings of juror's role and of what the law requires).

[26] In Zant v. Stephens, 462 U.S. 862, 878-80 (1983) the Court reaffirmed the necessity of appellate review of the sentencer's initial decision that a defendant is among the class of persons that the legislature has deemed eligible for execution.

[27] The concept of super due process for death sentencing procedures is a theory derived from the Court's conclusion that capital trials require increased and unique procedural safeguards. *See* Radin, *supra* note 18, at 1143-48.

first surfaced in *Furman v. Georgia*[28] in which the Court held that arbitrary and capricious application of the death penalty was itself cruel and unusual punishment.[29] The Court has since fashioned substantive and procedural protections to ensure that the death penalty is not imposed unjustly.[30] In prescribing a constitutional procedure, the Court has focused on three major concerns.

1. Cruel and Unusual Punishment

The eighth amendment to the United States Constitution prohibits the state from inflicting cruel and unusual punishments.[31] Although the Supreme Court has struggled to define this concept,[32] changing mores have prevented any static interpretation.[33] The difficulty is that what constitutes cruel and unusual punishment largely reflects prevailing societal attitudes.[34] Nevertheless, the death penalty, because of society's

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[28] *See* Furman v. Georgia, 408 U.S. 238 (1972); *infra* notes 36-41 and accompanying text; *see also* Radin, *supra* note 18, at 1150.

[29] *Furman*, 408 U.S. at 239-40; *see also* Radin, *supra* note 18, at 1144 (a process can be as unconstitutionally cruel as the event it authorizes).

[30] The Court has continued to espouse the need for super due process in death penalty sentencing to prevent arbitrary imposition of the death penalty. *See* Radin, *supra* note 18, at 1144.

[31] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The eighth amendment was incorporated into the fourteenth amendment and made applicable to the states in Robinson v. California, 370 U.S. 660 (1962).

[32] In *Furman*, Justice Brennan noted that the Court has found only three punishments unconstitutional since adoption of the eighth amendment: Robinson v. California, 370 U.S. 660 (1962) (imprisonment for narcotics addiction); Trop v. Dulles, 356 U.S. 86 (1958) (expatriation for wartime desertion); Weems v. United States, 217 U.S. 349 (1910) (12 years in chains at hard and painful labor for falsifying a public document). *Furman*, 408 U.S. at 282. The nine separate opinions in *Furman* illustrate the difficulty of defining what constitutes cruel and unusual punishment. *See infra* note 38.

[33] In Weems v. United States, 217 U.S. 349, 373 (1910), the Court stated that "[t]ime . . . brings into existence new conditions and purposes," and that when applying the Constitution "our contemplation cannot be only of what has been but of what may be." The Court further noted that what constitutes cruel and unusual punishment changes as "public opinion becomes enlightened by a humane justice." *Id.* at 378. Following this position in Trop v. Dulles, 356 U.S. 86, 101 (1958), the Court concluded that the eighth amendment derived its meaning from "the evolving standards of decency that mark the progress of a maturing society."

[34] *See* Bedau, *Witness to a Persecution: The Death Penalty and the Dawson Five*, 8 BLACK L. J. 7, 19 (1983) (moral attitudes of society have banished such punishments as branding, flogging, and maiming people); *see also* Vidmar & Ellsworth, *Public Opinion and the Death Penalty*, 26 STAN. L. REV. 1245, 1246 (1974) (interpretation of the eighth amendment's prohibition of cruel and unusual punishment appears to

changing beliefs, the moral issues it raises, its questionable penological justification, and its finality and severity, inevitably requires the Court to determine whether it constitutes cruel and unusual punishment.[35] The eighth amendment's cruel and unusual prohibition has therefore become the focal point for resolving the constitutionality of any given death sentence. Interpreting the eighth amendment, the Court has concluded that some state procedures for imposing the death penalty are unconstitutional and that death is a cruel and unusual punishment for some crimes. In both areas, the Court has found that certain state statutory schemes fall within the unconstitutional per se end of the spectrum. However, the Court also has concluded that with sufficient safeguards, a process for imposing death may be constitutional.

In *Furman v. Georgia*,[36] the Supreme Court declared, for the first time, that the death penalty as then imposed[37] constituted cruel and unusual punishment. In nine separate opinions, the Justices attempted to define cruel and unusual punishments.[38] A plurality of the Justices found that the death penalty was unconstitutional as applied in the

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include assessment of society's values). A recent Gallup Poll found that 70% of Americans favored capital punishment. However, if life imprisonment without parole were a certainty, the support fell to 50%; and a similar decline occurred (to 51%) if evidence were to show that the death penalty did not deter. Sacramento Bee, Feb. 3, 1985, Pt. A, at 25.

[35] In *Furman*, Justice Brennan concluded that inherent in the cruel and unusual clause are the principles that a severe punishment must not be unacceptable to contemporary society, a punishment is unconstitutionally excessive if a significantly less severe punishment adequately achieves the purpose for which the punishment is inflicted, a punishment must not by its severity degrade human dignity, and punishment cannot be inflicted arbitrarily. *Furman*, 408 U.S. at 281-82 (Brennan, J., concurring).

[36] 408 U.S. 238 (1972).

[37] In McGautha v. California, 402 U.S. 183, 196, 199 (1971), decided just one year before *Furman*, the Supreme Court rejected the petitioner's assertion that standardless imposition of the death penalty was a constitutional violation. The Court concluded that standardless discretionary judgment on the facts of each case was the only way to distinguish which crimes warranted executing the defendant and which defendants deserved death.

[38] A plurality of five Justices agreed in the per curiam judgment. Three Justices concluded that the death penalty was unconstitutional as applied in the cases before the court, but did not believe the death penalty was unconstitutional per se. *Id.* at 256-57, 310, 311. Justice Stewart found that in these cases, the death penalty was unconstitutional because it was wantonly and freakishly imposed. *Id.* at 310. "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual . . . . [T]he petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed." *Id.* at 309-10. Justice Douglas also found the death penalty unconstitutional as applied in these cases.

cases before the Court. The Justices who formed the plurality found that a death penalty statute that leaves to judges and juries standardless and uncontrolled discretion to decide whether someone should live or die constitutes cruel and unusual punishment.[39] The *Furman* plurality focused on a number of unconstitutional results with the then existing death penalty scheme. Justice Douglas found that the imposition of the death penalty was "pregnant with discrimination."[40] Justice Stewart

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> People live or die, dependent on the whim of one man or of 12 . . . . [T]hese discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on "cruel and unusual punishments."

Id. at 253, 256-57. Justice White concluded that the death penalty statutes involved in these cases violated the eighth amendment because as administered, "the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice." *Id.* at 313. He believed that if a punishment does not meet the social ends it was deemed to serve, in the case of death, it would mean the "pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes." *Id.* at 312. Justices Marshall and Brennan found the death penalty per se unconstitutional as it is always cruel and unusual punishment. Justice Brennan, stating that the death penalty is "fatally offensive to human dignity," concluded that the punishment of death is always

> "[c]ruel and unusual," and the States may no longer inflict it as a punishment for crimes. Rather than kill an arbitrary handful of criminals each year, the States will confine them in prison. "The State thereby suffers nothing and loses no power. The purpose of punishment is fulfilled, crime is repressed by penalties of just, not tormenting, severity, its repetition is prevented, and hope is given for the reformation of the criminal."

Id. at 305-06 (quoting Weems v. United States, 217 U.S. 349, 381 (1910)). Justice Marshall, after a thorough explanation of the evolving meaning of cruel and unusual and a discussion of the history of capital punishment in the United States, concluded that the death penalty per se violates the eighth amendment as it is an excessive and unnecessary punishment. *Id.* at 358. Additionally, he concluded that the death penalty "shocks the conscience and sense of justice" of an informed public and is therefore unconstitutional as it is "morally unacceptable to the people of the United States at this time in their history." *Id.* at 360-61. The four dissenting Justices asserted that changes in the law regarding the extent of imposing the death penalty were better and more appropriately made in the legislature. *Id.* at 405. The nine Justices, in as many opinions, attempted to define whether a punishment is cruel and unusual. *Furman* presents a good example of the difficulty in defining the terms.

[39] Although each stated a different reason for his conclusion, Justices Douglas, Stewart, and White found that the death penalty violated the eighth amendment's prohibition of cruel and unusual punishment, as it was imposed arbitrarily and capriciously. *See supra* note 38. In *Furman*, three petitioners sentenced to die were before the Court. Two were sentenced pursuant to Georgia law; one was convicted of murder, and one was convicted of rape. The third petitioner was convicted of rape pursuant to Texas law.

[40] 408 U.S. at 257.

believed that the death sentence violated the eighth amendment if it was wantonly and freakishly imposed, as arbitrarily as if the defendant were "struck by lightning."[41] Although not ruling the death penalty unconstitutional per se, the *Furman* majority did hold that, at a minimum, death penalty statutes must provide some rational basis for deciding who shall live and who shall die.

Furman invalidated death penalty statutes in over three-fourths of the states and in sections of the Federal Criminal Code.[42] States responded by reenacting death penalty statutes along two different lines to avoid the arbitrariness found unconstitutional in *Furman*. One scheme involved statutes that provided juries with guidelines for imposing the death penalty.[43] The second method provided mandatory death penalty statutes that theoretically would remove all sentencing discretion from the sentencer.[44] In formulating eighth amendment requirements for imposing the death penalty, the Supreme Court ultimately resolved the constitutionality of both approaches.

A constitutional process for determining how and upon whom the death penalty is imposed requires that a state's death penalty statute provide guidance to limit the jury's discretion. In *Gregg v. Georgia*,[45] the Court reviewed Georgia's guided discretion statute. Concluding that the death penalty is not per se unconstitutional, the Court found the constitutional infirmities of the *Furman* statutes could be corrected by providing juries with proper guidance, providing the defendant with a bifurcated proceeding, and entitling the defendant sentenced to death to an automatic direct appeal to the state supreme court.[46] Thus, *Gregg* established a constitutional scheme for imposing the death penalty. First, the statute authorizing the penalty must outline the aggravating factors that warrant the death penalty, thus guiding the sentencer's discretion.[47] To impose the sentence, the sentencer must find at least one

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[41] *Id.* at 309.

[42] In each of these jurisdictions, the sentencing choice of death was left to the sentencer's unguided discretion. *See* Note, *Capital Punishment: A Review of Recent Supreme Court Decisions*, 52 NOTRE DAME LAW. 261, 273 (1976).

[43] *See infra* notes 45-54 and accompanying text; *see also* MODEL PENAL CODE § 210.6 comment, at 156 n.144 (15 states enacted guided discretion statutes in response to *Furman*).

[44] *See infra* notes 59-61 and accompanying text; *see also* MODEL PENAL CODE § 210.6 comment, at 156 n.145 (18 states enacted mandatory death penalty statutes in response to *Furman*).

[45] 428 U.S. 153 (1976).

[46] *Id.* at 195, 206-07.

[47] The Georgia statute, as quoted in *Gregg*, 428 U.S. at 165 n.9, listed the following aggravating circumstances:

of the factors present.[48] Second, the defendant should receive a bifurcated trial:[49] one proceeding to determine the defendant's guilt, and if found guilty, a second proceeding to determine and impose the sentence. At the sentencing proceeding the defendant may provide the sentencer with additional information that would not be admissible at the

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(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

Act of Mar. 28, 1973, No. 74 § 3, 1973 Ga. Laws 159, 163-65 (currently codified at GA. CODE ANN. § 27-2534.1(b) (1983)).

[48] According to the Georgia statute, even if the sentencer identifies an aggravating circumstance, it may nonetheless choose not to impose the death sentence. It may instead sentence the capital defendant to life in prison. GA. CODE ANN. § 27-2534.1(b) (1983) (death penalty "may be authorized"). Consequently, the Georgia statute provides some general guidelines for the sentencer, but also leaves a legal option should the jury believe the specific defendant does not deserve to die.

[49] *Gregg*, 428 U.S. at 163.

guilt trial, thereby increasing the probability of imposing an appropriate sentence.[50] The third safeguard, automatic state supreme court review,[51] ensures that the sentence resulted from application of the statutory guidelines, and not from arbitrary factors.[52] Satisfied with these provisions, the Court upheld Georgia's guided discretion statute,[53] believing that it would prevent juries from wantonly and freakishly imposing the death sentence.[54]

Although the Court approved the guided discretion approach, a guided discretion statute may still be constitutionally infirm. For example, the statutory language and jury instructions that guide sentencer discretion must not be ambiguous. In *Godfrey v. Georgia*,[55] the defendant argued that the aggravating factor used to justify his death sentence was unconstitutionally vague.[56] The Court agreed, chastising the Georgia Supreme Court for affirming a death sentence that could not, in a principled way, be distinguished from the many cases in which the death penalty is not imposed.[57] Although the Court may have remedied the error for Godfrey, the case illustrates the problems that surround

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[50] *Id.* at 195.

[51] The Georgia Supreme Court is to consider the punishment, as well as errors enumerated by the appeal. The court is to determine whether passion, prejudice, or any other arbitrary factor influenced the choice of death, whether the evidence supports the aggravating factor that permits the imposition of death, and whether death is disproportionate or excessive when compared with penalties in similar crimes, considering the offender and the offense. GA. CODE ANN. § 27-2537(b), (c) (1983).

[52] Note, *Constitutional Procedure for the Imposition of the Death Penalty* — Godfrey v. Georgia, 30 DE PAUL L. REV. 721, 728 (1981) (purpose of automatic review is to "correct any deviation from consistent jury sentencing") [hereafter, Note, *Constitutional Procedure*].

[53] *Gregg*, 428 U.S. at 206-07.

[54] The Court reviewed and upheld two other guided discretion statutes the same day as *Gregg*. Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976).

[55] 446 U.S. 420 (1980).

[56] The statutory aggravating circumstance permitted the imposition of death if the defendant was convicted of murder and if it was found beyond a reasonable doubt that the offense "was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Act of Mar. 28, 1973, No. 74, § 3, 1973 Ga. Laws 159, 163-65 (currently codified at GA. CODE § 27-2534.1(b)(7) (1983)). In *Godfrey*, the defendant shot his estranged wife and his mother-in-law. He immediately notified the authorities and asked them to pick him up. 446 U.S. at 425.

[57] 446 U.S. at 433; *see also* Note, *Constitutional Procedure*, *supra* note 52, at 730 (Court's attention was on role and responsibility of state supreme court in sentencing process).

the death penalty.[58] While guided discretion statutes may be theoretically constitutional, their language and application may still produce unconstitutional results.

