

Fiscal Considerations and the Death Penalty in Indiana

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The death penalty is one of the more contentious aspects of the system of criminal justice in the United States. Some evidence of this is the fact that states have made a range of decisions about the role of the death penalty. Some states have rejected the death penalty outright; others have it as a potential penalty that is rarely, if ever, used. At the same time, some states regularly charge defendants with the death penalty. Differences of opinion are sometimes strongly held about the morality of its use, its effectiveness as a deterrent, the fairness with which it is implemented, the appropriateness of various technological issues in how it is applied, among other concerns.

Within this broad landscape of issues, the focus of the current contribution is narrow: what are the fiscal issues related to the death penalty in Indiana? This question has several elements: the overall costs of the death penalty, who bears these costs, and whether there are policy reforms that could lead to improvements in implementation.

The broad view is that the death penalty is costly. Appropriately so, U.S. constitutional law and the laws of Indiana require protections, protections that are greater than those required in cases with lower maximum possible punishments. Weighing whether the costs are “worth it” is beyond the scope of this project. Rather, the goal here is to consider the costs themselves. This narrow focus should not be taken to suggest that the broader issues are not relevant. Instead, it is precisely because these other elements of the death penalty are so relevant that they generally inhibit consideration of narrower topics which are perhaps more amenable to policy analysis and even political consensus.

To begin such a discussion, it would be helpful to have an estimate of the overall costs of the death penalty in the state. When a defendant is charged with a capital offense, this immediately increases the costs for both the defense and the prosecution. Costs increase for every phase of the case: jury selection generally takes longer, more experts are involved, more attorneys and more attorney time are used to prepare the case, among others.

These costs have been analyzed carefully in other states, using a variety of economic and statistical approaches. For North Carolina, a detailed assessment in 1993 of the costs of judicial, prosecutorial, defense, and other costs found that adjudication costs were about \$325,000 higher than for a life sentence.¹ A recent analysis of capital prosecution in Maryland concluded that

¹ The study was conducted in 1993. The cost figure was adjusted to 2010 dollars. See Philip J. Cook, *The Costs of Processing Murder Cases in North Carolina*, Duke University, May 1993. This report further notes that many capital convictions do not result in execution. Using the rate

overall costs were on the order of \$1 million per death notice filed (indicating the intention to seek the death penalty).² And a different approach that involved directly measuring aggregate county expenditures in the 1980s and 1990s found that when counties experienced a capital trial, county spending increased an average of \$2 million. These costs were largely offset by increasing taxes.³

Comparable comprehensive studies do not exist for Indiana, but data on defense costs are available and provide a window onto the scope and character of the expense. The Indiana Public Defender Commission is the vehicle for sharing the costs of providing public defense for defendants in capital (and other) cases. The Public Defense Fund obtains resources from court fees and from the state's general fund which it uses to reimburse counties for 50% of their eligible expenses for providing defense counsel in capital cases. Because of its role in reimbursement, the Commission collects data on these costs.⁴ (Costs for prosecuting these cases are not reimbursed through the Commission.)

Several facts are apparent from the Public Defender Commission data that were obscured in the citations of average costs above. First, most counties have no death penalty defense expenses in most years. Second, the reimbursement levels range wildly – from several thousand to several hundred thousand per county per year. Capital cases vary in their complexity and in their length. Over the past decade, reimbursements from the Public Defense Fund have been on the order of ½ to ¾ million dollars per year.

To put these figures into context, recall that these reimbursements are for only 50% of the costs incurred. At the same time, these are for the full costs, and a non-capital murder trial will also require considerable resources. Furthermore, note that these are only for defense costs. The Washington Bar Association conducted surveys of defense attorneys and prosecutors as a way to estimate the additional cost of a capital trial. They found that both groups estimated their costs at between \$200,000 and \$250,000 greater than the costs of non-capital murder trial. Because capital cases involve other types of expenses as well – for judges, courtrooms, secure confinement during the (often lengthy) trial, etc., these values underestimate the aggregate costs.

There are two existing estimates of the additional cost of the death penalty in Indiana relative to an alternative sentence of life in prison. As part of a review of capital sentencing in Indiana in 2002, researchers estimated that costs for capital cases were approximately 35% greater than for cases with a maximum sentence of incarceration.⁵ An alternate estimate is included in the Fiscal

of execution in North Carolina at the time, the additional costs are on the order of \$3 million per execution.

² John K. Roman, Aaron J. Chalfin, Carley Knight, “Reassessing the Cost of the Death Penalty Using Quasi-Experimental Methods: Evidence from Maryland,” *American Law and Economics Review*, 2009.

