THE KANSAS DEATH PENALTY DEBATE

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The death penalty has been fiercely debated in Kansas for more than ten years. During this period, the Kansas Legislature passed four bills that would have reinstated the death penalty. Former Governor Carlin, however, vetoed these bills. Last year, newly-elected Governor Hayden advocated the passage of a death penalty bill. The bill, which passed the House, was narrowly defeated by the Senate. Undoubtedly, a new death penalty bill will be introduced in the Kansas Legislature and the debate will continue.

Rather than take a position on capital punishment, this article surveys the death penalty debate. After briefly reviewing the constitutional aspects of the death penalty, it will analyze the primary arguments against the death penalty and examine the latest Kansas bill.

I. CONSTITUTIONAL ASPECTS OF THE DEATH PENALTY

The death penalty is a constitutional form of punishment. Under the eighth amendment punishment clause, a criminal sentence must be proportionate to the crime and comport with contemporary standards of decency.[1] The United States Supreme Court has consistently held that in murder cases the death penalty complies with these eighth amendment requirements.[2]

The Court has held that the death penalty is a proportionate sentence for deliberate murders. As the Court stated, the death penalty is an "extreme sanction suitable to the most extreme of crimes."[3] The Court also has held that the death penalty comports with contemporary standards of decency. After recognizing the death penalty's long history of acceptance in the United States, the Court, in 1976, found that it is "evident that a large proportion of American society continues to regard it as an appropriate and necessary criminal sanction."[4] To support this finding, the Court cited the fact

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[1] Gregg v. Georgia, 428 U.S. 153, 173 (1976).

[2] *Id.* at 176-78. In 1972, however, death penalty *procedures* were held unconstitutional. Furman v. Georgia, 408 U.S. 238 (1972). Only two Supreme Court Justices have ever written opinions stating that the death penalty is unconstitutional per se.

[3] *Gregg*, 428 U.S. at 187.

[4] *Id.* at 179.

that 35 states had death penalty statutes and that public opinion polls indicated that the majority of Americans favor the death penalty.

Today, support for the death penalty is even stronger. The number of states with death penalty statutes has increased to 37.[5] Furthermore, a 1986 Associated Press poll showed that 86% of Americans favor the death penalty.

Evidence of public support for the death penalty is relevant not only for constitutional purposes, but also in deciding whether Kansas should enact a death penalty statute. Opponents of the death penalty argue that it does not deter murder and that it will cost millions of dollars to implement. Death penalty proponents respond that the vast majority of legislatures and taxpayers would not support the death penalty if it was totally ineffective and extremely costly.

II. ARGUMENTS AGAINST THE DEATH PENALTY

Although death penalty debates typically focus on the morality issue, the death penalty opponents in Kansas made an essentially economic argument. They argued that the death penalty would cost the state millions of dollars. Furthermore, they argued that the death penalty does not deter murder. Thus, through a cost-benefit analysis the opponents claimed that the death penalty is not cost-effective. Although the deterrence and cost arguments were very persuasive, they do not withstand close scrutiny.

A. Deterrence

The United States Supreme Court, referring to premeditated murders, stated that "the death penalty *undoubtedly* is a *significant deterrent.*"[6] The Court has consistently recognized that the death penalty serves a valid social purpose by deterring murders.[7] This finding is based on sound legal principles and logical reasoning. Deterrence is a fundamental purpose of criminal law. The greater the punishment, the greater the deterrence.[8] This basic legal principle leads to the inescapable conclusion that for some types of murder the death penalty provides greater deterrence than a term of imprisonment.[9]

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[5] U.S. Department of Justice Bureau of Justice Statistics.

[6] *Gregg*, 428 U.S. at 185-86 (emphasis added).

[7] For example, the Court held that the death penalty should not be imposed upon an accomplice to a robbery felony-murder, who did not actually kill or intend to kill, because in that situation the death penalty would not serve as a deterrent. The Court reasoned that the death penalty should be imposed only in those situations in which it serves as a deterrent. Enmund v. Florida, 458 U.S. 782, 798-800 (1982).

[8] Most murderers, like most other criminals, certainly consider the likelihood of apprehension and the potential punishment when deciding whether to commit the crime.

[9] Although some murders are deterred by the death penalty, many types of criminal

A recent United States Department of Justice report unequivocally supports this analysis.[10] The report states that it is "clear that capital punishment has a deterrent effect."[11] After thoroughly analyzing the latest deterrence studies, the report finds that "the death penalty is the most effective deterrent for some kinds of murder"[12] and that "deterrence appears to be an undeniable fact of life."[13]

Opponents of the death penalty, citing their own statistical studies, disagreed with the Supreme Court and the Justice Department. Although their studies at best raised doubts as to the death penalty's deterrent effect, the opponents apparently were able to persuade many senators that the death penalty does not deter murder.[14] Thus, many of the senators were persuaded that there was no benefit to the death penalty.

