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Investigating the Costs of the Death Penalty in California

*Insights for Future Data Collection
from a Preliminary RAND Effort*

SUSAN S. EVERINGHAM

CT-300

February 2008

Testimony presented before the California Commission on the Fair
Administration of Justice on February 20, 2008

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1200 South Hayes Street, Arlington, VA 22202-5050
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Susan S. Everingham¹
The RAND Corporation

***Investigating the Costs of the Death Penalty in California:
Insights for Future Data Collection from a Preliminary RAND Effort²***

Before the California Commission on the Fair Administration of Justice

February 20, 2008

I appreciate the opportunity to appear before the Commission today to discuss the importance of quantitative data in making the difficult decisions required in the judicial system. In August of 2006, the California Commission on the Fair Administration of Justice (CCFAJ) approached the RAND Corporation seeking a study on the costs and administration of the death penalty in California. This was to be one of four death penalty studies commissioned by CCFAJ to assist in their deliberations. Given uncertainty regarding availability and access to data, RAND agreed to start by undertaking a feasibility study. After interviewing state-level participants and a small sample of county-level officials, we concluded that to collect the quantitative data necessary to generate defensible cost estimates for the death penalty would be much more difficult and more costly than we had originally envisioned, and that the proposed study was not feasible within the scope of the original timeframe and budget.

Our study, had we been able to pursue it, would have addressed many of the questions that are the focus of this hearing and we believe could have led to improvements in everyday judicial decisions. The study we proposed would have collected and analyzed data to: (1) document how the death penalty is administered in California; (2) determine how the administration of the death penalty drives the costs associated with it; (3) estimate the costs borne by state and local agencies associated with capital and other comparable cases; and (4) identify whether any reduction in public costs could be achieved without eliminating steps intended to guarantee the established rights of the accused.

Underlying any examination of the efficiency of the administration of the death penalty (or any public policy, for that matter) is an implicit yardstick: compared to what? Because of the “super due process” afforded death penalty defendants, the question is not so much whether capital

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cases are more expensive than other cases to prosecute, but rather the magnitude of the cost differential and, most importantly, the sources of any difference. Of greatest interest are innovations that can speed the process while maintaining its integrity. The goal of the study would have been to identify opportunities for reducing the cost of capital cases to the system, focusing on aspects such as the backlog of cases and cost shifting.

The study would have been based on two comparisons; first, how different counties administer the death penalty, and second, how death penalty cases compare to cases that result in a sentence of life without the possibility of parole (LWOP). In the first comparison, offenders in each county are subject to the same state laws but district attorneys may organize their prosecutorial processes differently, and in ways that could inform an analysis of efficiencies and costs. The second comparison could be limited by the possibility of significant differences in the kinds of cases that become capital cases. Yet by combining the two approaches, we believe it would be possible to isolate costs uniquely attributable to death penalty cases and to understand differential costs associated with the adjudication of capital and non-capital cases. In effect, the analysis would try to "hold constant" other county-specific factors such as size, caseload or case mix. The combination of the comparison to LWOP cases and the analysis of cross-county variation, especially regarding the time it takes to resolve death penalty cases, could have offered insight into ways to reduce the cost of the criminal justice system without adversely affect the integrity of the process.

In order to conduct the proposed study, RAND would have needed data on public (i.e., state and county) expenditures including direct and indirect labor costs for all participants in the adjudication process, including prosecutors, public defense attorneys, expert witnesses, investigators, support staff, judges and clerks, administrative assistants, bailiffs and court reporters. In addition, it would be important to establish the value of a day in a courtroom for all courts, from county courts up through the California Supreme Court. The study also proposed to collect data on jail and prison costs, looking at the length of time a defendant is incarcerated and jail and prison operating costs.

However, *a priori*, it was not at all obvious whether the potential data sources would be adequate to answer the questions at hand, or how difficult it would be for the RAND investigators to get access to those data. Therefore, the key objective of the feasibility study was to determine whether adequate data could be collected to answer the questions posed in the proposed study.

Given this background, I will limit the remainder of my remarks to the first question you have asked regarding data collection "Should reporting requirements be imposed to systematically

collect and make public data regarding all decisions by prosecutors in murder cases whether or not to charge special circumstances and/or seek the death penalty, as well as the disposition of such cases by dismissal, plea or verdict in the trial courts?”