In addition to Georgia's method for avoiding the *Furman* result, the Court tested the constitutionality of removing all discretion from the sentencer. The Court in *Woodson v. North Carolina*[59] invalidated a mandatory death penalty statute because the process was unconstitutional. The Court stated that the mandatory process would result in an arbitrary and wanton imposition of the death penalty, since the procedure would lead to "refusal of juries to convict murderers rather than subject them to automatic death sentences."[60] The procedure violated the eighth and fourteenth amendments because it treated "all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death."[61] Thus, the Court recognized the need for some jury discretion when imposing the death penalty. Subsequently, the Court addressed the degree of discretion permitted for the sentencing portion of a constitutionally imposed death sentence.

In *Lockett v. Ohio*[62] the defendant contended that the Ohio death penalty statute was unconstitutional because it prevented the sentencer from considering the defendant's mitigating factors.[63] The defendant ar-

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[58] As Justice White noted in his dissent, the majority adopts the argument " 'that no matter how effective the death penalty may be as a punishment, government, created and run as it must be by humans, is inevitably incompetent to administer it.' " 446 U.S. at 456 (White, J., dissenting) (quoting *Gregg*, 428 U.S. at 226 (White, J., concurring)). White's words imply a frustration with a system that will not permit the imposition of a theoretically constitutional penalty. *Gregg*, 428 U.S. at 226 (1976) (White, J., concurring in judgment) (human incompetence cannot be accepted as a proposition of constitutional law).

[59] 428 U.S. 280 (1976).

[60] *Id.* at 290, 303.

[61] *Id.* at 304. In Roberts v. Louisiana, 428 U.S. 325 (1976), decided the same day as *Woodson*, the Court also found Louisiana's mandatory death penalty statute unconstitutional, for the same reason put forth in *Woodson*.

[62] 438 U.S. 586 (1978).

[63] Lockett waited in a getaway car while her three co-participants robbed a pawnshop. During the robbery, the pawnbroker was accidentally killed. Lockett's role in the crime as getaway driver was sufficient to convict her of murder. Lockett's case also presented the issue whether the death penalty was an unconstitutional punishment for a co-felon in a felony murder who did not kill. The Court did not have to decide this issue since it found Lockett's sentence unconstitutional on other grounds. However, a number of the Justices discussed whether death could be imposed when the defendant did not intend the death of the victim. *Id.* at 613-16, 624.

gued that her sentence was invalid since the mitigating factors she offered — her age, lack of specific intent to cause death, and relatively minor part in the crime — justified a sentence less than death.[64] The Court reversed Lockett's death sentence because a capital sentencing statute that prevents a sentencer "from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty."[65]

In addition to regulating the process by which a death sentence may be imposed, the Court has concluded that a death sentence may only be imposed if proportionate to the crime. In *Coker v. Georgia*, the Court concluded that the eighth amendment prohibits "punishments . . . that are 'excessive' in relation to the crime committed."[66] An excessive, and therefore unconstitutional punishment, is one that "(1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime."[67] Applying this standard, the Court held that death was an excessively disproportionate penalty for the crime of rape.[68]

In 1982, the Court again considered the class of persons who may be

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[64] *Id.* at 597.

[65] *Id.* at 605. Unlimited mitigation and individualized sentencing is another attempt by the Court to ensure that the most appropriate sentence is imposed. However, according to some commentators, the *Lockett* decision returned to sentencers the discretion that *Furman* held resulted in the unconstitutional imposition of death. *See, e.g.*, Radin, *supra* note 18, at 1153-55 (death is not a permissible punishment since fairness requires flexibility and nonarbitrariness, requirements that vary inversely to each other). Others assert that the two decisions are reconcilable. *See, e.g.*, Hertz & Weisberg, *In Mitigation of the Penalty of Death:* Lockett v. Ohio *and the Capital Defendant's Right to Consideration of Mitigating Circumstances*, 69 CALIF. L. REV. 317, 373-76 (1981) (eighth amendment does not require that the discretion to afford mercy be guided). As one author noted, the emphasis in *Lockett* was on the importance of providing unlimited *mitigation*, and on individualizing the sentence; *Furman* only prohibits arbitrary and capricious imposition of death, not capricious imposition of mercy. *See* Comment, *Dark Year on Death Row: Guiding Sentencer Discretion After* Zant, Barclay, *and* Harris, 17 U.C. DAVIS L. REV. 689, 698-99 (1984) (as it is only in the aggravation of the sentence that a defendant receives death, the Court distinguished between permitting discretion in mitigation, and limiting discretion in aggravation). Nonetheless, as a result of *Lockett*, the reviewing court must ensure that the defendant's mitigating factors were considered, while preventing a sentence based on arbitrary factors.

[66] 433 U.S. 584, 592 (1977).

[67] *Id.*

[68] *Id.* at 598.

constitutionally sentenced to death. In *Enmund v. Florida*,[69] the Court concluded that an accomplice defendant convicted of first degree murder cannot be punished by death unless the state proves an intent to kill. The Court reiterated that to be constitutional a death sentence must be (1) proportionate to the severity of the crime,[70] and (2) penologically justifiable, that is, serve the purposes of retribution and deterrence.[71] The Court found neither constitutional requirement satisfied by executing a person who neither killed, intended to kill, nor attempted to kill. Although a state can still charge an aider or abettor with first degree murder under the felony-murder doctrine,[72] it may not impose the death penalty unless the defendant had the intent to kill. Imposing the death penalty by using felony murder's legal fiction of presumed intent to kill is unconstitutional.[73]

In its effort to maintain a constitutional execution system, the Court has designed procedures that limit the arbitrary and capricious imposition of the death penalty. Direct review by the state supreme court was considered one means of achieving a constitutional system. However, in *Pulley v. Harris*[74] the Court decided that the eighth amendment did not require proportionality review. Proportionality review is a sentencing comparison by the state supreme court between the defendant's sentence and the sentences imposed in similar cases.[75] Justice White writing for the Court observed that although *Gregg*'s guided discretion statute included a proportionality review of a death sentence by the state supreme court as a safeguard against jury inconsistency, it was not

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[69] 458 U.S. 782, 797 (1982); *see also* People v. Garcia, 36 Cal. 3d 539, 684 P.2d 826, 205 Cal. Rptr. 265 (1984) (*Carlos* decision, requiring an instruction on intent to kill when the special circumstance is tried to a jury, shall apply retroactively to all cases not yet final); Carlos v. Superior Court, 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983) (proof of intent to kill or intent to aid a killing is essential to establish a felony-murder special circumstance under the California death penalty statute); Note, Enmund v. Florida: *The Constitutionality of Imposing the Death Penalty Upon a Co-Felon in Felony Murder*, 32 DE PAUL L. REV. 713, 734-35 (1983).

[70] 458 U.S. at 788, 798.

[71] *Id.* at 798-99.

[72] Felony murder is a killing or unintended death during the commission or attempted commission of a felony. *See, e.g.*, W. LAFAVE & A. SCOTT, JR., HANDBOOK ON CRIMINAL LAW § 71, at 545-58 (1972).

[73] 458 U.S. at 799-801.

[74] 104 S. Ct. 871, 881 (1984).

[75] *See id.* at 874. A controversy regarding proportionality is whether the comparison pool includes only other cases resulting in death judgments, all cases in which death was a possible punishment, or variations between these categories. Comments on earlier draft from Michael Millman, Executive Director, Cal. Appellate Project (Feb. 11, 1985) (copy on file with *U.C. Davis Law Review*).

required for a constitutional capital punishment scheme.[76] Observing that discretion is adequately guided by requiring the jury to find at least one special circumstance, that no procedure is perfect, and that occasional aberrations are inevitable, Justice White concluded that the potential for arbitrary and capricious imposition was not significant.[77]

The Supreme Court's treatment of the cruel and unusual punishments prohibition raises the difficult question of how to ensure a just and fair death sentence. The Court has developed some contours for answering that question — too much or too little discretion is unconstitutional — but unresolved areas persist.[78] With new studies presenting

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[76] *Harris*, 104 S. Ct. at 873.

[77] *Id.* at 881. As Justice White noted, Jurek v. Texas, 428 U.S. 262 (1976), a case upholding a guided discretion statute decided the same day as *Gregg*, did not include a proportionality review. *Harris*, 104 S. Ct. at 878. However, Texas' death penalty scheme included review by the Texas Supreme Court, and as the *Jurek* Court noted, Texas had provided for the evenhanded, rational, and consistent imposition of death. *Id.* at 878; *Jurek*, 428 U.S. at 276. Consequently, as the concurrence suggests, *Harris* may imply the necessity of some form of judicial review, *Harris*, 104 S. Ct. at 881-82, particularly because the decision was limited to proportionality review. *Id.* at 879. In fact, the Court itself has reviewed death penalty cases by comparing capital sentences in similar cases. *See, e.g.*, Comment, *Dark Year on Death Row: Guiding Sentencer Discretion After* Zant, Barclay, *and* Harris, 17 U.C. DAVIS L. REV. 689, 727 (1984).

The *Harris* decision is dismaying because it suggests that some arbitrary and capricious death sentences will be tolerated. As Justices Brennan and Marshall emphasized in their dissent, compelling evidence indicates that the death penalty violates the eighth amendment since racial discrimination influences the application of the penalty. *Harris*, 104 S. Ct. at 887-88; *see also* Spencer v. Zant, 715 F.2d 1562 (1983) (case remanded because district court did not adequately analyze petitioner's data that death penalty was disproportionately imposed based on factors of race, sex, and poverty). Consequently, they conclude that a system without proportionality review by a court of statewide jurisdiction will necessarily result in arbitrary, capricious, and therefore unconstitutional, imposition of the death penalty. *Harris*, 104 S. Ct. at 888.

[78] There are countless examples of arbitrary and capricious imposition of the death penalty. Some of the factors that commentators have isolated include: (1) prosecutorial discretion, *see* Bedau, *supra* note 34, at 25; Paternoster, *Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 J. CRIM. L. & CRIMINOLOGY 754, 784-85 (1983) [hereafter Paternoster, *South Carolina*]; Paternoster, *Prosecutorial Discretion in Requesting the Death Penalty: A Case of Victim-Based Racial Discrimination*, 18 LAW & SOC'Y REV. 437 (1984) [hereafter Paternoster, *Prosecutorial Discretion*]; Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 HARV. L. REV. 1690, 1714, 1716 (1974); (2) race of the defendant, *see* Bedau, *The Laws, the Crimes, and the Executions*, in DEATH PENALTY, *supra* note 1, at 32; Browning, *The New Death Penalty Statutes: Perpetuating a Costly Myth*, 9 GONZ. L. REV. 651, 661 (1974); Note, *Constitutional Procedure*, *supra* note 52, at 733; (3) poverty of the defendant, *see* Greenberg, *Capital Punishment as a System*, 91 YALE L. REV. 908, 910 (1982); (4) race of the victim, Bowers & Pierce,

compelling evidence that death sentences continue to be imposed discriminatorily and arbitrarily,[79] the cruel and unusual prohibition will continue to be a focal point for resolving the constitutionality of capital punishment.

2. Ineffective Assistance of Counsel

The constitutional guarantee of effective counsel in death penalty cases derives from both the sixth and eighth amendments. The sixth amendment provides that in "all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel."[80] However, the eighth amendment is also implicated since a death sentence due to ineffective assistance would constitute a cruel and unusual punishment. Effective assistance is necessary to ensure that a capital defendant receives the super due process[81] that the Constitution requires.[82] When

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Arbitrariness and Discrimination Under Post-Furman *Capital Statutes*, 26 CRIME & DELINQ. 563 (1980); (5) jury composition, *see Death Qualification*, 8 LAW & HUMAN BEHAV. 1-195 (1984); Schnapper, *Taking* Witherspoon *Seriously: The Search for Death-Qualified Jurors*, 62 TEX. L. REV. 977 (1984).

[79] Bowers, *The Pervasiveness of Arbitrariness and Discrimination Under Post*-Furman *Capital Statutes*, 74 J. CRIM. L. & CRIMINOLOGY 1067 (1983); Jameson, *Ethnic Background May Influence Jurors' Decisions*, 16 TRIAL, Mar. 1980, at 11; Paternoster, *South Carolina*, *supra* note 78; Paternoster, *Prosecutorial Discretion*, *supra* note 78; Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456 (1981). As Justice Brennan noted in his dissenting opinion in *Harris*, studies continue to suggest that discrimination by race of the defendant, race of the victim, gender, socio-economic status, and geographical location within a state, are factors applied in deciding who dies. *Harris*, 104 S. Ct. 871, 888 (1984).

[80] U.S. CONST. amend. VI.

[81] As previously indicated, the constitutionality of the death penalty depends upon compliance with the safeguards designed to prevent unjust executions. *See supra* notes 27-30 and accompanying text.

[82] *See, e.g.*, Strickland v. Washington, 104 S. Ct. 2052, 2064 (1984) (quoting McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970)) ("[T]he right to counsel is the right to the effective assistance of counsel."); Cuyler v. Sullivan, 446 U.S. 335, 344 (1980) ("[I]nadequate assistance does not satisfy the sixth amendment right to counsel . . . ."). In Faretta v. California, 422 U.S. 806 (1975), a noncapital case, the Court held that the sixth amendment guarantees the defendant the right to represent himself without counsel. The Court recognized, however, that its decision ran counter to the basic premise that "the help of a lawyer is essential to assure the defendant a fair trial." *Id.* at 832-33. Additionally, the Court stated that "a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.' " *Id.* at 835 n.46. Arguably, the Court would not permit a capital defendant to proceed pro se. In *Faretta*, the Court concluded that the state may appoint "standby counsel," even over the defend-

defense counsel fails to protect adequately her client's interests, imposition of death is unjust.

Death penalty appeals and habeas corpus petitions frequently include claims of ineffective assistance of counsel.[83] A major reason for this may lie in the uniqueness of death penalty trials. In *Gregg*, the Court endorsed a bifurcated proceeding — one trial for the guilt phase and one for the penalty phase.[84] The penalty phase places the defense attorney in a novel and difficult position. Her role shifts from one of defending the accused's innocence to one of advocating an affirmative case for life.[85]

Many defense attorneys fail to make the transition and do not adequately prepare or effectively present the defendant's penalty phase trial. For example, a defense attorney may structure a guilt trial strategy that is inconsistent with the penalty phase theory. This situation may negate any effective defense at the penalty proceeding since a consistent trial strategy increases the defendant's believability and credibility. Should a guilty verdict be rendered in the guilt phase, it is imperative that the jury believe the defendant's mitigating circumstances proffered in the penalty phase.[86] Therefore, the defense attorney cannot

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ant's objection, in the event the court deems it necessary to end the defendant's self-representation. *Id.*

[83] *See, e.g.*, *Death Row on Trial*, N.Y. Times, Nov. 13, 1983, § 6 (Magazine), at 80, 100. As noted by a former Deputy Attorney General, although ineffective assistance of counsel is one of the most common arguments in capital appeals, "the truth of the matter is that many, many, many times these people *were* represented by incompetent counsel . . . . Historically, we have taken the most serious of cases, where the defendant's life was at stake, and because the defendant was poor allowed him to be represented by inexperienced young lawyers." *Id.* (emphasis in original).

