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Weighing the Costs of Capital Punishment

v.

Life in Prison Without Parole

*An Evaluation of Three States' Studies and Methodologies
Comparing Costs of the Death Penalty Versus Life in Prison
Without Parole (LWOP)*

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§I: Introduction and Scope of this Evaluation

This paper is a cost analysis that compares the costs of charging, trying, convicting and imposing a sentence of death versus the costs for its alternatives, life in prison without parole (LWOP) and life in prison with the possibility of parole (LPP) when the crime charged (“indictment”) involves one or more instances of aggravated first-degree murder. For the most part, the cost analysis will involve only one option to the death penalty, LWOP; this option is available to prosecutors in death penalty states for the same class of particularly heinous crimes for which a capital indictment is available. The two-option model also is that chosen by two of three major case studies evaluated for this paper. The second option, LPP(-20), was in the model of my third chosen major case study. For reasons explained later in this paper, a cost analysis of death versus one option (LWOP) or death versus two options (LWOP, LPP) does not matter because defensible comparisons can be among the three cost studies.

One of the three major studies evaluated in this paper, conducted by researchers Cook, Slawson and Gries at Duke University, raises an appropriate cautionary note for the introduction:

What exactly is the question to which a cost estimate is supposed to be the answer? We take some pains in this report to clarify this fundamental matter. The result is not a definitive set of estimates, but, we hope, a clearer understanding of the issues and a better estimate of some of the relevant magnitudes than has been available previously. In fact, there is not just one “price” for the death penalty but several, depending on how we define the question.ⁱ

Cook, Slawson and Gries reinforce this *caveat* by quoting from and concurring with the conclusion of a 1991 study by the US General Accounting Office (as the GAO then was named): “even though many experts believe that it costs more to finance a system in which the death penalty is an option, little empirical data exist that actually compare the cost of a death sentence with a non-death sentence case.”ⁱⁱ For reasons explained in the next section, which describes how three case studies were selected from the many available, the GAO conclusion about data made over a decade ago probably is less true regarding available data in two selected case studies from the years 2002 and 2004, but it does suggest that caution should be used when evaluating the data and information.

§II: How Three Death Penalty Cost Analysis Studies Were Selected

The method employed to select the three cost analyses was to perform an electronic search of databases, particularly LexisNexis Academic and Legal, Hein-Online, other criminal justice and law databases and EconLit. A literature review law journals, particularly citations in law journal articles provided six candidate studies. The following paragraphs describe in detail the composition, staffing and areas of expertise for those who conducted the studies. Also examined are possible sources of bias. This information is important because it may help to explain why two of the three studies evaluated in this paper reached similar outcomes while the third produced a contrary result.

Arguments for or against the death penalty usually are not framed in terms of costs but through prisms of law, morality and even religion – the latter two values being so core to an individual’s sense of self that positions on capital punishment are entrenched and difficult to change. Many cost studies are available that have been written by pro-death penalty or anti-death penalty advocates. This evaluation did not select these studies because *a priori* declarations put forth from the outset not surprisingly matched the outcomes of these studies. Much of the literature reviewed cited a May 1993 study conducted by researchers at the Terry Sanford Institute of Public Policy at Duke University as a model of a comprehensive and unbiased cost analysis of the death penalty and its alternative, life in prison, in North Carolina.ⁱⁱⁱ It will be the first study evaluated in this paper.

The principal investigators for the North Carolina study were a Ph.D. (in economics) and a *Juris Doctor* (J.D.) with a Master's degree in the social sciences; assistance was provided by a recent Duke graduate holding a B.B.A. (business administration). The Duke – North Carolina study used charge, trial, conviction and appeals data from 1991 – 1992; death penalty data used ranges from the early 1980s through 1992. Funds for the study came from a grant from the State Justice Institute to the North Carolina Administrative Office of the Courts.