Logically, this perception alone probably would have defeated the death penalty bill. The overwhelming public support for capital punishment,[15] however, required that the senators also find that the death penalty would be too costly to implement.

B. Cost

Opponents argued that the death penalty would cost millions of dollars per year to implement. Although the opponents offered several estimates, the most comprehensive estimate was $7 million per year.[16] Careful analysis, however, reveals that the opponents grossly overestimated the death penalty cost.

The opponents, relying on figures provided by the Board of Indigent Defense Services (B.I.D.S.), grossly exaggerated the number of death penalty cases per year.[17] To analyze cost, two figures must be determined: (1) the number of capital trials; and (2) the number of death penalty appeals, i.e., the number of death sentences imposed.[18] Although specific estimates are difficult because of inadequate data in Kansas, it is apparent that the B.I.D.S. estimates were ridiculously high.

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homicide are not deterred. For example, "heat of passion" killings are not deterred. These homicides, however, are considered voluntary manslaughter and appropriately are not covered under death penalty statutes.

[10] U.S. Department of Justice, *Report to the Deputy Attorney General on Capital Punishment and the Sentencing Commission* (Feb. 13, 1987).

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] Thus, retribution remained the only justification for the death penalty.

[15] A 1987 survey showed that 69% of Kansans favor the death penalty and only 24% oppose it. University of Kansas Institute for Public Policy and Business Research, *Third Annual Public Opinion Survey of Kansas.*

[16] This estimate was made by Professor David J. Gottlieb, University of Kansas, School of Law.

[17] The Kansas Legislative Research Department's cost estimates also relied on the B.I.D.S. figures.

[18] Capital trials (particularly sentencing) and capital appeals are definitely more costly than noncapital trials and appeals.

year.[19] According to Kansas Bureau of Investigation (K.B.I.) statistics, in 1986 there were only 107 criminal homicides that could be categorized as either first degree murder, second degree murder, or voluntary manslaughter. It is incredible to estimate that 80 of these homicides would result in capital trials.

A realistic estimate is that there will be approximately 10 capital trials per year. This estimate is roughly made by subtracting from the 107 criminal homicides the following: (1) voluntary manslaughters, i.e., "heat of passion" killings; (2) second degree murders, i.e., intentional, but not premeditated, killings; (3) felony-murders not covered by the Kansas bill, e.g., murder occurring during robberies, burglaries, and arsons, and all unintentional felony-murders; (4) murders covered by the Kansas bill that either do not display an aggravated circumstance or display an outweighing mitigating circumstance; and (5) capital cases in which the defendant pleads guilty. Although specific numbers for each of these categories are unavailable, it is obvious that the vast majority of criminal homicides would *not* result in capital trials.

A specific estimate can be made by analyzing the Sedgwick County figures. There were 12 first degree murder cases filed in Sedgwick County in 1986. Only three of the cases, however, would have been death penalty cases.[20] According to K.B.I. statistics, 26% of Kansas criminal homicides in 1986 occurred in Sedgwick County. Thus, the Sedgwick County figures indicate that there would be only 12 capital cases filed in Kansas per year. This figure would be further reduced by capital defendants who plead guilty.[21]

In addition to exaggerating the number of capital trials, the B.I.D.S. grossly overestimated the number of death sentences. The B.I.D.S. estimated that there would be 16 death sentences per year.[22] For this estimate to be accurate, Kansas would need to impose the death sentence *eight* times more frequently than the national average.

A realistic estimate is that there would be two death sentences per year in Kansas. This estimate is obtained by computing the per capita death sentence rate in the 37 states that have the death penalty and adjusting the result to the Kansas murder rate.[23] This esti-

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[19] Apparently this is an estimate of first degree murder cases filed annually. This figure is irrelevant because it includes noncapital first degree murders and does not estimate how many cases will be tried.

[20] These figures were supplied by James Puntch, Chief Trial Attorney for the Sedgwick County District Attorney.

[21] It is reasonable to assume that a substantial percentage of capital defendants would plead guilty in exchange for a term of imprisonment.

[22] The number of death sentences represents the number of capital appeals. This is the most important estimate in the cost analysis because capital appeals are clearly the most expensive aspect of the death penalty.