[84] *See supra* notes 49-50 and accompanying text; *see also* Goodpaster, *supra* note 15, at 790 (bifurcated trials reduce arbitrary sentencing by permitting the jury to consider guilt evidence apart from sentence evidence and therefore focus on sentencing guidelines, and by permitting the jury to hear mitigating evidence necessary for an individualized sentence, which might be inadmissible at a unitary trial).

[85] Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 337 (1983) (defense advocates must establish a prima facie case for life); *see also* Farmer & Mullin, *Capital Trial Emphasis on the Punishment Stage of a Case* (1977), *reprinted in* California Office of State Public Defender, 2 CALIFORNIA DEATH PENALTY MANUAL N-24-25 (1980) (attorney's role is to help the jury understand the defendant and view him as a human being).

[86] At the penalty phase, the defense attorney's goal is to convince the jury that the human life they are judging has value, in spite of the crime that was committed. The defense attorney should establish a rapport between the defendant and the jury, and, whenever possible, not present a guilt phase defense that jeopardizes that rapport for the sentencing phase. For example, if at the guilt phase a defendant claims an alibi that

plan the theory of the guilt phase trial independent of the penalty phase. She must develop and structure a defense theory that will include the penalty phase. Because the preparation required for structuring a bifurcated proceeding is categorically different from that required for a noncapital trial, defense counsel who may be very competent in complex noncapital criminal trials may, without training, be ineffective in capital trials.[87] For example, many defense attorneys fail to present any penalty phase evidence or any mitigating circumstances.[88] As a result, the jury may lack the meaningful individualized circumstances required by *Lockett*[89] in making its decision whether to impose death.

Recognizing the importance of effective counsel, the Supreme Court has developed standards to ensure effective representation. The Court in *Strickland v. Washington*[90] recently addressed minimum standards for effective assistance of counsel during the sentencing phase in a capital trial. Justice O'Connor, writing for the Court, concluded that the traditional standard applied to ineffective assistance claims is sufficient to "ensure that the adversarial testing process works to produce a just result."[91] Consequently, despite the Court's recognition that death is

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the jury disbelieves in light of the state's overwhelming contrary evidence, the jury may likewise disbelieve the defendant when he proffers mitigating circumstances at the penalty phase. *See* Farmer & Mullin, *supra* note 85, at N-27.

[87] Even though competent "defense counsel will reasonably exhaust every possible means to save his client from execution," Furman v. Georgia, 408 U.S. 238, 358 (1972) (Marshall, J., concurring), many attorneys do not understand how to use the bifurcated trial. *See generally* Farmer & Kinard, *The Trial of the Penalty Phase* (remarks at the National Legal Aid and Defender Association Convention, Philadelphia, 1976), *reprinted in* CALIFORNIA DEATH PENALTY MANUAL, *supra* note 85, at N-33. A competent defense counsel's inability to present effectively her client's case for life at the penalty phase was exemplified in Hopkinson v. State, 632 P.2d 79 (Wyo. 1981). In *Hopkinson*, the defense attorney, at the close of the guilt phase, informed the judge that he needed merely two minutes for the penalty phase since the jury would do what it wanted to, making it unnecessary to take more time. *Id.* at 197 n.13.

[88] *See e.g.*, Blake v. Zant, 513 F. Supp. 772, 779-81 (S.D. Ga. 1981) (experienced attorney failed to present any evidence at penalty phase); Collins v. State, 271 Ark. 825, 833-36, 611 S.W.2d 182, 188-90 (no penalty phase argument), *cert. denied*, 452 U.S. 973 (1981); People v. Jackson, 28 Cal. 3d 264, 285, 618 P.2d 149, 156, 168 Cal. Rptr. 603, 610 (1980) (no penalty phase evidence, only argument), *cert. denied*, 450 U.S. 1035 (1981).

[89] Lockett v. Ohio, 438 U.S. 586 (1978). In *Lockett*, Chief Justice Burger's opinion for the Court concluded that "the nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence." *Id.* at 604-05; *see supra* notes 62-65 and accompanying text.

[90] 104 S. Ct. 2052 (1984).

[91] *Id.* at 2064.

different, the standard for attorney performance, as with a noncapital trial, is that of reasonably effective assistance. The defendant must show that counsel's representation fell below an objective standard[92] of reasonableness and prove that the unreasonable representation resulted in prejudice.[93] The Court's opinion in *Strickland* requires the same case-by-case review of ineffective assistance claims in the penalty phase as a defendant would receive in the guilt phase or in a noncapital trial.[94] Therefore, given the requirement that ineffective assistance be considered in light of the circumstances of the case, reviewing courts should apply the standards with concern for the capital defendant's unique constitutional protections.[95]

3. Fair and Impartial Jury

Ensuring that the final arbiters of guilt and punishment will be fair and impartial is another integral constitutional protection in a criminal case.[96] With society's inherent prejudices, the judicial system must

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[92] An objective standard is one that measures the attorney's performance against the performance customary of an attorney with ordinary training and skill in the criminal law — reasonableness under prevailing professional norms. *See id.* at 2065; *see also* Moore v. United States, 432 F.2d 730, 736 (3d Cir. 1970).

[93] *Strickland*, 104 S. Ct. at 2064-65.

[94] *Id.* at 2073.

[95] The *Strickland* Court affirmed the defendant's death sentence, although his attorney failed to investigate possible mitigating factors. Consequently, despite Chief Justice Burger's opinion for the Court in *Lockett*, which required the sentencer to consider a defendant's mitigating circumstances, *Strickland* concludes that the counsel's conduct was reasonable in not presenting such mitigation for the sentencer's consideration. *Id.* at 2070. Moreover, the Court noted that even assuming the counsel's conduct was unreasonable, the defendant suffered insufficient prejudice to warrant setting aside his death sentence. *Id.* Even Justice Brennan, who finds the death penalty per se unconstitutional, concurred in the Court's opinion, while dissenting in the judgment. *Id.* at 2071. He noted that the Court's "standards are sufficiently flexible to accommodate the wide variety of [ineffective assistance claims]," but also admonished the Court to apply the standards with the special consideration required for capital sentencing review. *Id.* at 2073. Since the penalty phase representation in *Strickland* was minimal, and the attorney failed even to investigate the defendant's mitigating factors, the Court's conclusion that the representation was effective is questionable. Apparently, the defendant's constitutional right to have the sentencer consider mitigating evidence is significant only if counsel effectively obtains and presents the evidence. *See, e.g.*, Note, Washington v. Strickland: *Defining Effective Assistance of Counsel at Capital Sentencing*, 83 COLUM. L. REV. 1544, 1569 (1983) (defense counsel should be required to undertake investigation that sufficiently enables her to discover defendant's mitigating circumstances).

[96] "In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury . . . ." U.S. CONST. amend. VI.

guard against unfairly imposed death sentences. The Supreme Court has been confronted with challenges to the composition of juries and has attempted to formulate constitutional standards for assessing the impartiality and fairness of death penalty juries.

In *Witherspoon v. Illinois*,[97] the Court held that excluding prospective jurors for cause[98] merely because they have general objections to or conscientious beliefs against imposing the death penalty denied a capital defendant an impartial jury on the sentencing issue.[99] The Court stated that excluding all prospective jurors who had "conscientious or religious scruples" against the death penalty produced a jury composed only of those "uncommonly willing to condemn a man to die."[100] The Court, however, rejected the defendant's argument that a jury composed only of persons favoring the death penalty resulted in an unrepresentative jury on the issue of guilt or unconstitutionally increased the risk of conviction.[101] The Court stated that the record before it did not permit

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[97] 391 U.S. 510 (1968).

[98] In selecting a jury, an attorney can excuse a prospective juror in two ways. She can challenge for cause for actual or implied bias; or she may challenge peremptorily, i.e., excuse without stating a reason. An attorney can challenge for cause an unlimited number of jurors; however, the number of peremptory challenges available to her is limited by statute. *See infra* note 167.

[99] *Witherspoon*, 391 U.S. at 518.

[100] *Id.* at 521; *accord* Adams v. Texas, 448 U.S. 38 (1980). Decided before *Furman*, *Witherspoon* was not based upon the super due process concept or the conclusion that arbitrary and capricious imposition of the death penalty is an eighth amendment violation. Nonetheless, the Court recognized the constitutional infirmity of permitting dismissal for cause for mere misgivings about imposing death.

[101] *Witherspoon*, 391 U.S. at 517-18 (petitioner's data too tentative to establish whether exclusion of jurors opposed to capital punishment results in an unrepresentative jury on issue of guilt or whether risk of conviction is substantially increased). In Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985), the court held that the practice of excluding for cause from the guilt phase jurors holding absolute scruples against the death penalty violated the defendant's sixth amendment right to a jury composed of a representative cross-section of the community. The court concluded that a jury with *Witherspoon* excludables stricken for cause is "conviction prone and, therefore, does not constitute a cross-sectional representation in a given community." *Id.* at 229. At least one court disagrees with this approach. Keeten v. Garrison, 742 F.2d 129 (4th Cir. 1984). The *Keeten* court held that the exclusion of *Witherspoon*-excludable jurors did not create a conviction prone jury in violation of due process or in violation of defendant's right to a jury selected from a fair cross-section of the community. *Id.* at 133. The court stated that the right to a jury trial "does not include the right to be tried by jurors who are unable or unwilling to follow the law and the instructions of the trial judge in a capital case." *Id.*; *cf.* Smith v. Balkcom, 660 F.2d 573, 578 (5th Cir. 1981) (court held that excluding two persons from the guilt phase venire for cause when they unambiguously expressed their opposition to the death penalty, indicating that they

this conclusion. However, recent studies indicate that even though a jury may be constitutionally sound under *Witherspoon* for the penalty phase, it tends to be more willing to find a defendant guilty.[102] Moreover, this tendency may increase given the Court's recent modification of the *Witherspoon* standard. In *Wainwright v. Witt*,[103] the Court concluded that prospective jurors whose doubts about the propriety of the death penalty may prevent or substantially impair the performance of their duties as jurors may be excused for cause.

Studies also indicate that the death qualification process may deny the capital defendant a fair trial on the issue of guilt. A death-qualified jury has been circumscribed by its willingness to impose the death penalty and barraged with questions regarding its views on the death penalty.[104] Even before the trial begins, the potential punishment has been discussed before the jury at length, thus creating expectations and preconceptions about the case they will hear and the defendant they

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would automatically vote against imposing the death penalty, did not violate the defendant's right to an impartial jury), *cert. denied*, 459 U.S. 882 (1982).

[102] Studies conclude that a death-qualified jury is guilt prone. *See* Cowan, Thompson & Ellsworth, *The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation*, 8 LAW & HUM. BEHAV. 53 (1984); Gross, *Determining the Neutrality of Death-Qualified Juries: Judicial Appraisal of Empirical Data*, 8 LAW & HUM. BEHAV. 7 (1984); Thompson, Cowan, Ellsworth & Harrington, *Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes into Verdicts*, 8 LAW & HUM. BEHAV. 95 (1984). However, the Supreme Court has not required a separate jury for the guilt and for the penalty phase. The Court apparently accepts the view that since a class of people who have absolutely no reservations about the death penalty do not constitute a cognizable group the sixth amendment does not provide the defendant with a challenge for the guilt phase. Nonetheless, the inability of this class of people to fit snugly into the language of the sixth amendment does not address the issue. Moreover, prosecutors can use their peremptory challenges to exclude persons who have only general objections to the death penalty, but who believe that they could impose it in the proper case, and effectively structure a jury that has absolutely no reservation about imposing the death penalty. *See* People v. Fields, 35 Cal. 3d 329, 342-53, 673 P.2d 680, 687-95, 197 Cal. Rptr. 803, 810-18 (1983); *see also* Hovey v. Superior Court, 28 Cal. 3d 1, 27-42, 616 P.2d 1301, 1314-26, 168 Cal. Rptr. 128, 142-53 (1980) (overview of conviction prone studies; expert witnesses testified to strong correlation between attitudes toward capital punishment and tendency to convict).

[103] 105 S. Ct. 844, 852 (1985) (stating that the Court was reaffirming the standard adopted in Adams v. Texas, 448 U.S. 38, 45 (1980)).

[104] *See* Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process*, 8 LAW & HUM. BEHAV. 121, 122, 151 (1984) (biasing effects that flow from the death qualification process may deny defendant fair and impartial jury); *see also* Hovey v. Superior Court, 28 Cal. 3d 1, 74-81, 616 P.2d 1301, 1350-55, 168 Cal. Rptr. 128, 177-82 (1980).

will sentence.[105]

In construing the eighth amendment's cruel and unusual clause and the sixth amendment's right to counsel and an impartial jury, the Supreme Court has attempted to define the constitutionally permissible execution. This task has not been easy, nor is it finished. In each area of the Court's concern, unanswered questions remain. But for the moment, the Supreme Court has articulated some guidelines for imposing the death penalty. Although complex, these guidelines represent only the minimum required by the Constitution. The next part of this Comment will explore the financial costs of these minimum guidelines.

II. Financial Costs of a Constitutional Execution Process

The Supreme Court has decided that the death penalty is constitutional when its imposition complies with certain protections. Part II of this Comment focuses on the financial costs required by a constitutional capital punishment system. Little information exists on the costs of capital litigation, although commentators frequently allude to its astronomical dimensions.[106] While cost arguments, focusing solely on expense, should never replace a moral discussion concerning the sanctity of life, financial considerations are nonetheless important; findings regarding costs can be used to assess the common claim that the death penalty is cheaper than sentencing a person to life imprisonment.

Because of constitutional requirements and the diligence of attorneys in capital cases, death penalty litigation is a long, expensive process.[107]

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[105] *See* Haney, *supra* note 104, at 128-29 (death qualification process appears to increase juror belief in defendant's guilt, encourages belief that the law disapproves of persons who oppose the death penalty, and persuades jurors to believe that the death penalty is an appropriate sentence).

[106] Amsterdam, *Capital Punishment*, in Death Penalty, *supra* note 1, at 354 (cost of life imprisonment in most secure prison is less than cost of legal proceedings needed to execute a defendant); L.A. Times, July 27, 1983, Pt. II, at 5, col. 3 (cost of life imprisonment is one-third the cost of death penalty litigation); L.A. Daily J., Sept. 4, 1984, at 4, col. 4 (death penalty prosecution costs upwards of $2 million per successful conviction, with time delays of up to 12 years).