The Duke study (which hereinafter will be referred to as the “North Carolina” study) was conducted roughly a decade before the other two analyses that will be evaluated. Its age does not make comparisons with the later studies impossible or invalid, but differences in the legal environments for Duke and the other two studies do require an awareness of how time has influenced study inputs and outcomes. In *Furman v. Georgia* [408 US 238 (1972)] the US Supreme Court invalidated most state capital punishment laws and the sentences of those condemned to death under such laws. The Court some four years later articulated situations and processes by which states might resume executions in *Gregg v. Georgia* [428 US 153 (1976)], with the majority holding that when vetted appropriately through the Fourteenth Amendment the death penalty does not violate the Eighth Amendment's prohibition on “cruel and unusual” punishment. However, *Furman* and *Gregg* produced a series of “Balkanized” concurrences and dissents from a very divided Court, which provided grounds for further evolution of Supreme Court rulings *and changes in state death penalty laws*. Since legal analysis is not the purpose of this cost evaluation, it is sufficient to make two statements: First, there will be less biased case data (samples) available the more distant in time a study is from post-*Gregg* state death penalty laws; more cases and samples should, everything else being equal, produce better results. Second, as the Duke study notes, *Furman* and *Gregg* roiled due process requirements, invalidated death sentences and resulted in some invalidated sentences later retried. Accordingly, studies using data from “*Furman* +10” or so years are of questionable empirical value.

The second and third studies chosen for the paper were produced by organizations affiliated with the state governments in Indiana (2002) and Tennessee (2004). The Indiana analysis was conducted by the Indiana Criminal Law Study Commission at the requests of the Indiana General Assembly (controlled by Republicans) and the Governor, a Democrat. This study weighed the costs associated with the charge, conviction and imposition of the death penalty against costs associated with LWOP. The 28 Commissioners were a diverse mixture of academics, attorneys, current and former judges (including appellate judges), prosecutors and public defenders, current and former state legislators, law enforcement (particularly sheriffs, which under Indiana law are responsible for protection of the courts and maintaining security during trials), a state corrections official and the current and former state Attorney General. The Commission had a staff of six (6) senior professional staff, a mixture of attorneys, analysts and statisticians. The Indiana study has six (6) major sections. Of these, § IV, “How the cost of a death penalty case compares to that of a case where the charge and conviction is life without parole,” will be the section evaluated for this paper. The principal Commission staffer responsible for § IV was Mark Goodpaster, Senior Fiscal Analyst in the Office of Fiscal and Management Analysis, Legislative Services Agency.

The final study assesses death penalty costs against LWOP in the state of Tennessee. The study was requested by the House Judiciary Committee and was performed by the Comptroller of the Treasury, John G. Morgan – a constitutional officer of the state appointed by the Tennessee House and Senate. The actual research was conducted by a division within the Comptroller of the Treasury, the Office of Research. Three analysts – one a senior legislative research analyst and two associates – conducted the research. It appears that a total of eight (8) individuals, including three administrative/clerical employees, worked on the search and analysis in various stages of the analysis. Unlike the Indiana study, the Tennessee study has one central objective, cost analysis,

whereas the Indiana study also examined legal issues. The Tennessee study also might have political bias since a political office-holder was the senior official who signed off on the report and whose signature is on letters of transmittal. All three studies provide extensive explanations of complex legal issues and constitutional law which must be understood because what is required by statute, state judicial rules, *habeas corpus* and other issues in constitutional law determine the very different cost-timelines for capital and LWOP cases. These issues are examined in the next section.