[23] U.S. Department of Justice Bureau of Justice Statistics. These 37 states have a total population of approximately 180 million and in 1985 imposed 273 death sentences. The national murder rate in 1985 was 7.9 per 100,000 compared to 4.9 per 100,000 in Kansas. According to the latest census, Kansas has a population of 2.3 million. (The 1985 figures were the latest available when the opponents' cost estimates were made.)

mate is further verified by comparing the number of death sentences in Missouri. Missouri has nearly four times as many murders as Kansas yet annually imposes only eight death sentences.[24] Thus, a comparison with Missouri will also result in an estimated two death sentences per year in Kansas. Furthermore, the Kansas estimate does not consider that the scope of the Kansas bill was much narrower than other death penalty statutes and would have resulted in even fewer death sentences.

Applying this reasonable estimate of death penalty cases to the *opponents'* cost estimates would reduce the cost to approximately $1 million per year.[25] This figure would be reduced further by weighing the savings that would result from the death penalty. For example, the cost of incarcerating each murderer would be at least $300,000 over his lifetime. Also, because defendants faced with the death penalty would be far more willing to plead guilty in exchange for a term of imprisonment, there would be fewer murder trials and more favorable plea bargains for the State.[26] Finally, the cost is arguably justified if only one murder per year would be deterred.

Although the opponents' cost estimates were grossly overestimated, they were extremely timely. Cost arguments—even those based on ridiculous figures—are persuasive when made to legislators facing a budget crisis.

III. KANSAS DEATH PENALTY BILL

The Kansas House bill[27] was modeled after existing death penalty statutes. It differed from existing statutes, however, in three areas.[28] First, the House bill significantly limited the definition of capital murder. The Senate committee[29] version clarified this definition. Second, the House bill required a special sentencing jury. This provision was repealed by the Senate committee. Third, the House bill implied that prosecutors could not exercise discretion in seeking the death penalty. The Senate committee version expressly provided for prosecutorial discretion.

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[24] U.S. Department of Justice Bureau of Justice Statistics (1985 figures).

[25] This assumes that the opponents accurately estimated the additional costs involved in capital trials and appeals.

[26] Defendants will certainly try to avoid the death penalty and, except under rare circumstances, prosecutors will accept offers to plead to life imprisonment. Under present Kansas law, however, if the prosecutor refuses a plea to a lesser charge, the defendant will go to trial because he will at worst, be eligible for parole in 15 years. Thus, a death penalty statute will result in fewer trials and the State will save the *entire* cost of these first degree murder trials and appeals. Furthermore, if the prosecutor decides to plea bargain he will be in a stronger position and receive a better agreement.

[27] H.R. 2062 (1987).

[28] Other variances were due to poor drafting and failure to update the draft bill with recent case law.

[29] Kansas Senate Committee on Federal and State Affairs.

A. Definition of Capital Murder

The House bill defined capital murder as premeditated murder and intentional murder in the commission of kidnapping, rape, and aggravated criminal sodomy.[30] Thus, the death penalty was limited to premeditated murders and intentional felony-murder when the underlying crime is an inherently dangerous felony against a person. Most death penalty statutes, on the other hand, include premeditated murder and all intentional felony-murders.[31]

Under the House bill, capital murder was wisely limited to the most heinous killings. Unfortunately, the bill was poorly drafted and did not consider either disparity of punishment or the impact upon plea bargaining.[32] The House bill simply stated that the defined murders would be subject to the death penalty.

The Senate committee amendments attempted to address these problems. Capital murder was separately defined as a new class AA felony[33] and subject to the death penalty or life imprisonment with eligibility for parole after 25 years of imprisonment.[34] These amendments clarified the definition of capital murder, lessened the disparity in punishment, and improved the plea bargaining process.

The Senate committee amendments, however, should have been more extensive. Enacting a death penalty statute requires a complete revision of the criminal homicide statutes.[35] Great disparity in punishment must be avoided and the parties must have reasonable latitude in plea bargaining.

B. Special Sentencing Jury

A House bill amendment required that the death penalty be imposed by a special sentencing jury.[36] Under this provision, following a capital murder conviction, a new jury would be empaneled to decide whether to impose the death penalty. Opponents supported this provision on the theory that it would avoid conviction-prone "death qualified" juries at the trial's guilt phase.[37]

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[30] H.R. 2062 §§ 1-3 (1987) (House amendments).

[31] U.S. Department of Justice Bureau of Justice Statistics. For example, death penalty statutes typically include felony-murder when the underlying felony is robbery, burglary, or arson.

[32] For example, a defendant found guilty in a death penalty case would either be sentenced to death or eligible for parole in 15 years. This disparity in punishment is too great and would inhibit flexible plea bargaining.

[33] H.R. 2062 § 1(b) (1987) (Senate amendments).

[34] *Id.* §§ 3(a), 15(b).

[35] Even without the death penalty, the Kansas criminal homicide statutes need to be revised in terms of classification and punishment. Inserting a death penalty provision, without considering its impact on the other statutes, further exacerbates the situation.