[107] As Justice Marshall stated in *Furman*, "defense counsel will reasonably exhaust every possible means to save his client from execution." 408 U.S. at 358 (Marshall, J., concurring); *cf. False Statistic*, Nation, Dec. 31, 1983-Jan. 7, 1984, at 685 (judges who cite the number of previous appeals a prisoner has made to either deny last minute pleas, or as Chief Justice Burger stated when referring to a defendant who made 14 appeals during his 10 years on death row, to demonstrate "the specious suggestion of a 'rush to judgment,' " often fail to disclose that the number of times a court *actually* considered the defendant's argument, may be closer to zero than to 14).

Although the cost of life-long incarceration surely would be high, the cost of execution with constitutional protections is staggering. This part examines the costs of the death penalty as the defendant moves toward execution.[108]

A. Pretrial Costs

The added costs of a death penalty system begin to accrue long before the trial. Limited plea bargaining, lengthy and complex pretrial motions, extensive investigation, and increased use of psychiatrists, psychologists, and other experts are impelled by the greater stakes in capital cases. These factors, as well as the constitutional requirements, result in a substantial financial toll on the criminal justice system.

In the usual criminal case, prosecution and defense attorneys commonly engage in plea bargaining. Under this arrangement, the defendant pleads guilty in return for certain concessions, such as the reduction of charges or the promise of a lenient sentence.[109] Statistics indicate that eighty-five to ninety percent of noncapital felony cases reaching the arraignment stage result in a plea of guilty,[110] which eliminates the need

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[108] Collecting cost data on each aspect of capital litigation is difficult. Much of the data upon which this Comment is based was collected through questionnaires sent to capital defense attorneys and district attorneys throughout the country. The questionnaire sent to 50 district attorneys and 50 defense attorneys in states with death penalty statutes is included in the Appendix. The responses to the questionnaires are on file with *U.C. Davis Law Review*. Additionally, the four counties in California that represent approximately 63% of the death penalty filings in the state were surveyed by in-person and telephone interviews. From 1977, when California enacted a new death penalty statute, to the end of 1983, 1948 special circumstances cases were filed in California. There were 950 filed in Los Angeles County; 95 in Orange County; 93 in Alameda County; and 90 in Sacramento County. Telephone interview with Linda Lenker, Legal Administrator, Cal. Appellate Project, a non-profit corporation established by the California State Bar (Feb. 28, 1985).

[109] Vorenberg, *Decent Restraint on Prosecutorial Power*, 94 HARV. L. REV. 1521, 1533 (1981) (in return for defendant's decision to plead guilty, the prosecution offers a lighter punishment, either by reducing the charge or by recommending a reduced sentence).

[110] H. REYNOLDS, COPS AND DOLLARS — THE ECONOMICS OF CRIMINAL LAW AND JUSTICE 205 (1981) (for prosecutors, plea bargaining answers the problem of how to prosecute large case load with severely limited resources because it expedites the case; without plea bargaining the prosecutorial staff may not be able to handle the same quantity of cases and many defendants may have to be released and the charges against them dropped); Carney & Fuller, *A Study of Plea Bargaining in Murder Cases in Massachusetts*, 3 SUFFOLK U.L. REV. 292, 293, 306 (1969) (plea bargaining is a necessary and expedient means of dealing with criminal cases; without plea bargaining courts would be overwhelmed and the criminal justice system severely impaired; courts

for a trial. Thus, plea bargaining has become an accepted resolution to an overburdened criminal justice system because it reduces the number of trials.[111]

In capital cases, however, plea bargaining is less effective in reducing the probability of proceeding to trial. In death penalty cases, the prosecutor is dissuaded from plea bargaining since reducing the charge or promising a lighter sentence would render the case noncapital.[112] Without the prosecutor's offer of a lesser charge or less severe punishment, the death-eligible defendant gains little, if anything, by pleading guilty to capital murder.[113] If he did, he would proceed directly to the penalty phase of his trial, waiving any defense. In economic terms, therefore, the immediate effect of the prosecutor's decision to seek the death penalty is that capital cases become jury trials.[114] Moreover, to meet constitutional safeguards these trials have evolved into separate proceedings on guilt and penalty.[115]

A second area disproportionately increasing the costs in capital cases is pretrial motions.[116] In a capital case, the number of pretrial motions

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depend upon guilty pleas even when a defendant is charged with first or second degree murder); Nakell, *The Cost of the Death Penalty*, 14 CRIM. L. BULL. 69, 71 (1978) (85-90% of criminal cases, including murder cases, are resolved by guilty pleas and are therefore resolved without trials).

[111] JUDICIAL COUNCIL OF CALIFORNIA, 1984 ANNUAL REPORT 3 (1985) (increase of over 3000 cases per year disposed of by guilty plea rather than by trial); Vorenberg, *supra* note 109, at 1532 (United States Supreme Court, American Bar Association, President's Crime Commission, and American Law Institute endorse plea bargaining).

[112] Nakell, *supra* note 110, at 71 (if the prosecution offers capital murder defendant a lesser degree of homicide in exchange for a guilty plea, the defendant is no longer death-eligible). In a 1982-83 California death penalty case, the defendant was found guilty. However, in the penalty phase, the jury deadlocked at 11-1 for death. Although it was acknowledged that a retrial would hurt the already financially strapped county, the prosecutor declined a plea offer and pursued a retrial. The county auditor estimated that the retrial would be more expensive than the first trial. *Proctor: Death Penalty Worth the Cost?*, Redding (Cal.) Record Searchlight, Feb. 4, 1983, at 1, col. 1.

[113] Even in a case with overwhelming evidence of guilt, going to trial on guilt and presenting a reasonable doubt defense may benefit the defendant. For example, if the defendant is found guilty, the prosecution may forego presenting some of the vivid evidence and the aggravating factor evidence during the penalty phase. Thus, the guilt phase may help separate and distance the sentencer from the prosecution's strongest case against the defendant. Additionally, permitting the sentencer to observe the defendant for a longer time, that is, during two trials, may induce the sentencer to view the defendant more favorably. *See, e.g.*, Goodpaster, *supra* note 85, at 331-32.

[114] Nakell, *supra* note 110, at 71 (ten times as many trials for capital cases as there are for noncapital cases).

[115] *See supra* notes 49-50 and accompanying text.

[116] SOUTHERN POVERTY LAW CENTER, MOTIONS FOR CAPITAL CASES 2 (1981)

filed is at least double, but more often three or four times the number of motions filed in a noncapital case.[117] Defense attorneys assert that the increased number of pretrial motions in capital cases ranges from twice as many to as much as five to six times the number of motions as in noncapital cases.[118] District attorneys generally conclude the number of motions they file is approximately twice the number filed for noncapital murder cases but note that this may result from the increased number of defense motions.[119]

Although many of the motions are those typically filed in a criminal case and address the specific aspects of the defendant's criminal charges, even these motions increase costs because in a capital case they have greater ramifications, are often more complex,[120] and generally raise more evidentiary issues.[121] Another factor resulting in a lengthier process is that a capital defense attorney may have a dual goal when pursuing a motion in a capital case. Her primary concern may be with structuring a defense that will render the case noncapital.[122] Consequently, extensive planning and strategy are involved in preparing motions and collecting data to provide the proof and legal arguments to support the motions.[123] Additionally, the defense attorney also requests legal relief unique to capital cases.[124] In a capital case, a main goal is to prevent the penalty of death.[125] Because the potential punishment is so extraordinary, the defense attorney should, from the beginning, structure a defense that challenges the constitutionality of the death penalty generally, as well as its appropriateness for the individual defendant.

[hereafter MOTIONS FOR CAPITAL CASES].

[117] NEW YORK STATE DEFENDERS ASS'N, INC., CAPITAL LOSSES: THE PRICE OF THE DEATH PENALTY FOR NEW YORK STATE 12 (1982) [hereafter CAPITAL LOSSES] (usual number of pretrial motions in noncapital cases between five and seven as compared to between ten and twenty-five for capital cases); *see also* MOTIONS FOR CAPITAL CASES, *supra* note 116, at 2.

[118] Questionnaires on file with *U.C. Davis Law Review*; interview with James Thomson, Attorney, Sacramento, Cal. (Apr. 5, 1985).

[119] *Id.*

[120] CAPITAL LOSSES, *supra* note 117, at 13 (ordinary motions take on different meaning in death penalty cases; routine motions are generally longer, more complicated, and more heavily litigated).

[121] Telephone interview with Stuart Rappaport, Bureau Chief, Los Angeles Public Defender (Apr. 4, 1985).

[122] *See, e.g.*, MOTIONS FOR CAPITAL CASES, *supra* note 116, at 5.

[123] *Id.* at 6.

[124] *See, e.g., id.* at 10-17.

[125] A critical factor to keep in mind is that a defense victory in a capital case often means a life sentence. *See id.* at 1.

General arguments, for example, challenge the penological justification of the death penalty, its arbitrary and capricious nature, and its cruelty.[126] Motions that are generally included in a death penalty case include: Change of venue;[127] challenging those aspects of the charge that render the defendant death-eligible;[128] motions for individual *voir dire*;[129] and sequestration of jurors during *voir dire*.[130] Motions are also made to request funds for investigators,[131] expert witnesses,[132] and pri-

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[126] *Id.* at 233-36. In answering the question regarding defense motions filed in capital cases, defense attorneys generally listed *voir dire* motions, jury composition, challenges to the death qualification process, change of venue, challenges to the constitutionality of the death penalty in general and the constitutionality of the state's statute specifically, as common capital case motions. Questionnaires on file with *U.C. Davis Law Review*; interview with James Thomson, Attorney, Sacramento, Cal. (Apr. 5, 1985).

[127] *See, e.g.*, CAL. PENAL CODE § 1033 (West Supp. 1985). *See generally* THE NATIONAL JURY PROJECT, JURYWORK—SYSTEMATIC TECHNIQUE § 7 (2d ed. 1983).

[128] For example, in California, the defendant would file a Penal Code § 995 motion to challenge the special circumstance of his charge. If defendant's motion were granted, the case no longer would be capital. Consequently, thorough preparation of this motion is critical. *See* CAL. PENAL CODE § 995 (West 1970 & Supp. 1985).

[129] In California, individual sequestered *voir dire* is judicially required in capital cases. *See* Hovey v. Superior Court, 28 Cal. 3d 1, 80, 616 P.2d 1301, 1354, 168 Cal. Rptr. 128, 181 (1980). Pennsylvania statutorily requires individual *voir dire* for capital cases unless defendant waives the right. *See* 42 PA. CONS. STAT. ANN. R. CRIM. P. 1106(e) (Purdon 1984). A Texas statute mandates individual sequestered *voir dire* at request of the state or defendant. TEX. CRIM. PROC. CODE ANN. § 35.17(2) (Vernon Supp. 1985). According to one experienced capital defense attorney, individual sequestered *voir dire* is the most important procedure in a death penalty case. There are numerous justifications for individual *voir dire*: Collective *voir dire* educates the jury panel on prejudicial and incompetent material; each juror hears the question as each attorney questions; and collective *voir dire* may be embarrassing and result in untruthful answers, especially when the questions explore bias and prejudice. Goodpaster, *supra* note 85, at 327.

[130] *See* Kaplan, *The Problem of Capital Punishment*, 1983 U. ILL. L. REV. 555, 571 (some states require sequestration of remaining jurors while questioning of prospective jurors proceeds).

[131] For example, the defense attorney will make a motion requesting funds for an investigator. In California, the defense will file a Penal Code § 987.9 motion. The statute states, in relevant part:

> In the trial of a capital case the indigent defendant, through his counsel, may request the court for funds for the specific payment of investigators, experts, and others for the preparation or presentation of the defense . . . . The ruling on the reasonableness of the request shall be made at an *in camera* hearing. In making the ruling, the court shall be guided by the need to provide a complete and full defense for the defendant.

CAL. PENAL CODE § 987.9 (West Supp. 1985).

Pretrial investigation is essential. The capital defense attorney must prepare for both

vate psychologists and psychiatrists.[133] Although expensive, the exhaustive filing of motions is necessary to provide the defendant with the constitutional rights of super due process, effective assistance of counsel,

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proceedings and extensively investigate the defendant's life history to present mitigating evidence during the sentencing phase. *See* Goodpaster, *supra* note 85, at 344. Of course, the prosecution will conduct its own investigations to present aggravating circumstances to rebut the defense's mitigating circumstances.

[132] The types of expert witnesses needed will vary with differing facts of the case. In response to a questionnaire, defense attorneys listed the following experts as those most frequently requested in capital cases: Psychiatric; jury selection and composition; forensic; criminologists; and experts on the arbitrary and capricious imposition of the death penalty. Questionnaires on file with *U.C. Davis Law Review*; interview with James Thomson, Attorney, Sacramento, Cal. (Apr. 5, 1985).

A recent article vividly described the impact of lack of investigative funds in an Arizona case. The defendant was sentenced to death for allegedly murdering his two children by setting fire to their bedroom. The defense retained an arson investigator as an expert witness. After initial preparations and testing, the expert billed the public defender's office $1300 ($40 an hour). Although the expert needed more time to investigate, the public defender could no longer afford the cost. The defense attorney's motion that the investigator be appointed by the court was denied. The prosecution presented two expert witnesses to support the state's theory of the fires. The defense expert had conducted sufficient tests to testify that the markings in the charred room could have been caused by means other than that in the state's theory, and in fact, that some of the consequences of the fire could not be explained by the state's theory. The first trial resulted in a hung jury. In the defendant's second trial, the judge excluded almost all of the expert testimony since it was not prepared in an exact replica of the bedroom. However, the earlier denial of the defense funds for the expert precluded the defense from further testing. Although the exclusion of the expert testimony was the only significant difference between the two trials, the jury found the defendant guilty. Brill, *An Innocent Man on Death Row*, AM. LAW., Dec. 1983, at 1, 87-88.

[133] Most state death penalty statutes allow mitigation based on the defendant's mental state. Generally, the jury may consider whether the defendant suffered a mental health problem during the commission of the act or generally suffers a serious mental health problem, even though the mental state does not satisfy the criteria for an insanity defense. Additionally, the defendant may present evidence of drug addiction or alcoholism. SOUTHERN POVERTY LAW CENTER, TRIAL OF THE PENALTY PHASE 16-17 (1981) [hereafter TRIAL OF THE PENALTY PHASE]. For example, California's death penalty statute lists, as mitigating factors to be considered by the sentencer, the following factors regarding the defendant's mental state:

> . . . (d) whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance . . . . (h) whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects (sic) of intoxication . . . .