§III: Death Is Different: How Super Due Process Affects Costs^{iv}

The use of the death penalty in the United States has been controversial since the beginning of the nation and the Constitution of the United States explicitly and implicitly recognizes that “death is different.” This sets up conflicts among fundamental principles of American jurisprudence: the Sixth Amendment’s requirements for a “speedy trial and public trial,” an impartial jury, the right to compel witnesses in the defendant’s favor, etc. – in sum, the swift administration of impartial justice – crash up against other constitutional icons when framed by the possible imposition of the death penalty, which, unlike any other form of punishment, is the most severe and irrevocable – and for which no level of public or private compensation for error is appropriate or just. In the post-*Gregg* environment (1976), charging and prosecuting a case capitally almost always involve at least one charge of aggravated first degree murder^v; legal requirements for the consideration of both aggravating and mitigating factors, especially in the post-conviction stages; and a bifurcated process at conviction and sentencing stages. A jury trial is not an option but a requirement; in most states where the death penalty is an option, both prosecution and defense are allowed significantly more preemptory challenges than are available in non-capital cases.^{vi} Capital cases thus require larger juror pools, longer times to select a jury and (owing to an abundance of caution) a greater number of potential jurors to fill attrition vacancies in the jury of 12 selected. Capital trials may result in jury sequestration more frequently than trial where the charge is LWOP or LPP and bail is not available to a defendant charged capitally. A number of states *require* jury sequestration in capital trials (as does Indiana), which results in significantly higher costs for death penalty trials. Almost all death penalty states provide no limitations on public funds for the defense. In most death penalty states there also is a requirement in statute or in state supreme court rules that the defendant is entitled to at least two attorneys who must possess demonstrated trial experience with capital cases. Costly expert witnesses, including forensic, medical and psychiatric experts, are used more extensively and frequently in capital trials. The average (mean) duration of first degree murder capital and non-capital trials is noticeably longer for the former class. The probability of reversal (trial court error or constitutional issues) is higher for capital convictions than LWOP or LPP. Average (mean) time spent on death row is 10+ or more years, depending on a particular state’s jurisdictional assignment to remedies available in federal District Courts, Circuit Courts of Appeals and ultimately the US Supreme Court. (Some federal appeals circuits are more congested with death penalty appeals than others.)

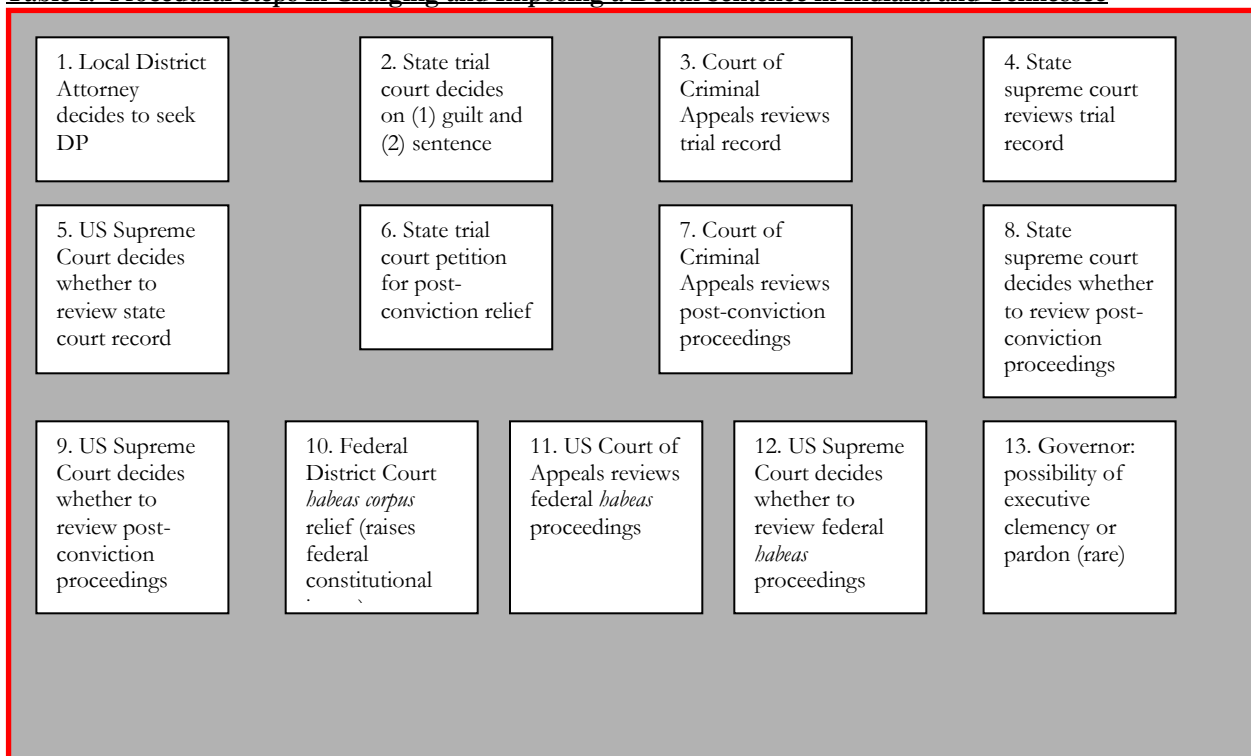
Two phrases appear frequently in the NC, IN and TN studies: “death is different” and “super due process.” Examining the two different processes – death penalty cases and LWOP cases – are not extraneous to cost analysis; it is necessary to understand constitutional and *habeas corpus* issues to evaluate what fixed and variable costs are used and why.^{vii} The taking of a human life by the state represents the ultimate sanction any government can impose on a person convicted of the “worst-of-the-worst” crimes where one or more human beings have paid the ultimate price at the hands of the convicted. The following are some of the issues raised when applying super due process in death penalty cases that are likely to require different cost inputs and produce different outputs than LWOP cost assessments:

- The evidence, indictment, trial conviction and sentencing and/or direct appeal processes may violate the Constitution of the United States. Successful challenges to sentences of death have been raised under the Fourth (searches and seizures), Fifth (self-incrimination), Sixth (right to effective counsel, confrontation), Eighth (cruel and unusual punishment) and Fourteenth Amendments (due process, equal application of the laws, equal protection of the laws).
- Conviction and the imposition of a sentence of death is not error-proof, and the risks of an irrevocable taking of an innocent life by the state alone justifies great care at all stages of the process. Overall, approximately 25 to 30 percent of all death penalty convictions are overturned *on direct appeal*,^{viii} which means these Stage Two appellate courts were able to find one or more errors occurred at the trial court stage. Accordingly, state statutes and judicial rules provide extraordinary resources where the charge brought is the death penalty; equivalent resources may not be available when the charge is LWOP.
- Numerous studies have been conducted as to whether the death penalty deters future heinous crimes (a future cost none of the three cost analyses considers). Most “deterrent studies” find no death penalty benefit over LWOP or, at most, suggest it does not deter heinous crimes significantly. Many of the 13 states which have abolished the death penalty or imposed moratoria have capital crime rates similar to or lower than neighboring states that provide for capital punishment. Examples of non-death penalty states with lower heinous crime rates than its death penalty neighbors are Iowa, Michigan and Maine.^{ix}
- Whether the death penalty charge is actually sought *or* results in a sentence of death may depend on where geographically the crime is committed and tried and this may be a source of error when comparing costs analyses conducted among different states. “Geographic discrimination” may be found in neighboring counties of the same state. In a New York Law Journal study, urban counties brought 166 more death penalty indictments than non-urban counties (271 to 105) – 39 percent more. However, a non-urban convict is statistically far more likely to be sentenced to death: of the 271 urban indictments, 23 received the death penalty (called “death notice” in the study), which is 8.4 percent of those indicted. Non-urban counties returned sentences of death for 20 convicts, which is 19.04 percent of those indicted. A person indicted for a capital crime in a non-urban county in which the death penalty is sought is more than twice as likely to receive that sentence as is a comparable individual in an urban county. Out of those receiving the ultimate sentence, the state of New York executed 3 from urban and 3 from non-urban.^x
- In the *Report of the Kansas Judicial Council Death Penalty Advisory Committee* (12 November 2004), the number one issue (out of six) examined was whether death penalty cases are sought, charged and prosecuted similarly in all counties in Kansas. The Kansas Committee in particular looked at two counties – Wyandotte and Sedgwick “with the potential for the most capital (death penalty) cases. The Kansas study reports clear evidence of geographic discrimination based in part on availability of fiscal resources. This official state study was cited by the Kansas Supreme Court’s decision invalidating Kansas’ death penalty laws on 12 December 2005.^{xi}

§IV: Super Due Process

Table 1 illustrates the stages in the 13-step “super due process” available in Indiana’s and Tennessee’s capital cases. These stages were in effect when the two cost studies were conducted. Other death penalty states provide same-similar due process.^{xiii} At the time the Duke-NC was being conducted, the state had a ten-step process for capital cases.^{xiiii} The difference regarding process among the three studies comes down to two missing steps in the NC process *vis-à-vis* IN and TN with the latter two states providing additional appellate layers in the appeals process.