[36] H.R. 2062 § 7(2) (1987) (House amendments).

[37] In a capital case in which the same jury determines guilt and imposes sentence, potential jurors who indicate an inability to follow the law and impose the death sentence when the law requires may be excluded "for cause" from the jury panel. Lockhart v. McCree, 106 S. Ct. 1758 (1986). Opponents of the death penalty argue that "death qualified" juries are prone to conviction. The Supreme Court rejected this argument. *Id.*

Special sentencing juries are unprecedented[38] and unnecessary.[39] Furthermore, this procedure is inconsistent with sentencing theory[40] and would be very time-consuming and extremely expensive.[41] Ironically, special sentencing juries may also be more likely to impose death sentences.[42]

The Senate committee repealed the special sentencing jury provision. Under the Senate amendment, the decision to impose the death penalty would be made by the trier-of-fact.[43] The Senate procedure has been specifically approved by the U.S. Supreme Court and is the standard procedure in states with death penalty statutes.[44]

C. Prosecutorial Discretion

The House bill implied that prosecutors would not have discretion in seeking the death penalty.[45] This implication is unprecedented[46] and may violate the separation of powers doctrine.[47] Prosecutorial discretion is essential in criminal cases, particularly those involving the death penalty. The State, as well as the defendant, benefits when a prosecutor exercises his discretion not to seek the death penalty.[48]

The Senate committee amendments expressly provided for prosecutorial discretion. Under the Senate amendment, at the arraignment the prosecutor must notify the defendant of his intent to seek the death penalty.[49] This gives the defendant and the trial judge sufficient notice to prepare for capital jury selection. Following a guilty verdict or guilty plea, the prosecutor may move for a death sentence proceeding.[50] This allows the prosecutor to re-evaluate his earlier decision to seek the death penalty.

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[38] No other state's death penalty statute provides for a special sentencing jury.

[39] *See supra* note 37.

[40] The jury (or judge) who heard the guilt phase of the trial is in a far better position than a new jury to determine a fair sentence.

[41] A new jury would need to be empaneled. Furthermore, to ensure a fair sentence, virtually the entire case would need to be presented to the new jury.

[42] If the trial jury also sentences the defendant, jurors with "residual doubts" about guilt are extremely unlikely to impose a death sentence. (This also ensures that the death penalty will be imposed only when all jurors are absolutely convinced of guilt.) Jurors on a special sentencing jury, however, obviously will not have "residual doubts" and thus, will be more likely to impose a death sentence.

[43] H.R. 2062 § 6(2) (1987) (Senate amendments).

[44] *Lockhart*, 106 S. Ct. at 1768-69.

[45] Although prosecutorial discretion could be implied, both proponents and opponents assumed that the bill did not provide prosecutorial discretion.

[46] All other states' death penalty statutes permit prosecutorial discretion.

[47] It could be argued that the Legislature unconstitutionally infringed upon prosecutorial discretion.

[48] In addition to the obvious benefit to the defendant, the State would also benefit by saving the time and cost of unwarranted death penalty prosecutions. Many cases that technically fit within a death penalty statute may not warrant a death sentence.

[49] H.R. 2062 § 6(1) (1987) (Senate amendments).

[50] *Id.* § 6(2).

IV. CONCLUSION

The death penalty is a constitutional form of punishment that has been enacted by 37 states and is supported by the overwhelming majority of Americans. Furthermore, a strong argument can be made that the death penalty is a cost-effective deterrent for some types of murder.

Despite these facts, the Kansas Senate defeated the death penalty bill by a 22-18 vote. The vote was particularly unexpected because the Kansas Legislature had passed four death penalty bills in the past ten years. The defeat was caused by six senators withdrawing their support for the death penalty. Five senators actually switched their votes and one voted against the bill after campaigning with Governor Hayden and promising to vote for the death penalty.

Two explanations have been offered for the senators withdrawing their support for the death penalty.[51] First, it has been suggested that, when faced with a governor that would sign a death penalty bill, some senators could not vote for the bill on moral grounds. Although the morality of the death penalty is certainly questionable, this "morality switch" might indicate that the senators' prior support for capital punishment was politically motivated. Second, it has been suggested that some senators voted against the death penalty to embarrass Governor Hayden, who had vigorously campaigned on the death penalty issue and promised the voters a death penalty statute.

The death penalty debate undoubtedly will continue.[52] The only issue in this debate should be the morality of the death penalty. Perhaps the Kansas Senate made the right decision for the wrong reasons.

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[51] These explanations have been offered by death penalty proponents. It is possible that these senators withdrew their support for the death penalty because they did not carefully consider the issue when Governor Carlin was in office.

[52] Governor Hayden raised the death penalty issue in his 1988 State of the State Address.