CAL. PENAL CODE § 190.3 (West Supp. 1985).

and a fair trial.[134]

A third pretrial cost is investigators' fees.[135] The sixth amendment provides the defendant with the right to effective assistance of counsel.[136] To be effective, the defense attorney must thoroughly investigate both the facts of the case and the background and character of the capital defendant.[137] Much of this investigation is conducted during the filing of the pretrial motions to allow thorough preparation of the defendant's capital trial and to support the motions factually. The cost of capital case investigations is particularly high for two reasons: A capital trial is qualitatively different from noncapital trials; and an effective attorney must prepare to introduce mitigating circumstances during the penalty phase of the trial and therefore must extensively investigate the defendant's background.[138] This investigation may include an exploration of the past twenty, thirty, or forty years.[139] One capital case in-

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[134] Sevilla, *Between Scylla and Charybdis: The Ethical Perils of the Criminal Defense Lawyer*, 2 NAT'L J. CRIM. DEF. 237, 271 (1976) (defense counsel has ethical and professional responsibility to file nonfrivolous pretrial motions that advance client's interests). Establishing a record for the capital defendant is critical. Pretrial motions establish and protect the defendant's record for appeal. *See, e.g.*, Sevilla, *Motions*, in INEFFECTIVE ASSISTANCE OF COUNSEL SEMINAR SYLLABUS 1 (J. Thomson comp. 1985); *see also* People v. Pope, 23 Cal. 3d 412, 426, 590 P.2d 859, 867, 152 Cal. Rptr. 732, 740 (1979) (in an ineffective assistance challenge, the conviction will be affirmed when the record sheds no light on why counsel acted or failed to act in the manner challenged, unless no satisfactory explanation exists for the attorney's act or omission).

[135] *See supra* note 131.

[136] *See supra* notes 80-81 and accompanying text.

[137] *See, e.g.*, Keenan v. Superior Court, 31 Cal. 3d 424, 431, 640 P.2d 108, 112-13, 180 Cal. Rptr. 489, 493-94 (1982) (citing 1 ABA STANDARDS FOR CRIM. JUSTICE, THE DEFENSE FUNCTION 4-42 (2d ed. 1980), for proposition that capital defense counsel's responsibility includes thorough preparation of factual and legal circumstances of case prior to trial).

[138] *See* Goodpaster, *supra* note 85, at 323-24 (trial counsel's duty includes investigating client's life history and emotional and psychological makeup, i.e., inquiring into client's childhood, upbringing, education, relationships, friendships, formative and traumatic experiences, personal psychology, and present feelings); *see also* TRIAL OF THE PENALTY PHASE, *supra* note 133, at 15-16 (clergy, teachers, and social workers provide helpful testimony, the value of which is enhanced by their neutrality since they are not related to either the victim or the defendant); OFFICE OF THE PUBLIC DEFENDER, STATE OF MARYLAND, OPERATIONAL OVERVIEW—IMPACT DEATH PENALTY CASES—1982 FISCAL YEAR 3 (1982) (minimum capital defense requirements include extensive use of investigators and paralegals to locate and interview witnesses; a recent case listed 106 state's witnesses) [hereafter OPERATIONAL OVERVIEW].

[139] Telephone interviews with capital defense attorneys: Jim Merwin, Orange County (Mar. 6, 1985); Joe Najpaver, Alameda County (Mar. 6, 1985); Lawrence Biggam, Biggam, Christensen & Minsloff, Santa Cruz County (Mar. 10, 1985); James

volved interviewing 240 persons, one-half of whom became witnesses at the trial.[140] The investigation often includes extensive travel throughout the country and requires a skilled investigator who can locate persons from the defendant's past and persuade them to participate in a death penalty trial.[141] An investigation for capital trials is generally three to five times longer than that for noncapital trials,[142] and may take as long as two years.[143]

A fourth step in the pretrial process that increases the cost of the capital case is the use of psychiatrists. Psychiatric evaluations are used to prove diminished actuality, diminished capacity, an insanity defense, or more commonly, are presented at the penalty phase as mitigating evidence.[144] Additionally, the prosecution generally obtains the services of another psychiatrist to provide a contrary view of the defendant's psychiatric condition.[145] Moreover, the court may occasionally find it necessary to supply a third opinion, one not provided by either the defense or the prosecution.[146] The Supreme Court recently held that due

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Thomson, Sacramento County (Apr. 5, 1985); Stuart Rappaport, Bureau Chief, Los Angeles County Public Defender (Apr. 4, 1985).

[140] People v. Trillo, Cal. Super. Ct. 61425. Telephone interview with Roy Simmons, Sacramento County Public Defender's Office (Mar. 7, 1985).

[141] Telephone interviews with private investigators: Margaret Erickson, Santa Cruz, Cal. (Mar. 7, 1985); Rodney Harmon, Harmon Investigations, Sacramento, Cal. (Apr. 5, 1985); Casey Cohen, Criminal Justice Consultant, Beverly Hills, Cal. (Apr. 5, 1985).

[142] Questionnaire on file with *U.C. Davis Law Review.* Telephone interviews with private investigators: Margaret Erickson, Santa Cruz, Cal. (Mar. 7, 1985); Rodney Harmon, Harmon Investigations, Sacramento, Cal. (Apr. 5, 1985); Casey Cohen, Criminal Justice Consultant, Beverly Hills, Cal. (Apr. 5, 1985).

[143] Telephone interview with Lawrence Biggam, Attorney, Biggam, Christensen & Minsloff, Santa Cruz, Cal. (Mar. 10, 1985).

[144] During the penalty phase, the defense can present any aspect of a defendant's character or record as a mitigating factor in arguing for the defendant's life. Lockett v. Ohio, 438 U.S. 586, 604 (1978); *see also* Robinson v. State, 548 S.W.2d 63, 65 (Tex. 1977); TRIAL OF THE PENALTY PHASE, *supra* note 133, at 25 (courts readily approve use of traditional expert witnesses such as psychologists and psychiatrists). For example, in California, evidence of a defendant's mental disease, mental defect, or mental disorder is admissible to prove whether or not the defendant actually formed the required specific intent, premeditation, deliberation, or malice aforethought, when the crime was committed. *See* CAL. PENAL CODE § 28 (West Supp. 1985). A court may consider evidence of diminished capacity or a mental disorder at the time of sentencing. *See* CAL. PENAL CODE § 25 (West Supp. 1985).

[145] District attorneys assert that psychiatric evaluations are more commonly used in capital trials than in noncapital murder trials. Questionnaires on file with *U.C. Davis Law Review.*

[146] In critical criminal trials, there are occasions when the court will seek psychiatric

process requires that a state provide an indigent defendant access to a psychiatrist's assistance if the defendant's sanity at the time of the offense is likely to be a significant factor at trial.[147] The typical cost of the psychiatrist is approximately $700 a day, exclusive of expenses.[148] The per hour rate is in the range of $110 an hour for examinations and $125 an hour for in-court testimony.[149] When the defense, the prosecution, and the court all require evaluations, the cost to the state is clearly substantial.

Additional expert and auxiliary services necessary before trial include medical examiners, polygraph experts, and experts who provide data regarding race bias and death penalty bias for jury selection. In rendering effective assistance to the capital defendant, the defense attorney has an ethical obligation to present the best defense and the best possible case for life.[150] This obligation translates into case preparation that extensively uses experts.[151] A typical cost breakdown for use of experts includes the following: a medical examiner costs approximately $700 to $1000 per day;[152] a polygraph expert costs approximately $200-300 per day for courtroom testimony and $150-250 for the poly-

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evaluation and testimony not prepared by either defense or prosecution. Telephone interview with Martin Blinder, M.D., San Francisco, Cal. (Jan. 11, 1985).

[147] Ake v. Oklahoma, 105 S. Ct. 1087, 1092 (1985).

[148] CAPITAL LOSSES, *supra* note 117, at 15 (figure quoted by Psychological Evaluations, Inc., an Atlanta based firm that provides psychiatric evaluations in capital cases throughout the country). The fee in California can run as much as $1500 per day. Telephone interview with Martin Blinder, M.D., San Francisco, Cal. (Jan. 11, 1985).

[149] CAPITAL LOSSES, *supra* note 117, at 15 (figure quoted by Chicago psychiatrist who has testified in several capital cases; fee quoted is exclusive of expenses).

[150] *See supra* notes 80-82 and accompanying text; *see also* OPERATIONAL OVERVIEW, *supra* note 138, at 4 (although no constitutional or statutory right to expert witnesses exists for the indigent capital defendant, denial of expert witnesses establishes an "abhorrent double standard" when a defendant's life is at stake). Asked whether they attempted to obtain the "best" experts for capital trials, defense attorneys answered affirmatively. However, they also stated that they attempt to obtain the best experts for noncapital murder trials. Questionnaires on file with *U.C. Davis Law Review*; interview with James Thomson, Attorney, Sacramento, Cal. (Apr. 5, 1985).

[151] The use of experts, although varying with each case, is generally acknowledged to increase in death penalty case preparation. The costs of using experts also extend into the trial stage. *See, e.g.*, TRIAL OF THE PENALTY PHASE, *supra* note 133, at 25-26 (generally, use of expert witnesses readily approved, although use of expert testimony regarding unique aspects of capital trial not as commonly approved; nonetheless, experts' knowledge is used in defense preparation); questionnaires on file with *U.C. Davis Law Review*.

[152] CAPITAL LOSSES, *supra* note 117, at 15 (figure quoted by medical examiner in Atlanta, Georgia, as the going rate for medical examiner services).

graph examination;[153] an expert witness concerning eyewitness identification costs approximately $500 per day for courtroom testimony and $100 per hour for consultation;[154] and a witness who testifies concerning *Witherspoon*[155] issues could run $500 per day.[156]

Increased pretrial costs must be viewed in terms of its impact on the public defender or court appointed defense attorney, the prosecutor, the judge, and attendant court costs. Capital defendants are almost always poor,[157] and the state provides indigent defendants with an attorney. Additionally, although capital case prosecution costs are not generally apparent because expenditures may appear as part of the office's overall budget, documented prosecution costs are often greater than defense costs.[158] Also, the state puts more resources and time into prosecuting capital cases, increasing the complexity of the case that the defense at-

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[153] *Id.* (figure quoted by Georgia firm that has participated in approximately 25 capital trials). The research and procedure, which generally takes at least three hours, costs approximately $250 at a minimum. Telephone interview with LeClair and Associates, Sacramento, Cal. (Jan. 11, 1985). If the examination involves a single issue, the cost is approximately $200; however, if it is for a complicated homicide case with substantial discovery records, the cost often increases to $400 or more. In-court testimony costs $250 for one-half day. Telephone interview with John Smith, Polygraph Examiner, Sacramento, Cal. (Apr. 5, 1985).

[154] CAPITAL LOSSES, *supra* note 117, at 15 (fee quoted by eyewitness identification expert).

[155] *See supra* notes 97-100 and accompanying text.

[156] The approximate cost for testimony regarding death qualification of a jury is $500 per day plus expenses. A typical case might be a two-witness day for defense. Telephone interview with Samuel Gross, Acting Professor of Law, Stanford University, Palo Alto, Cal. (Jan. 14, 1985).

[157] The attorney costs involved in capital litigation invariably will be paid by the state. Almost all capital defendants are indigent and are assigned a defense attorney. *See* Greenberg & Himmelstein, *Varieties of Attack on the Death Penalty*, 15 CRIME & DELINQ. 112, 114 (1969) (almost 100% of the persons executed from 1930 until 1967 were poor); *see also* L.A. Daily J., Aug. 27, 1982, at 5, col. 3 (almost without exception people on death row are poor); San Francisco Chron., Oct. 13, 1982, at 39, col. 1 (quoting Clinton Duffy, former San Quentin Prison Warden who opposed the death penalty: "Only the poor and underprivileged are put to death. In the 60 years I have been around prisons, I have never known of one man who had wealth or position who has ever been executed.").

[158] *See, e.g.*, Kirsch, *Rural Justice at the Crossroads*, 4 CAL. LAW., Apr. 1984, at 22, 24 (during five-year period from 1975 to 1980, prosecution costs in California increased $138.4 million; public defender increases were $45.4 million); New York State Defenders Association, THE DEFENDER, Mar.-Apr. 1983, at 25, 25-26 (89% of the cost of a recent trial against an inmate defendant is attributable to the prosecution); L.A. Daily J., Feb. 3, 1983, at 2, col. 5 (58% of the money spent for the Juan Corona trial attributed to prosecution — 40% to defense). The prosecution also has access to law enforcement services. *See, e.g.*, Sacramento Union, Mar. 20, 1985, at A2, col. 1.

torney must address.[159] Moreover, the cost of the judge's time and courtroom costs are significant. The cost of running a courtroom for a day is approximately $2186.[160] The total courtroom time varies depending on the number of motions and the vigor with which they are pursued. The defense attorney carries the burden of presenting an impeccable defense. Consequently, she contests every viable issue and vigorously argues law and motions.[161]

B. Trial Costs

1. Voir Dire

The goal of *voir dire* is a fair and impartial jury, not one that will impose the death penalty arbitrarily or capriciously. The defense attempts to identify biases about the death penalty and prejudice against the defendant. If racism, a guilt prone bias, or a death penalty prone bias influences the jury's decision on the defendant's guilt or whether to impose the death penalty, the result is the unconstitutional imposition of death. To avoid this unconstitutional result, many states require sequestration of the jury panel while individual jurors are questioned, or permit sequestration upon motion by the defense.[162] In noncapital cases, jurors can be questioned collectively on certain issues, saving a considerable amount of time during *voir dire*.[163] In capital cases, however, the magnitude of the penalty warrants sequestered *voir dire*. Sequestered *voir dire* increases the likelihood that prospective jurors will provide their own answers, rather than give those answers that they have learned from other jurors are favored.[164] This individualized question-

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[159] Telephone interview with Stuart Rappaport, Bureau Chief, Los Angeles Public Defender (Apr. 4, 1985); interview with Gary Goodpaster, Professor of Law, U.C. Davis (Apr. 8, 1985).

[160] JUDICIAL COUNCIL OF CALIFORNIA, 1984 ANNUAL REPORT, at 53 (1984). This amount, however, does not include the cost of extra security or daily transcripts, both of which are often used in capital trials. Interview with Gary Goodpaster, Professor of Law, U.C. Davis (Mar. 22, 1985).

[161] *See generally* MOTIONS FOR CAPITAL CASES, *supra* note 116.

[162] *See supra* notes 129-30 and accompanying text.

[163] Kaplan, *supra* note 130, at 571. For example, the trial judge generally asks a series of questions of prospective jurors to determine their qualifications to serve as jurors in a criminal case. These include: Whether bias or prejudice would prevent a fair decision; whether they have heard of or have any prior knowledge of the case; and whether they or any member of their family or a close friend has been a witness or victim in a criminal case. *See, e.g.*, CAL. R. OF CT. APP. § 8.5.