Table 1: Procedural Steps in Charging and Imposing a Death Sentence in Indiana and Tennessee



Note: In the NC-IN-TN comparative table that follow in the next section, Row Headings such as “Stage 1 Costs” reference back to the respective “stage box” in this table.

At the end of the stages, the national average is that only about one in eleven – nine percent (9%) – of those sentenced to death are executed; most others spend the rest of their lives in prison, die in prison from other causes, have their sentences overturned on appeal or escape the death penalty through executive clemency.^{xiv} One of the major complexities in death penalty cost analyses is that myriad paths (probabilities) exist for death penalty cases; multiple paths also exist for LWOP or LPP-20, but not nearly so many as capital cases. In most states, only stages 1 through 4 (and possibly stage 6) are “automatic.” Most, but not all, death sentences will run super due process until it is exhausted or the sentence is overturned or remanded. Accordingly, the time ranges spent on death row can vary from as little as two to more than 20 years.^{xv}

An important note: None of the three studies captures private or federal government expenditures, which largely occur, in whole or in part, at stages 5, 9, 10, 11 and 12. The state will incur costs in these stages because the state attorney general will make arguments representing the state’s interests as the Appellee; state public defender counsel may participate in the PCR and *Habeas* stages but costs for attorneys principal to the Appellant and most other defense costs will be borne by the federal government. Federal judicial rules require that the Appellant in a capital appeal has at least two attorneys who must have a defined level of competency with death penalty cases. The Appellant’s legal team has no limit on direct expenditures for resources related to the appeals. Thus, depending on the number of appeals, the number of constitutional and other claims raised in the

appeals, the merit of the appeals, etc, the costs to the federal government can be considerable. Just *how* considerable a cost is not available from BJS or other sources consulted by the author. All federal expenditures for appointed/indigent appeals in the federal judicial system are aggregated and not broken down by state, attorney hours, other costs, death penalty cases or LWOP cases.

The importance of exclusion of private and federal costs in death penalty (and LWOP) appeals from these three death penalty cost studies are:

1. Death penalty cases receive automatic appeals in state courts but automatic review is limited in federal courts. In most states, including the three evaluated here, LWOP appeals are not automatic. For the three states studied, automatic review of capital cases requires two separate examinations: issues related to the conviction phase of the trial *and* issues related to the sentencing phase of the trial. For non-capital appeals, sentencing bifurcation is not present and thus not a cost.
2. LWOP appeals are significantly fewer than death penalty cases and only very rarely engage advanced PCR and *Habeas* processes.
3. Examining frequencies and appellee costs *to the states* for appeals in the federal courts for capital cases and LWOP (or LPP-20 for NC) cases could provide rough indicators of federal costs for capital cases.
4. All three studies show significantly higher post-sentencing costs for capital cases than LWOP (LPP for NC), especially in post-conviction review (PCR) and *habeas* stages.
5. It thus logically follows that if federal appeals costs were included in all capital and LWOP (LPP) cases, federal capital appeals spending will be higher than non-capital spending, and this is noted in both the NC and IN studies.^{xvi}

§V: Tabular Presentation of Data and Information from NC, IN and TN Studies

Table 2 provides a “checklist” of costs and other factors identified in the three studies as a way of setting the stage for the evaluations. Please note that any dollar values assigned refer to the value of the dollar as defined by the study for a given year.

Table 2: Checklist of accounting rules, costs, resources and other issues

Cost, issue, process, rule or other factors	North Carolina (1993) ^{xvii}		Indiana (2002)		Tennessee (2004) ^{xviii}	
	Death	LPP-20	Death	LWOP ^{xix}	Death	LWOP
Accounting Rule(s)	Present value, Opportunity Costs, Fixed and Variable Costs, Estimates, Regression Analysis	Same	Present Value + same as NC study, death column	same	Accounting rules generally same as NC and IN but could not be implemented due to data issues.	Same
Present value duration used for LWOP	NA		50 years ^{xx}	50 years		
Average inflation rate assumed	5.5%	5.5%	5.2%	5.2%	NN	NN
Study dollar valued at yr?	1992	1992	2001	2001	2003	2003
Average annual discount rate assumed	6.5%	6.5%	7.97%	7.97%	NN	NN
Average estimated life expectancy for LWOP	NA	NA	NA	77 years	NA	NN
Average estimated time in prison for LWOP	NA	NN	NA	47	NA	>51 years
Omitted costs described?	Yes	Yes	Yes	Yes	Yes	Yes