RAND’s initial inquiries were focused on interviewing representatives from a sample of the agencies that play a role in the adjudication of capital and other comparable non-capital cases as a way of identifying the appropriate sources of agency information and administrative data, and of determining what hurdles we might face in collecting additional information directly from participants in the process. Although there are numerous local, state, and federal agencies that play a role in the process, we focused on the state and local-level players, as the CCFAJ’s mandate is limited to aspects of the system that are under state control. Moreover, for the feasibility study, we limited our focus to those agencies that play the most significant roles. These include the agencies responsible for prosecution, defense, the courts, and the correctional system.

At the state level, the key prosecutorial agency is the Office of the Attorney General. The state-level agencies that are involved in defending, or assisting in the defense of, the accused and convicted include the California Appellate Project (including both the appointed counsel administrator for the California Supreme Court on capital cases, as well as representatives of the appointed counsel administrators for the Appellate Districts), the Habeas Corpus Resource Center, and the Office of the State Public Defender. We interviewed officials at each of these agencies as part of the feasibility study. In addition, we consulted with a representative of the California Supreme Court who served as a source of information about the state-level appeals process.

At the local or county level, the Office of the District Attorney prosecutes these cases and the Office of the Public Defender provides defense counsel for the accused. For the feasibility study, we contacted these respective offices in one large county with a high rate of serious crime and high rate of seeking the death penalty, as well as the District Attorney’s Office of one other California county. For the purposes of this feasibility study, contacts with these key agencies were sufficient to establish likely obstacles to project success.

There are two kinds of approaches that could be employed to develop cost estimates, each employing different kinds of data. One is a “bottom-up” approach – one that develops estimates of the costs of each of the components of death penalty adjudication and then adds them up to arrive at a total cost. Another approach to generating cost estimates would be to undertake a statistical analysis of state and county budget data, and data on the number of death penalty

cases prosecuted by counties, and from these sources then infer the cost of a death penalty case.

The latter, the econometric or statistical approach, would involve collecting data about agency expenditures and the numbers of different types of cases over time and/or across jurisdiction. If the data provide adequate variation, and if the factors that affect the costs are captured, then the cost for each type of case can be imputed. However, we concluded that appropriate data were not available. For example, county budgets are not reported in a consistent fashion, and the spending information required by the analytical approach cannot easily be derived from the budget information that is more generally available. Moreover, this methodology does not lend itself to a comparison between death penalty and LWOP cases, which was inherent to our overall analytical approach.

In the bottom-up approach, each of the cost components (for each step of the adjudication process) must be considered separately. Some cost components could be estimated directly from agency budget and financial data, while other components would require primary data collection (e.g., obtaining labor and cost estimates by interviewing attorneys). Even where we can access agency budget and financial data, however, we have found that these data are not collected in a manner that would facilitate the cost comparisons we originally proposed to make.

Some agencies (such as the Habeas Corpus Resource Center and the California Appellate Project in San Francisco) deal only with death penalty cases. For these agencies, it would be relatively easy to determine their costs related to an average death penalty case – essentially, by dividing their annual budget by the number of death penalty cases they handled in that year. The marginal cost of a death penalty case would be determined similarly, after subtracting an estimate of the fixed costs associated with their role in maintaining a trained defense bar (e.g., resources to support and train other defense attorneys). Other agencies (such as the Office of the State Public Defender) focus primarily, although not exclusively, on death penalty cases. The resources allocated to other types of cases would need to be estimated, but since it is known to be a small fraction of the overall caseload, this estimate need not be terribly precise.

On the other hand, other agencies that are involved in the adjudication process are not organized or financed in a way that would facilitate our developing estimates of death penalty and non-death penalty cases, regardless of how those categories are defined. For example, both local prosecutors and public defenders are responsible for a mix of cases including capital and non-capital cases. This is true even at the appellate level: the district offices of the California Appellate Project handle appeals for the indigent for all non-death penalty cases, including crimes other

than homicide. Thus, cost estimates for the two types of cases (however defined) cannot be generated by the relatively simple process of dividing a budget line by a number of cases.