[164] Although favored answers may occur and prejudice may go undetected during collective *voir dire* in noncapital trials, the cost and time of sequestering overrides these

ing generally takes longer for the attorney to gain sufficient knowledge about each juror.[165]

The use of peremptory challenges in a capital case also adds to the cost. During jury selection, attorneys dismiss prospective jurors by two methods. A peremptory challenge allows dismissal without cause.[166] The number of peremptory challenges available in a capital case is greater than that in a noncapital case.[167] Since it is permissible to peremptorily excuse a greater number of prospective jurors in a capital case, the result is a lengthier *voir dire* process. Moreover, the procedure is extended further because the lengthy questioning often permits an attorney to exercise her unlimited number of dismissals for cause. For example, jurors are questioned on their beliefs about the death penalty.[168] If a juror expresses opposition to the death penalty, the defense attorney will try to "rehabilitate" her to prevent the prosecution from having the prospective juror dismissed for cause. If the defense is able to get the juror to express only general misgivings about the death penalty, and to state that the misgivings will not interfere with her impartiality and the discharge of her duties, the prosecution cannot constitutionally dismiss the juror for cause.[169] The prosecution may,

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concerns when the punishment is less than death. *See, e.g.*, Kaplan, *supra* note 130, at 571.

[165] Attorneys recognize the need to be fully informed about jurors' attitudes in death penalty cases because jurors usually have strong feelings about both the specific case and the death penalty generally. In People v. Williams, 29 Cal. 3d 392, 408, 628 P.2d 869, 877, 174 Cal. Rptr. 317, 325 (1981), the California Supreme Court concluded that attorneys should be allowed to inquire into matters when strong feelings about a case are held by the local community or public at large for the purpose of conducting peremptory challenges.

[166] *See infra* notes 167, 169 and accompanying text.

[167] For example, in California, each attorney is permitted 10 peremptory challenges in a noncapital case and 26 peremptory challenges in a capital case. *See* CAL. PENAL CODE § 1070 (West Supp. 1985).

[168] Kaplan, *supra* note 130, at 571 (jurors closely questioned on their attitudes toward the death penalty). For example, the California Supreme Court has held that *voir dire* dealing with the death penalty should be performed individually and in sequestration. *See* Hovey v. Superior Court, 28 Cal. 3d 1, 80, 616 P.2d 1301, 1353, 168 Cal. Rptr. 128, 181 (1980).

[169] *See* Witherspoon v. Illinois, 391 U.S. 510, 522 n.21 (1968) (prospective jurors opposed to the death penalty may not be excused for cause on that basis unless they make it unmistakably clear that they would automatically vote against the death penalty regardless of the evidence at trial, and that their attitudes would prevent an impartial decision on the defendant's guilt); *cf.* Wainwright v. Witt, 105 S. Ct. 844, 852 (1985) (prosecutor may challenge for cause prospective juror who states that her doubts about the death penalty may impair the performance of her duties as a juror).

however, excuse this person by using a peremptory challenge.[170] The defense may also question a jury panel on prejudice, especially if the race of defendant and the victim differ.[171] Although some answers may permit the defense to have the jurors dismissed for cause, the peremptory challenges must be available to rid the jury box of racism. Thus, even with a greater number of peremptory challenges available to the defense attorney, she must use care in exercising those challenges.

This extensive process seeks to ensure the defendant's sixth amendment right to an impartial jury. Because the penalty is death, super due process requires or permits individual questioning, longer questioning, and more challenges.[172] Jury selection is estimated to take, on the average, 5.3 times longer than jury selection for a noncapital case[173] and courtroom time alone may increase the cost to the system by as much as $87,440.[174]

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[170] *See supra* note 167.

[171] *See*, NATIONAL JURY PROJECT, *supra* note 131, §§ 10-50 to -56; Note, *Restricting Inquiry Into Racial Attitudes During the Voir Dire — Rosales-Lopez v. United States, 451 U.S. 182 (1981)*, 19 AM. CRIM. L. REV. 719 (1982); Note, *Probing Racial Prejudice on Voir Dire: The Supreme Court Provides Illusory Justice for Minority Defendants — Rosales-Lopez v. United States, 101 S. Ct. 1629 (1981)*, 72 J. CRIM. L. & CRIMINOLOGY 1444 (1981).

[172] *See, e.g.*, Goodpaster, *supra* note 85, at 328 n.132 (majority of jurisdictions give the attorneys leeway in asking questions since information gleaned may lead to intelligent use of peremptory challenges).

[173] L. Saunders, B. Moore & B. Gaal, An Empirical Study Attempting to Compare the Trial Costs of Capital Cases with the Trial Costs of NonCapital Cases (Spring 1983) (study of 20 California cases involving first degree murder convictions — 10 capital, and 10 noncapital — reveals that jury selection in capital cases lasted an average of 16 days as compared to 3 days for noncapital) (unpublished manuscript) (copy on file with *U.C. Davis Law Review*). Both district attorneys and defense attorneys assert that capital case *voir dire* lasts substantially longer than noncapital case *voir dire*. The estimated increase ranged from two days to two months — the average being approximately two weeks. Questionnaires on file with *U.C. Davis Law Review*; interview with James Thomson, Attorney, Sacramento, Cal. (Apr. 5, 1985). Another reason that capital case jury selection takes longer than noncapital cases is that more prospective jurors try to disqualify themselves, claiming that a lengthy death penalty trial will cause hardship, that is, that prior personal obligations do not permit the time commitment a capital trial requires. Additionally, the process is lengthier because the attorney is essentially picking a jury for two trials — the guilt and penalty phase. Moreover, prospective jurors' strong attitudes about the death penalty generally increase the *voir dire* time as the attorney attempts to filter through the jurors' answers to determine whether they will fairly and impartially apply the law. Telephone interview with Stuart Rappaport, Bureau Chief, Los Angeles County Public Defender (Apr. 4, 1985).

[174] Telephone interviews with defense attorneys and questionnaire responses indicated that death penalty *voir dire* can take as long as two months. Questionnaires on

2. The Trial

Due process for capital cases requires a lengthy and costly trial process. It has been estimated that it takes approximately 3.5 times longer to try capital cases than to try noncapital murder cases.[175] Attorneys contend that the average difference between a noncapital trial and capital trial is thirty days.[176] If this increase is multiplied by the cost per day of operating a courtroom, the additional cost for courtroom time alone is $65,580.[177] The additional attorney hours spent on capital trials must also be included.[178] A Maryland study estimated the cost of the defense attorney through trial disposition to range from $50,000 to $75,000 per capital case.[179] Moreover, because of the magnitude of capital trials, the state and the defendant may be assigned two attorneys.[180] Additionally, the expense is increased due to the large number of wit-

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file with *U.C. Davis Law Review*; telephone interviews conducted with Joe Najpaver, Alameda County (Mar. 6, 1985); Roy Simmons, Sacramento County (Mar. 7, 1985); James Thomson, Sacramento County (Apr. 5, 1985). Given the cost of a courtroom per day as $2186, *see supra* note 160, the total cost for *voir dire* would be approximately $87,440.

[175] L. Saunders, B. Moore & B. Gaal, An Empirical Study Attempting to Compare the Trial Costs of Capital Cases with the Trial Costs of NonCapital Cases (Spring 1983) (capital trials averaged 42 days and noncapital trials averaged 12 days in study of 20 California cases involving first degree murder convictions (10 capital and 10 noncapital)) (unpublished manuscript) (copy on file with *U.C. Davis Law Review*).

[176] *See id.*; questionnaires on file with *U.C. Davis Law Review*. However, the increased number of trial days can be substantially more. Interview with James Thomson, Attorney, Sacramento, Cal. (Apr. 5, 1985).

[177] The cost of operating a court room is approximately $2186 per day. *See supra* note 160 and accompanying text. The cost for 30 days is $65,580.

[178] *See supra* notes 120-21, 173, & 175 and accompanying text. A major cost to some small public defender offices comes from having to assign to outside counsel the caseload that would be handled by staff, but which is displaced when the staff attorney is assigned a capital case. Questionnaires on file with *U.C. Davis Law Review*; telephone interview with Larry Biggam, Attorney, Biggam, Christensen & Minsloff, Santa Cruz, Cal. (Mar. 10, 1985).

[179] *See* OPERATIONAL OVERVIEW, *supra* note 138, at 2.

[180] *See, e.g.*, Keenan v. Superior Court, 31 Cal. 3d 424, 434, 640 P.2d 108, 114, 180 Cal. Rptr. 489, 495 (1982). The *Keenan* court held that given the constitutionally mandated distinction between death and other penalties, the trial court abused its discretion when it denied defendant's motion for appointment of a second attorney. *See* CAL. PENAL CODE § 987(d) (West Supp. 1985) (authorizes funds for appointment of a second attorney if the trial court finds that the second attorney is needed to provide a complete and full defense for the defendant); *see also* L.A. Times, July 27, 1983, Pt. II, at 5, col. 3 (complexity of capital case may entitle defendant to the appointment of two attorneys; prosecution also often assigns two attorneys to capital case).

nesses necessary in a capital trial.[181]

The capital trial process itself is more expensive because it includes two trials — the guilt phase and the penalty phase.[182] The capital trial lawyer must structure the bifurcated proceeding around the possible sentence. This requires that competent counsel thoroughly investigate and evaluate both the guilt and penalty phase evidence prior to trial to present a case in the guilt phase that will support the penalty phase strategy.[183] This requirement increases the capital trial cost because the penalty phase investigation demands thorough research of the defendant's life.

The penalty phase of a capital trial is categorically different, in character, procedure, and magnitude from any counterpart in a noncapital trial, and it accounts for the greatest increase in cost before the appellate stage.[184] In noncapital cases, the judge generally imposes the sentence, the procedure is brief, and the attorney's role is minimal.[185] By contrast, the capital defendant receives a second trial solely to determine whether he should be sentenced to death. Constitutionally, the court must permit the defense attorney to present any mitigating evidence.[186]

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[181] *See supra* notes 140-41 and accompanying text.

[182] Moreover, in addition to investigating and defending the charge or charges in the defendant's instant case, the defense attorney may also have to investigate and defend against uncharged offenses that the prosecution offers as evidence of aggravation during the penalty phase. *See, e.g.*, CAL. PENAL CODE § 190.3 (West Supp. 1985) (state may present evidence of "criminal activity" by the defendant that involved use or attempted use of force or violence or threat to use force or violence and the "criminal activity" does not require a conviction).

[183] *See, e.g.*, Goodpaster, *supra* note 85, at 334 (defense counsel should integrate "guilt phase defense and penalty phase case for life," to prevent inconsistency between penalty phase argument and guilt phase defense).

[184] A recent California case exemplifies the costs that can be incurred solely from the retrial of the penalty phase. The defendant was convicted in the guilt phase, but the jury could not decide whether the defendant should be sentenced to death or to life in prison without parole. The judge declared a mistrial for the penalty phase. The defense attorney suggested that the defendant might consider accepting the life without parole sentence and forego an appeal, but the district attorney stated he would not agree to a plea bargain. The county auditor commented that the retrial of the penalty phase would be more expensive than the first trial, which cost $10,000 just for defense investigation and defense expert witnesses. Moreover, the court costs alone would "skyrocket," since the judge granted a motion to move the penalty phase retrial to another county. *See Proctor: Death Penalty Worth the Cost?*, Redding (Cal.) Record Searchlight, Feb. 4, 1983, at 1, col. 1.

[185] *See, e.g.*, Goodpaster, *supra* note 85, at 328 (probation reports and mandatory sentencing schemes minimize role of defense attorney in noncapital case).

[186] Lockett v. Ohio, 438 U.S. 586 (1978); *see supra* notes 62-65 and accompanying text.

Due process must be satisfied in both the guilt phase and the penalty phase.[187] Consequently, as stated above,[188] competent counsel will investigate the defendant's entire background. A thorough investigation of a defendant's life will include locating, interviewing, and often presenting as witnesses, the defendant's family, friends, neighbors, teachers, coworkers, and social workers.[189] Additionally, depending on the law of the jurisdiction, the defense may be permitted to call witnesses to testify about the cruelty of the death penalty,[190] to testify that the death penalty does not deter,[191] and to testify that the death penalty is discriminatorily imposed.[192]

The preparation of a penalty phase trial and the presentation of guilt phase witnesses require substantial time and significant resources.[193] In California, the state appropriates funds each year to reimburse the county for money advanced for the defense preparation of capital trials.[194] The funds are used to pay investigators, experts, and others needed to prepare and present the defense.[195] Since 1978, the amount appropriated each year has been $1 million.[196] However, due to yearly overexpenditures, the amount appropriated for fiscal year 1984-85 was $4 million.[197] Since approximately 325 capital cases are pending in California trial courts, this total figure suggests the average per case payout to be approximately $12,000.[198] However, in major capital cases this payout may be substantially more.[199]

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[187] *See* Gardner v. Florida, 430 U.S. 349, 358 (1976).

[188] *See supra* notes 135-41 and accompanying text.

[189] *See supra* note 138 and accompanying text.

[190] *See, e.g.*, TRIAL OF THE PENALTY PHASE, *supra* note 133, at 17-18 (testimony of clergy on ethical and theological aspects of the death penalty); Bedau, *supra* note 34, at 19 (testimony of Hugo Bedau at pretrial hearing on cruelty of death penalty).

[191] *See, e.g.*, TRIAL OF THE PENALTY PHASE, *supra* note 133, at 20.

[192] *Id.* at 25; *see also* Wolfgang & Riedel, *Racial Discrimination, Rape and the Death Penalty*, in THE DEATH PENALTY IN AMERICA, *supra* note 1, at 94.

[193] Moreover, the state puts a great deal of time and resources into prosecuting capital cases and also calls many more witnesses than are generally called in a noncapital case. Telephone interview with Stuart Rappaport, Bureau Chief, Los Angeles Public Defender (Apr. 4, 1985).

[194] *See supra* note 131.

[195] *Id.*

[196] Telephone interview with Linda Lenker, Legal Administrator, Cal. Appellate Project (Feb. 28, 1985).

[197] *Id.*

[198] If the 325 cases divide the $4,000,000 provided under CAL. PENAL CODE § 987.9 (West Supp. 1985), each case would receive $12,307.69 from the state to prepare and present the defense.