Cost, issue, process, rule or other factors	North Carolina (1993) ^{xvii}		Indiana (2002)		Tennessee (2004) ^{xviii}	
	Death	LPP-20	Death	LWOP ^{xix}	Death	LWOP
Grand Jury <u>required</u> to charge?	Yes	No	NN	NN	NN	NN
Special Court rules for capital cases?	Yes, but not equiv. to IN or TN in 1993	NA	Yes: IN Criminal Rule 24	NA	Yes: TN Sup. Ct. rules 12, 13	NA
When were special rules implemented?	NA	NA	1993	1993	UC; 1995 seems to be the year.	NA
Jury sequestration required?	No	No	Yes	No	No	No
At least two attorney/experienced capital cases required?	No	No	Yes	No	Yes, but after 1995	No
Unlimited allowable defense expenses provided?	UC	UC	Yes	No	Yes, but after 1995	NN
Direct costs (unit costs) defined and published?	Yes	Yes	Yes	Yes	Not always	Not always
Indirect costs discussed?	Yes	Yes	Yes	Yes	Yes	Yes
Random samples used for estimates and modeling?	Yes	Yes	Yes	Yes	Yes but flawed due to poor data and small samples	Same
Are detailed definitions, descriptions, estimating and modeling information provided in study or appendix?	Yes, very detailed	Yes, very detailed	Yes, very detailed.	Yes, very detailed	Not very detailed	Not very detailed
Actual Cases Studied?	Yes	Yes	Yes	Yes	Yes (only 1)	Yes (limited)
Date range of cases sampled/examined	1991-92	1991-92	1993-2001 ^{xxi}	1993-2001	1 Jan 1993-30 Apr 2003	Same as TN death
Total number of cases	32 (29)	45 ^{xxii} (30) ^{xxiii}	84 ^{xxiv}		737 ^{xxv}	NN
Actual death row population, 2003 ^{xxvi}	214	NA	39	NA	95	NA
Inmates actually executed in study date range	NN	NA	11	NA	1 (year 2000)	NA
Sample size used for estimates and modeling			84 (47) ^{xxvii}	47	53 pending; 1 actual execution	38 ^{xxviii}
Average age at sentencing	NN	NN	29.3 years	same (assumed for model)	NN	NN
Average length of time on death row before execution	10	NA	10.5	NA	13.22 ^{xxix}	NA
Average length of trial (in days, from change to imposition of sentence by judge)			399 days ^{xxx}		847 ^{xxxi}	659
Average Stage 1 costs (all) ^{xxxii}	\$84,000 ^{xxxiii}	\$17,000	\$272,796	\$63,095	\$46,791	\$31,494
Primary government unit which pays Stage 1 costs	County	County	County	County	County	County
Does state reimburse Stage	UC	NA	Yes, up to	NA	NN	NA