³ Katherine Baicker, “The Budgetary Repercussions of Capital Convictions,” *Advances in Economic Analysis and Policy*, 2004.

⁴ The Commission's web address is <http://www.in.gov/judiciary/pdc/>. Reimbursement data is available at <http://www.in.gov/judiciary/pdc/finance.html>.

⁵ Indiana Criminal Law Study Commission, *The Application of Indiana's Capital Sentencing Act* January 10, 2002, pp.135-155.

Impact Statement for a piece of related legislation. For cases with an original capital charge, the overall costs were more than twice those of cases with a maximum charge of life without parole (\$230,000 to \$102,000).

All of these studies reveal that the costs of capital cases are high, and higher than for murder cases without a capital charge. It is expensive to prosecute and punish criminal offending, especially for murder cases. Nonetheless, each of these studies, with their various approaches to estimating the overall impact, finds that capital cases are more expensive. They also conclude that most of the additional cost comes during the trial phase, not from appeals.

The cost of a capital or other high profile or particularly heinous murder case can be particularly difficult for small counties to manage. For counties with large budgets, the costs are more predictable as well as more easily absorbed when they are unexpected. The Public Defense Fund helps to smooth out these costs for counties. Nevertheless, the sharing of the expenses through this fund covers just 50% of the out of pocket costs for capital defense, leaving county budgets responsible for the other half as well as local contributions for prosecution, corrections, and the judiciary. As the national study showed, these local costs are generally covered by increasing revenues at the local level.

At the state level, the Public Defense Fund prioritizes capital defense cost. When requests for reimbursement exceed the Fund's budget, then the non-capital reimbursements are pro-rated in accordance with the shortfall. In fiscal year 2009-10, non-capital cases received the full 40% share. However, in the previous 8 years the reimbursement was pro-rated, from a low of 25% in 2003-04 to values in the upper 30 percents in more recent years.⁶ Therefore, one immediate consequence of high costs of capital defense is lower reimbursements for non-capital cases. Less immediately, these costs must be covered either by increasing taxes or reducing expenditures in other areas of law enforcement or the general state budget.

There are several potential avenues for reform to reduce the fiscal burden of the death penalty, all of which have been adopted by one or another state. Several states have recently dropped the death penalty altogether. Costs were one element of the public debate in these states, but it is impossible to parse the precise role that costs played in the final outcome. Some states have opted for more parsimonious use of capital indictments. This approach can reduce the overall cost of the death penalty for a state but at the same time any fixed costs of maintaining death row and a set of death-qualified attorneys for the rare cases results in higher per-case costs as the number of cases declines. Some states without cost-sharing between the state and counties have considered implementing it, and Indiana could certainly consider different sharing rules or funding mechanisms for the Public Defense Fund.

Finally, Indiana could develop stricter limitations on expense reimbursement. To do so would require development of prospective limits or more aggressive audit procedures after the fact. (The latter might be difficult for counties with few capital cases, if the county is then responsible for the full cost. Procedures to protect counties from this outcome could be crafted. For example, some states have considered a statewide screening function.) Prospective limits could be set, for example, on the number, type, or fees for expert witnesses. These types of limits are

⁶ Indiana Public Defender Commission, Annual Report 2009-2010.

frequently avoided due to concerns that such limits will threaten the case outcomes. Because of these concerns, the American Bar Association recommends against caps on attorney fees, for example, and other states have rejected cost-control measures for fear that they will be counterproductive. If capital convictions are overturned based on overly limited defense resources, then the policy to reduce costs has not been effective. This concern notwithstanding, the only way to make progress on the per-case costs of capital cases is to carefully consider how to draw some boundaries that reflect the quality and extent of an adequate defense in a capital case.

Any of these possible reforms will have consequences for law enforcement far beyond the case processing costs highlighted here. In addition, criminal justice reforms frequently have a series of expected and unexpected effects on other stages of the operation of the criminal justice system. Therefore, any work to define and implement boundaries on capital prosecution should be undertaken with participation of all parties in the planning process, and with cautious initial steps. Without these, it is unlikely that cost reductions will be realized.

In any environment, governments should work to ensure responsible expenditure of public resources. But in the current environment of dramatic fiscal retrenchment, this imperative is sharper than usual. The death penalty should not be immune to such scrutiny. This report is meant to provide some structure to these key elements of fiscal concern, none of which can be analyzed without regard to the larger context. The research reported here is intended merely as an initial input to the policy process in Indiana.