[199] Comments on earlier draft from Michael Millman, Executive Director, Cal. Ap-

The $4 million appropriation does not include defense attorney time or prosecution expenses — all expected to be paid by the county.[200] The potential expenditure for a death penalty trial caused one California county to reject the death penalty as a possible punishment for the defendant.[201] The county's board of supervisors voted that the county could not afford to prosecute a death penalty case.[202] That county's concern about death penalty expenses has been echoed by others throughout the country. When New Jersey adopted a death penalty statute in 1982, it was estimated that prosecuting death penalty cases would cost the state $16 million a year.[203] According to the defense coordinator of the capital punishment cases, in August, 1983, New Jersey's public defender's office was budgeting $102,000 for each of its fifty-two pending capital cases.[204] The Maryland Public Defender asserts that ninety percent of its office's overexpenditures are due to death penalty cases.[205] As evidence of the magnitude of a death penalty case and its concomitant costs, a Maryland law firm that accepted a death case on a *pro bono* basis worked for eleven months (1817 hours of services rendered) on the case. Had the state been charged, the bill would have been $156,462.[206] The Ohio Public Defender estimated that Ohio's 1981 death penalty statute would cost the defender's office approximately $1.5 million annually.[207] An Oregon attorney estimated that defense cost for a death penalty case in Oregon would be approximately

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pellate Project (Mar. 28, 1985) (copy on file with *U.C. Davis Law Review*); interview with James Thomson, Attorney, Sacramento, Cal. (Apr. 5, 1985).

[200] *See* Corenevsky v. Superior Court, 36 Cal. 3d 307, 314, 682 P.2d 360, 363, 204 Cal. Rptr. 165, 168 (1984) (appointment of second defense counsel not encompassed within Penal Code § 987.9 funds); Keenan v. Superior Court, 31 Cal. 3d 424, 430, 640 P.2d 108, 111, 180 Cal. Rptr. 489, 492 (1982).

[201] *See* Corenevsky v. Superior Court, 36 Cal. 3d 307, 314, 682 P.2d 360, 363, 204 Cal. Rptr. 165, 168 (1984) (because Imperial County Board of Supervisors refused to pay for a second defense counsel, superior court judge ordered that the prosecutor may not seek the death penalty).

[202] *See* San Diego Tribune, Dec. 3, 1982, at B-12, col. 3 (One member of the board of supervisors stated "[w]e're already borrowing $6 million to pay our people's salaries. Should we lay off employees to pay for a criminal's defense?").

[203] *See* Amicus Curiae Brief of Boston Bar Association at 67 n.21, Commonwealth v. Colon-Cruz, 393 Mass. 150, 470 N.E.2d 116 (1984) (copy on file with *U.C. Davis Law Review*).

[204] *Id.*

[205] *See* OPERATIONAL OVERVIEW, *supra* note 138, at 1.

[206] *See* Amicus Curiae Brief of Boston Bar Association at 68 n.21, Commonwealth v. Colon-Cruz, 393 Mass. 150, 470 N.E.2d 116 (1984) (copy on file with *U.C. Davis Law Review*).

[207] *Id.*

$700,000.[208]

A constitutional death penalty process requires an enormous expense because procedures must scrupulously be followed, and the punishment demands an exactness when the sentencer decides upon whom it will be imposed. The procedures, safeguards, and goal of exactness follow the defendant through the appeals process.

C. Appeals Process

At the end of the trial process, a defendant condemned to death receives an automatic appeal to the state supreme court.[209] In *Gregg v. Georgia*,[210] the Court concluded that the statutorily required state supreme court review of every death sentence "serves as a check against the random or arbitrary imposition of the death penalty."[211] The numerous errors in death penalty trials[212] warrant the constitutional safeguard of state supreme court review, because the review helps ensure that the penalty imposed stays within the parameters of super due process and within the eighth amendment's mandate of prohibiting punishments that by their arbitrary and capricious imposition are cruel and unusual. The result of the review in a significant percentage of cases is a reduction of the sentence to life, a remand for resentencing, or a reversal.[213]

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[208] *Id.*

[209] *See* Jurek v. Texas, 428 U.S. 262, 276 (1976); Proffitt v. Florida, 428 U.S. 242, 258 (1976); Gregg v. Georgia, 428 U.S. 153, 204 (1976).

[210] 428 U.S. 153 (1976).

[211] *Id.* at 206; *see, e.g.*, Note, *Constitutional Procedure*, *supra* note 52, at 733 (defendant's automatic appeal to state supreme court corrects error and prejudice in capital sentencing); *see also* Adelstein, *Informational Paradox and the Pricing of Crime: Capital Sentencing Standards in Economic Perspective*, 70 J. CRIM. L. & CRIMINOLOGY 281, 296 (1979) (appellate court's role is clear in evolutionary process of capital sentencing).

[212] *See, e.g.*, Kaplan, *supra* note 130, at 573-74 (reversal in capital cases far greater than in noncapital cases generally due to number of issues in capital cases, greater complexity, courts' increased willingness to disturb verdict rather than affirm on ground justice was done, scrupulous attention to procedure, and court's ambivalence towards death penalty).

[213] *See* Bedau, *American Attitudes Toward the Death Penalty*, in THE DEATH PENALTY, *supra* note 1, at 68 (over 2000 death sentences vacated since 1967 on constitutional grounds alone); Greenberg, *supra* note 78, at 918 (capital case reversal rate is approximately 60%; noncapital federal criminal judgment reversal rate of appealed cases is 6.5%; California reversal rate for all felony convictions is .8%); Sacramento Bee, Mar. 20, 1985, Pt. A, at 16 (in California, the state supreme court has reversed 27 of the 30 death penalty cases decided since the 1977 death penalty law); Sacramento Bee, June 6, 1985, Pt. A, at 1, col. 1 (California Supreme Court reversed death

A typical capital appeal takes approximately 800-1000 attorney hours.[214] In California, at the present compensation rate of $60 per hour for court appointed defense attorneys, the direct appeal will cost approximately $48,000-$60,000. This amount does not include the attorney's expenses for travel, photocopying, or investigation for habeas corpus petitions.[215] Nor does the cost include the attorney general's expenses or the court's time. The direct appeal must also be viewed in terms of its impact on the state supreme court.[216] The defense and the prosecution prepare extensive briefs, and the trial proceeding transcripts are voluminous.[217]

A final judgment by the state supreme court affirming a penalty of death far from ends the defendant's challenge of his conviction or sentence. As one recent study on the cost of capital litigation concluded, "a permanent and indispensable feature of capital litigation involves the review of constitutional, discretionary questions at a *minimum* of ten state and federal levels."[218] The trial process and state supreme court

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sentences in four cases — three of the decisions were unanimous); *Death Row on Trial*, N.Y. Times, Nov. 13, 1983, § 6 (Magazine), at 80, 112 (In Florida, trial judges have overridden jury's recommendation for life and sentenced defendant to death in 82 murder trials. The Florida Supreme Court has ruled on 60 of these cases. In 45 cases, either the sentence was reduced to a life sentence, or the case was reversed and remanded to the trial court for further proceedings).

[214] Telephone interview with Michael Millman, Executive Director, Cal. Appellate Project (Apr. 1, 1985); *see* Sacramento Bee, Apr. 21, 1985, at A11, col. 3.

[215] Telephone Interview with Michael Millman, Executive Director, Cal. Appellate Project (Apr. 1, 1985).

[216] *See, e.g.*, L.A. Times, Sept. 25, 1984, Pt. I, at 16, col. 1 (According to Justice Lucas of the California Supreme Court, "[t]he death penalty is consuming an ever greater share of the high court's attention — to the point where it threatens to take all the justices' time."); *Death Row on Trial*, N.Y. Times, Nov. 13, 1983 § 6 (Magazine), at 80, 112 (the Florida Supreme Court spends at least one-third of its time on death cases).

[217] *See, e.g.*, L.A. Times, Sept. 25, 1984, Pt. I, at 16, col. 1 (Justice Lucas of the California Supreme Court noted that a recent death penalty brief, not even among the most massive, weighed 3 pounds, 13 ounces, and involved 32 volumes of trial transcript); *see also* OPERATIONAL OVERVIEW, *supra* note 138, at 6 (fiscal year cost increase of trial transcripts due principally to death penalty cases); *see also* L.A. Daily J., Nov. 24, 1981, at 4, col. 3 (trial record is generally 4000 pages or more; opening brief averages 200 pages).

[218] CAPITAL LOSSES, *supra* note 117, at 7 (emphasis added). The levels of review may include, for example: A writ of certiorari to the Supreme Court; post-conviction proceedings such as evidentiary hearings to vacate the judgment or set aside the sentence; review by the state supreme court of adverse rulings in the post-conviction proceedings; petition for writ of habeas corpus to the United States District Court; appeal of an adverse determination of the writ to the federal court of appeals; petition for a

review merely constitute the first two steps in the process. If the state supreme court affirms the death sentence, the defendant has several post-conviction remedies available to further challenge his death sentence. Most capital defendants pursue all avenues available.[219] A death row inmate has every incentive to pursue post-conviction relief.[220] First, the appeals and writ process results in a number of reversals or remands for sentencing.[221] According to an American Bar Association report, federal circuit courts have ruled for the defendant in at least twenty-eight of thirty-six capital cases since 1976.[222] Second, the pending post-conviction proceedings extend the inmate's life. In the interim, new evidence may prove the inmate's innocence, or legal developments may render his death sentence unconstitutional.[223]

Generally, the defendant first seeks United States Supreme Court review by writ of certiorari.[224] Preparation of the petition takes many hours.[225] One recent study concluded that when the Supreme Court grants a hearing, the entire process, that is, the research, certiorari petition, briefs, and oral argument preparation can take approximately forty-six percent of an attorney's work year.[226] Another critical post-conviction remedy available to the capital defendant is the writ of habeas corpus. Habeas corpus relief is available at both the state and federal level.[227] Federal habeas corpus relief requires that the defendant

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rehearing en banc from a negative ruling in the court of appeals; petition for writ of certiorari to the Supreme Court to review a negative ruling in the court of appeals.

[219] *See, e.g.*, Kaplan, *supra* note 130, at 573.

[220] *Id.* (the time the review takes lengthens the time the death row defendant can live; the reversal rate is far greater than for noncapital (even murder) cases). The need for pursuing post conviction relief in these difficult, emotionally charged cases was well illustrated in the case of James C. McCray. McCray was on Florida's death row for eight years. The Florida Supreme Court took almost five years to review and affirm his sentence. His state-appointed clemency attorney was incompetent. Two weeks before his scheduled execution, a private defense attorney took the case, copied the ten volume record from the Attorney General's office (the defense record disappeared with the clemency attorney) and discovered that the trial judge made an error when instructing the jury. Six days before the appointed execution time, the Florida Supreme Court ordered that McCray be given a new trial. L.A. Daily J., Aug. 27, 1982, at 5, col. 3.

[221] *See supra* note 213 and accompanying text.

[222] *See* Sacramento Bee, Apr. 21, 1985, at A11, col. 3.

[223] *See supra* notes 66-73 and accompanying text.

[224] *See* Kaplan, *supra* note 130, at 573; CAPITAL LOSSES, *supra* note 117, at 21.

[225] A petition for writ of certiorari to the Supreme Court may take as many as 50 hours to prepare. Comments on earlier draft from Michael Millman, Executive Director, Cal. Appellate Project (Feb. 11, 1985) (copy on file with *U.C. Davis Law Review*).

[226] *See* CAPITAL LOSSES, *supra* note 117, at 22.

[227] *See id.* at 8 n.26 (theoretical model of capital case proceedings); *see also*

demonstrate that his imprisonment violates the United States Constitution.[228] When filing for a writ of habeas corpus, the defendant may introduce evidence to support his version of the facts because state court factual findings are only presumptively valid.[229] Additionally, federal courts may reconsider prior rulings of law by state courts.[230] If the defendant's petition for a writ is denied, he may appeal[231] or file a new petition for a writ of habeas corpus. However, a defendant's failure to raise a claim in the previous habeas corpus proceeding may bar him from litigating the claim in a subsequent proceeding, if the court determines that there has been an "abuse of the writ."[232] As the Court permits the state to take a life only after scrupulously following constitutional procedure, the financial cost of permitting numerous habeas claims pales when compared to the alternative social and moral cost of an erroneous and irrevocable execution.

Appellate and post-conviction costs include numerous *pro bono* hours expended by private law firms. Most of these firms enter the litigation close to the appointed time of execution, after all state proceedings have been exhausted. One firm that sought post-conviction relief in four capital cases estimated the costs of each case to the firm as: (1) $88,785 in out-of-pocket disbursements and $312,579 in attorney hours in a case that is still pending; (2) $48,909 in out-of-pocket disbursements and $138,858 in attorney hours; (3) $20,752 in out-of-pocket disbursements and $116,787 in attorney hours; and (4) $20,038 in out-of-pocket disbursements and $138,101 in attorney hours.[233]

The dollars and cents statistics of a constitutionally imposed death

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Goldberg, *The Supreme Court Reaches Out and Touches Someone—Fatally*, 10 HASTINGS CONST. L.Q. 7, 13 (1982) (federal habeas corpus as a safeguard of defendant's constitutional rights is still preserved). For example, in California, violation of certain fundamental procedural rights may be grounds for issuance of a writ of habeas corpus regardless of the state of the evidence or whether the claims were made on direct appeal. *See* J. SMITH & M. SNEDEKER, THE CALIFORNIA STATE PRISONERS HANDBOOK 328-29 (1982).

[228] 28 U.S.C. § 2254(a) (1982).

[229] *Id.* § 2254(d).

[230] Neil v. Biggers, 409 U.S. 188, 190-91 (1972).

[231] 28 U.S.C. § 2253 (1982).

[232] *Id.* § 2255, Rule 9(b). It has been suggested that an exception to the bar be made for capital defendants, as procedural errors should not preclude a death sentenced defendant from pursuing constitutional claims. *See* Batey, *Federal Habeas Corpus Relief and the Death Penalty: "Finality With a Capital F"*, 36 U. FLA. L. REV. 252, 271-72 (1984).

[233] Telephone interview with Jay Topkis, Attorney, Paul, Weiss, Rifkind, Wharton & Garrison, New York City (Mar. 8, 1985).

sentence are overwhelming. However, to minimize the risk of arbitrary and capricious imposition of death, a costly execution process is unavoidable.

III. Implications of the Death Penalty on the Criminal Justice System

Financial considerations must play a role in criminal justice administration. The criminal justice system, like any system, has a finite source of funds. These funds will be used to achieve the system's goals and will inevitably define the types of goals that can be achieved.[234] One goal of the criminal justice system is crime prevention. Another is punishment.[235] A third goal is to prevent false convictions and disproportionate punishments.

Part II presented an overview of the costs of a constitutional state-imposed execution system. The costs are astronomical, although necessary. An expedited capital punishment process invites the risk of error and caprice.[236] Any attempt to modify the capital process must confront the constitutional recognition that death is different.[237] As one author so aptly stated, "[w]e must be careful not to imitate the village that took down the Danger—Curve Ahead sign on its road because nobody in

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[234] *See, e.g.*, Harrell, *The Underfunded Commitment to Justice*, 69 A.B.A. J. 528 (1983).