Instead, these costs must themselves be broken into their component parts. The costs associated with expenses (e.g., expert witness fees, outsourced investigation) can likely be derived from financial files, although we have been unable to identify a statewide data source that would make this an easy task. The lion's share of the cost, however, consists of the labor costs for attorneys. This component would be relatively easy to estimate if public agencies required their attorneys to keep track of how they spend their time as private firms do (for the purposes of billing their clients). According to representatives with whom we spoke, neither prosecution nor defense agencies maintain such records. Although we were in contact with only two districts for this feasibility study, it is our impression that few if any districts maintain such records, as they have no incentive to do so (and significant budget pressures that work to discourage such paperwork).

Or, if agencies organized their operations by type of case (e.g., a specific office or group responsible for capital cases), it would be possible to estimate labor costs by type of case by totaling the salaries of all the staff in the relevant office and dividing by the number of cases they handle. Our interviews indicate that this is not generally the case, even in a relatively large district where this kind of organization could conceivably be efficient. Instead, both prosecutor and defense agencies exploit the fact that their experienced attorneys can handle a variety of types of cases to ensure that the workload is distributed efficiently across staff resources.

Moreover, it appears unlikely that attorneys would be able to make any but the roughest possible estimates of the time they spend on particular types of cases because, according to our interviewees on both the prosecution and defense side, there is no such thing as a *typical* homicide case, thus limiting confidence in data collected. We were also told that attorneys often do work on multiple cases simultaneously, sometimes including a capital case, in large part because of the episodic pace at which most criminal cases proceed – although sometimes assignment to a capital case will result in reassignment of other cases, especially when the capital case is in trial. Attorneys are responsible for juggling multiple cases and manage the competing demands on their time by, for example, working (unpaid and undocumented) overtime and by limiting the time and effort they invest in less serious cases. One interviewee emphasized that a capital case may not in fact be considered the most serious case and thus the highest priority. The facts of the specific cases, including the circumstances of the victims, might very well dictate that a non-capital case demands greater attention. Consequently, the attorneys employed by public agencies would probably be unable to determine how much time they spent on a

particular case, especially once a significant amount of time had passed (e.g., more than a few months) since the case was active.

The consensus of those we interviewed was that an attorney would be able to determine the date on which a particular case was assigned and the duration of that case, but that estimates of how much actual time was spent on the case would be too rough to capture any variation within case type, or to permit any distinction between time spent on different phases of adjudication for the two different types of cases (i.e., death penalty versus LWOP cases). This suggests that the most appropriate method for establishing attorney costs would be a carefully designed time study, in which attorneys would be observed or asked to log the time they spent on each of their cases over a sufficiently long time period to capture the typical costs of LWOP and death penalty cases. Such a data collection effort would clearly exceed the timeframe originally envisioned for the proposed project.

Alternatively, second best might be a carefully designed survey of attorneys' estimates of the labor costs associated with capital and non-capital cases, but whether these data would be precise enough to differentiate *between* costs associated with the two types of cases cannot be predetermined. In addition, even an attorney survey would likely require the better part of a year to conduct and would cost considerably more than the sum available for the proposed study.

Furthermore, some concern was raised – from representatives on both the prosecution and defense sides, and at both the state and local levels – about whether data on ongoing cases could be made available for research purposes. Some stakeholders we interviewed suggested that some of the data we seek might not be publicly releasable. For example, we were told that information regarding the costs associated with expert witnesses was protected. Since such a large fraction of recent death penalty cases are ongoing (and will be until all appeals have been exhausted), this implies the possibility of legal limitation to our data access. The fact that participants would be reluctant to disclose cost information for strategic reasons in individual cases would complicate data collection and probably require some form of aggregation.