[235] Punishment is one of society's means of controlling crime and protecting itself. *See* McGee, *Capital Punishment as Seen by a Correctional Administrator*, 28 Fed. Probation, June 1964, at 11, 15 (society uses the criminal law to protect itself, and criminal law uses punishment to inhibit conduct detrimental to society); Tropman & Gohlke, *Cost/Benefit Analysis — Toward Comprehensive Planning in the Criminal Justice System*, 19 Crime & Delinq. 315 (1973).

[236] *See* Coleman v. Balkcom, 451 U.S. 949, 953 (1981) (Court must beware of novel procedural shortcuts resulting in constitutional error) (Stevens, J., concurring in memorandum decision).

[237] *See* Gardner v. Florida, 430 U.S. 349, 357-58 (1976) (Five members of the Court expressly recognized that death is a punishment different from any other that may be imposed. "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.") (opinion of Stevens, J.); *see also* Note, *The Right of Confrontation and Reliability in Capital Sentencing — Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982)*, 20 Am. Crim. L. Rev. 599, 604 (1983) (some judges conclude that the Court's modification of constitutional requirements to impose death renders death penalty a procedural impossibility); Note, *The Impact of a Sliding Scale Approach to Due Process on Capital Punishment Litigation*, 30 Syracuse L. Rev. 675, 681 (1979) (Court has indicated due process test for capital sentencing procedures is a function of "evolving standards of procedural fairness in a civilized society," a requirement not applied in noncapital cases) (quoting *Gardner v. Florida*, 430 U.S. at 357).

years had gone off the curve."[238]

A system for achieving society's goals of preventing crime while providing a consistent and evenhanded punishment system requires wise use of the resources available to the administration of justice. However, maintaining a system with capital punishment deviates from and distorts these goals. Capital case litigation constitutionally requires that super due process be scrupulously followed.[239] Concomitantly, a capital trial demands a disproportionate amount of time by judges, prosecuting attorneys, defense attorneys, juries, and courtroom and correctional personnel. The demands made upon the legal system translate into an unparalleled financial and emotional[240] toll. Consequently, rather than providing a means of effectively adjudicating the law and combating crime, the death penalty's impact upon the administration of justice runs counter to its alleged goals.[241] The costly, time consuming, contro-

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[238] Kaplan, *supra* note 130, at 576.

[239] *See supra* notes 27-30 and accompanying text.

[240] In United States v. Harper, 729 F.2d 1216, 1223 (9th Cir. 1984), the court stated: "[E]nduring a trial that entails the possibility of a death penalty imposes a hardship "different in kind" from enduring the discomfiture of any other trial. The emotional stress and strain of a trial in a capital case are extreme in character and *sui generis*. We consider the ordeal of undergoing such a trial truly a substantial hardship."

[241] Capital punishment's proposed "benefit" of deterrence has been extensively researched and criticized. *See, e.g.*, Bailey, *Imprisonment v. the Death Penalty as Deterrent to Murder*, 1 LAW & HUM. BEHAV. 239 (1977); Bedau, *Deterrence: Problems, Doctrines, and Evidence*, in DEATH PENALTY, *supra* note 1, at 93-103; Bowers & Pierce, *Deterrence or Brutalization: What Is the Effect of Executions?*, 26 CRIM & DELINQ. 453 (1980); Zeisel, *The Deterrent Effect of the Death Penalty: Facts v. Faith*, in THE DEATH PENALTY IN AMERICA, *supra* note 1, at 116. *But see* Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life or Death*, 65 AM. ECON. REV. 397 (1975). Ehrlich's study has been criticized, and studies utilizing his methodology have failed to duplicate his results. *See, e.g.*, Baldus & Cole, *A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment*, 85 YALE L.J. 170 (1975); Bowers & Pierce, *supra* at 463; Bowers & Pierce, *The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment*, 85 YALE L.J. 187 (1975). The other significant proffered "benefit" is retribution. "In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct . . . . 'The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law . . . .' " Gregg v. Georgia, 428 U.S. 153, 183 (1976) (Stewart, J., quoting from his concurring opinion in *Furman*, 408 U.S. 238, 308 (1972)); *see, e.g.*, Gibbs, *The Death Penalty, Retribution and Penal Policy*, 69 J. CRIM. L. & CRIMINOLOGY 291 (1978); Pugsley, *A Retributivist Argument Against Capital Punishment*, 9 HOFSTRA L. REV. 1501 (1981); Warr & Stafford, *Public Goals of Punishment and Support for the Death Penalty*, 21 J. RE-

versial, and devastating process of capital punishment drains the criminal justice system of energy and resources that the system could otherwise direct toward achieving its goals.

What are the alternatives for the criminal justice system? An alternative punishment exists — life imprisonment. In 1982, the Director of the Michigan Department of Corrections stated that the argument that capital punishment is needed for society's safety will not withstand scrutiny; life imprisonment is as adequate for that purpose.[242] Currently, the cost of housing an inmate in prison is approximately $14,254 per year.[243] A Florida study found that the average age of persons sentenced to death was 30.8 years.[244] If an inmate lives to age sixty, multiplying the cost per year of life imprisonment by thirty years may give a rough estimate of the cost of this alternative punishment. Similarly, capital punishment costs, from the charging decision through the appeals, may be estimated. Conclusions are difficult given the variables and uncertainty of factors. For example: the cost increase due to decreased plea bargaining; whether the attorney chooses to conduct sequestered voir dire; or whether the attorney effectively investigates the capital defendant's background, are critical factors that affect the total amount, yet cannot be accurately estimated. Even with the uncertainties, assuming that the defense attorney will effectively prepare the case, pursue pretrial motions, thoroughly investigate and prepare for

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SEARCH CRIME & DELINQ. 95 (1984); Comment, *Retribution Exclusive of Deterrence: An Insufficient Justification for Capital Punishment*, 57 S. CAL. L. REV. 199 (1983). In fact, many death penalty proponents consider retribution alone a sufficient justification for the death penalty. *See* Vidmar & Ellsworth, *supra* note 34, at 1256-57 (54% of those who favored capital punishment stated they would favor it even if it did not deter); Warr & Stafford, *supra*, at 98-104 (persons who view retribution as the most important reason for punishment overwhelmingly favor capital punishment). However, retributionists may want to consider the means, given the greater resources that would be available if life imprisonment were the ultimate penalty. *See, e.g.*, Pugsley, *supra*, at 1514 (retribution theory seeks to achieve justice and reaffirm community rights and rule system); Comment, *Retribution Exclusive of Deterrence: An Insufficient Justification for Capital Punishment*, 57 S. CAL. L. REV. 199, 206-07 (1983) (retribution theory requires that the undeserving not be punished, and that punishment must be imposed upon those who deserve it to return society to a people equal in satisfactions). *See also* Tropman & Gohlke, *supra* note 235, at 321 n.10 (although cost-benefit analysis does not include the "political costs and benefits," its importance and significance come from providing alternatives for the worst projects in a system).

[242] *See* L.A. Daily J., Oct. 12, 1982, at 4, col. 3.

[243] Cost of housing inmate at San Quentin for one year is $14,254. Telephone interview with Department of Corrections staff services analyst, Sacramento, Cal. (Feb. 19, 1985).

[244] *See* CAPITAL LOSSES, *supra* note 117, at 23 n.61.

the penalty phase, and that the appeal and post-conviction remedies are sought, a minimal estimate for each execution is $600,000.[245] The cost of death row security additionally increases the cost.[246]

Life imprisonment saves the criminal justice system's resources. The number of pretrial motions filed in a noncapital case is one-half or less than the number filed in death penalty cases.[247] There is no bifurcated proceeding. The investigation process is more limited, as it is generally confined to issues of the defendant's guilt. In noncapital cases, mitigating circumstances and extensive investigation of the defendant's background do not play the role they do when determining whether a defendant lives or dies. The time and expense that the death penalty process takes from defense attorneys, district attorneys, and judges could be channeled elsewhere. Assuming the ratio of reversals and remands in noncapital to those in capital cases remains constant, the post-trial proceedings will substantially decrease.[248]

A less costly constitutional process for imposition of the death penalty does not exist. The minimum constitutional safeguards developed for death penalty sentencing were established by the Court to prevent the arbitrary and capricious application of death. Economizing capital punishment is unconstitutional. In a criminal justice system with inherent discretion, the constitutional mandate that death be imposed regularly and evenhandedly appears to be unachievable.[249]

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[245] This estimate reflects the minimum cost because of the significant incalculable increase due to limited plea bargaining. The $600,000 estimate was calculated as follows: (1) $12,000 for experts and investigation. *See supra* notes 193-98 and accompanying text. (2) $17,330 for pretrial motions: $10,930 for courtroom time (using an estimate of one week), *see supra* note 160 and accompanying text; and $6400 for attorney time — figured at $40 per hour for the district attorney and for the public defender, estimating a two-week preparation. (3) $87,400 *increase* for *voir dire*, *see supra* note 174 and accompanying text; and $6400 for attorney time estimating a two-week *voir dire*. (4) $65,580 *increase* for courtroom trial time, *see supra* note 177 and accompanying text; $12,800 for attorney time estimating a one-month trial. (5) $100,000 for estimated appeal costs, *see supra* notes 214-17 and accompanying text. (6) $221,202 for post-conviction remedies; *see supra* text accompanying note 233, figure estimated is the average of the cases listed. (7) $64,143 for estimated four and one-half year stay on death row, *see supra* text accompanying note 243; *see, e.g.*, Streib, *Executions Under the Post-*Furman *Capital Punishment Statutes: The Halting Progression from "Let's Do It" to "Hey, There Ain't No Point in Pulling so Tight"*, 15 RUTGERS L. REV. 443, 447-75 (1984) (average stay on death row is approximately 4.5 years).

[246] *See* CAPITAL LOSSES, *supra* note 117, at 23 (estimating that the expense of death row security can increase the cost by as much as $15,000 annually).

[247] *See supra* note 117 and accompanying text.

[248] *See supra* notes 212-13 and accompanying text.

[249] *See, e.g.* Greenberg, *supra* note 78, at 914 (*Furman* stands for the proposition

A moral and just society should not want to expedite a process that would lead to the execution of the innocent or the use of the death penalty in cases not warranting such a harsh penalty. The Constitution does not permit a process that is vulnerable to caprice or mistake when the result is death. Maintaining a constitutional death penalty process results in astronomical costs — both morally and financially — for the criminal justice system.

CONCLUSION

A criminal justice system that includes the death penalty costs more than a system that chooses life imprisonment as its ultimate penalty. Because the penalty is death, the Constitution requires additional procedural safeguards to protect the defendant and to ensure a fair system. These safeguards, formulated and designed specifically for capital trials, are costly. The argument that the death penalty costs less to punish than does life imprisonment is erroneous. Alternatives exist to punish the convicted defendant and protect society. When our "standards of decency" evolve to the point that the death penalty is considered per se cruel and unusual, or when we recognize the inability of the system to fairly or evenhandedly impose death,[250] the penalty of death will be replaced with life imprisonment. Justice will be served, society will be protected, the criminal justice system will be given a reprieve, and the state will not kill those few who are arbitrarily and capriciously chosen.

Margot Garey

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that capital punishment can be upheld only if it is applied regularly and evenhandedly); Krivosha, Copple & McDonough, *A Historical and Philosophical Look at the Death Penalty — Does It Serve Society's Needs?*, 16 CREIGHTON L. REV. 1, 37 (1982) (experience discloses that under present standards, goal of imposing death penalty in nondisciminatory manner nearly impossible to meet).

[250] For a full discussion about the inherent nature of caprice and mistake in the imposition of the death penalty, see C. BLACK, *supra* note 2.

APPENDIX

District Attorney Questionnaire

1. Approximately how many more pre-trial motions are filed by the defense, and therefore need a response, in a capital case, as compared to a noncapital murder case?

2. Please list some of the motions that you respond to, which although not unique to capital cases, are more predominantly filed in capital cases.

3. Are the standard motions that you respond to in capital cases more complex and more time consuming?

4. If possible, please estimate the additional number of hours spent in preparing your response to the standard motions for capital trials.

5. Please approximate any differences in numbers of hours for investigations between a capital and a noncapital murder case.

6. Are psychiatric examinations more commonly used in at least some aspect of the capital trial, as compared with a noncapital murder case?

a. If psychiatric testimony is introduced by the defense, how often does the prosecution and/or the court introduce its own psychiatric evaluation?

7. If you use experts, is the quality of the experts the same or better than experts used in noncapital murder cases?

8. Do you attempt to obtain the "best" expert witnesses?

9. Please list the types of expert witnesses which you may use that are unique to capital cases.

10. In your state, is individual *voir dire* generally conducted in a capital case?

11. Is prospective juror questioning generally longer in capital cases?

a. If so, please estimate by number of days the approximate increase in time for empaneling the jury, as compared with a noncapital murder case.

12. Assuming the same case were tried both as a capital and as a noncapital case, approximately how many more days would the trial take if it is tried as a capital case.

13. a. Please estimate the average number of hours spent on a capital appeal.

b. Please estimate the average number of hours spent on a noncapital appeal.

14. Approximately how many days does it take one attorney to prepare a response to a death row defendant's writ of certiorari to the

United States Supreme Court?

15. General comments and impressions. (Please feel free to use back of questionnaire.)

Public Defender Questionnaire

1. Approximately how many more pre-trial motions are filed in a capital case, as compared to a noncapital murder case?

2. Please list some of the defense motions, which although not unique to capital cases, are more predominantly filed in capital cases.

3. Are the standard motions filed in capital cases more complex, and more time consuming?

4. If possible, please estimate the additional number of hours spent in preparing the standard motions for capital trials.

5. Please approximate any differences in number of hours for investigations between a capital and a noncapital murder case.

6. Are psychiatric examinations more commonly used in at least some aspect of the capital trial, as compared with a noncapital murder case?

7. If you use experts, is the quality of the experts the same or better than experts used in noncapital murder cases?

8. Do you attempt to obtain the "best" expert witnesses?

9. Please list the types of expert witnesses which you may use that are unique to capital cases.

10. In your state, is individual voir dire generally conducted in a capital case?

11. Is prospective juror questioning generally longer in capital cases?

a. If so, please estimate by number of days the approximate increase in time for empaneling the jury, as compared with a noncapital murder case.

12. Assuming the same case were tried both as a capital and as a noncapital case, approximately how many more days would the trial take if it is tried as a capital case.

13. a. Please estimate the average number of hours spent on a capital appeal.

b. Please estimate the average number of hours spent on a noncapital appeal.

14. In what percentage of capital cases that you handle, are you likely to seek a habeas corpus hearing, in addition to appeal, as compared with noncapital cases.

15. Approximately how many days does it take one attorney to prepare a writ of certiorari to the United States Supreme Court for a capi-

tal case?

16. General comments and impressions. (Please feel free to use back of questionnaire.)