Acquiring data to make estimates on court costs could also prove to be an obstacle. We were told that the basic data on pre-conviction court costs are collected and publicly available. However, with respect to post-conviction court costs, the situation is more complicated. According to a representative of the California Supreme Court, the principal labor costs associated with court activities include hearing cases and writing opinions. The hearing costs could be established from court calendar records and information about salaries and budgets of the court system, but the latter costs (those related to written opinions) would be much more difficult to determine. While

there is a unit that focuses exclusively on death penalty cases (the Capital Central Staff), the justices also use their own staff to help with opinions in death penalty cases. As is the case with the local prosecutors and public defenders, the justices and their staff work on multiple cases simultaneously, they all work on a variety of cases, and they do not maintain records of the hours spent on particular cases. Therefore we would need to do primary data collection (e.g., structured surveys that would depend on individual recall) in order to establish estimates of the labor hours associated with particular cases or particular types of cases.

Finally, obtaining corrections data poses its own challenges. The county jails and state prison system house defendants and the convicted. The only data we would need from these agencies are duration of stay (by individual) and cost per day of incarceration. Pre-conviction, the duration of stay could be determined from the duration of the court proceedings. Post-conviction, the duration of stay is either the duration of the appeals process and incarceration until execution (if the death penalty has been imposed) or the sentence (if not imposed). Thus, the main datum we need is the cost per day of incarceration. Our inquiries to the California Department of Corrections have led us to conclude that although the average cost per day is widely publicized, detailed data about how cost per day *differs* between death row inmates and other serious offenders are not readily available.

We decided that the greatest challenge to collecting the quantitative data necessary to generate defensible cost estimates would be to generate estimates of the labor hours associated with specific types of cases. We believe this will be particularly true at the local level, but to some extent at the state level as well. Therefore, we concluded that neither the bottom-up nor the econometric approach would be feasible within the scope (i.e., time and budget) of the study under consideration.

Our pilot study did reveal one clear fact, endorsed by nearly everyone with whom we spoke: there are inefficiencies in the system that cause long delays and affect the rights of the accused. We strongly believe that a study like the one we discussed with the Commission could shine a light on how to address those inefficiencies, and thus we were disappointed that the study was tabled, a decision driven largely by the dearth of data.

Perhaps it goes without saying that a researcher like myself finds any dearth of data frustrating. However, my nearly twenty years at RAND have trained me to recognize the importance of understanding cost and efficiency to making good public policy. There are a variety of ways to remedy this deficiency. Possibilities include a study like the one we proposed, with adequate time and funding to be done carefully and thoroughly, and with the committed participation of all the

players in the system. The first step would be to develop and pilot test the survey instruments that could ultimately lead to relatively good cost estimates at the local level and in the appeals courts. Alternatively, data on labor hours and other costs associated with death penalty and other categories of cases could be collected on a regular basis by the local and state level agencies involved in the system. Although this would impose some administrative cost associated with establishing and operating such a data-collection system, it conceivably could facilitate not only research of the kind I have described to you today, but also other analyses by the management of the various agencies to maximize their efficiency. I am not prepared to make a recommendation regarding which of these options is preferable, as weighing the pros and cons of each approach would take some careful consideration and analysis. However, a study focused on developing a detailed description of the kind of routine data collection that could and should be established state-wide to support future cost analysis, as well as other needs of decision makers in the process, could be quite fruitful.

Many studies, at RAND and elsewhere, have considered these and other aspects of the death penalty system, including questions about racial disparity. These studies suffer from one serious obstacle: “the need to convert case characteristics into quantifiable variables that are unambiguous and amenable to statistical analysis. Coding rules must be developed to abstract data from case files, and there is no standardized set of rules for constructing variables.”³ Moreover, the process of abstracting data from case files is very time-consuming and expensive. Thus, the establishment of a system to regularly collect data related about the system, including those where race may play a role, such as the charging decisions, would facilitate analyses of the workings of the system.

In closing, I would like to say that our small effort on the death penalty for the Commission points to the potential value of systematically collecting more data on how the resources in the system are utilized, especially when studies that rely on intensive periodic data collection (e.g., retrospective surveys or prospective time-use data) are infeasible or insufficient.

This concludes my prepared remarks, which also reflect the position of my RAND colleagues and co-investigators Susan Ridgely and James Anderson. Now, I'd be pleased to answer any questions you may have.

³ Klein, Stephen P., Richard A. Berk, and Laura Hickman, *Race and the Decision to Seek the Death Penalty in Federal Cases*, RAND TR-389-NIJ, 2006.