Cost, issue, process, rule or other factors	North Carolina (1993) ^{xvii}		Indiana (2002)		Tennessee (2004) ^{xviii}	
	Death	LPP-20	Death	LWOP ^{xix}	Death	LWOP
1 capital?			50% if CR-24 is fully impl.			
Average Stage 2 costs	Stated for all remaining stages as \$4.2 million		\$66,359	\$8,070	\$20,784	\$1,935
Average Stage 3 costs			Included in stage 2	Same	NN	NN
Average Stage 4 costs			\$228,782 for S4-S9 but data problems	\$6,325 for S4-S?? but data problems	NN	NN
Average Stage 5 costs					NN	NN
Average Stage 6 costs					NN	NN
Average Stage 7 costs					NN	NN
Average Stage 8 costs					NN	NN
Average Stage 9 costs					NN	NN
Average Stage 10 costs			\$13,444 S10-S12	\$4,802 S10 – S??	NN	NN
Average Stage 11 costs					NN	NN
Average Stage 12 costs					NN	NN
Average Stage 13 costs			\$27,421	NA	NN	NN
Average fully-burdened per capita cost to incarcerate	\$23,000	\$19,500 – 23,000			Data provided only operational costs per day for prisons with no populations	Same
Does study specifically raise problems with data availability and quality? If so, what are the actual or potential impacts on the study?	Yes	Yes	Yes; very minor	Yes; very minor	Yes, significant	Yes, significant
Total estimated costs of capital and LWOP (or LPP20) cases ^{xxxiv}	+\$4,300,000 per year, state-wide	NA	\$27,484,394	\$23,345,740		
Difference Death/LWOP (or LPP20) per case	+\$163,000	NA	+\$116,544 (+21.15%)	NA	-\$773,736	Executions cheaper
Average estimated costs of a case adjudicated capitally but defendant NOT executed	Total cost per execution = \$2.16 million at 10% rate.	NA	Stated as 38% higher than LWOP	NA	NN	NA

NA = not applicable; NN = not known from study; UC = unclear from study; DNA = data/information not available from study or BJS statistics.

§VI: Evaluation of Duke – North Carolina Cost Analysis

The Duke – NC study often is referred to in much of the literature reviewed as one of the best models of a cost analysis for the death penalty versus alternatives. Many of the assumptions and estimates it makes have held up well over time. Its definitions, accounting rules, unit cost rules, and estimating and modeling techniques have been adopted, in whole or in part, by other death penalty cost studies. Despite its age, I have chosen this study as a basis for comparison with the IN and TN studies – not so much for a comparison of dollars numbers but in terms of its comprehensiveness, clarity of definitions and unit costs, exhaustive discussions of law, statistics and sources of bias and its methodological rigor.

The controlling case law on capital punishment was in a state of flux when the NC study was conducted. For example, the state of North Carolina did not have an equivalent to Indiana Criminal Rule 24 (CR-24) or Tennessee Supreme Court Rules 12 and 13 (SCR-12, 13), which impose higher costs on cases adjudicated capitally than other aggravated first-degree murder cases. However, the authors do speculate on possible future changes in capital punishment requirements, such as bans on executions of mentally retarded people and additions to the list of aggravating circumstances that must be considered now in NC and were considered in the IN and TN studies. These two examples are now enshrined in case law and rules such as Indiana CR-24 and Tennessee SCR-12 and 13.^{xxxv} Noting that “there is not just one ‘price’ for the death penalty,” the authors test two definitions to determine which one provides better results.

Definition I is the single case perspective.^{xxxvi} It has two basic scenarios: In the first, an aggravated first degree murder case is charged, tried, sentenced to death and ultimately executed after the condemned’s appeals go through all available stages and are upheld. In the second, an aggravated first degree murder case is charged non-capitally, the defendant is found guilty, sentenced to life, runs through the average appeals cycle and serves out the “normal” term for life in prison. Definition II is more complex and is referred to by the authors as the “cohort perspective.”^{xxxvii} The authors’ note that as a practical matter only a small percentage of capital convictions end with an execution. Some may be charged and tried capitally but not sentenced to death, others will have death sentences overturned or some outcome other than execution results. The authors use an assumption, based upon available post-*Furman* data, that for every 20 cases tried capitally one will result in an execution.^{xxxviii} This definition and model thus captures all the additional costs of cases tried capitally. The authors explain the limitations of the cohort model which will be important to remember when the IN and TN studies are evaluated:

*One difficulty in generating such an estimate is to assign reasonable probabilities the myriad of paths capital cases can take through trial and post-conviction proceedings. We provide a framework for such an estimate. Given the uncertainty that future death sentences will eventually result in execution, we cannot provide a definitive estimate. The problem here is that past experience (since *Furman v. Georgia*) is sparse, and may not in any event be a reliable guide to the future in this area, given the rapid changes in postconviction rules and practice.^{xxxix} [Emphasis added to the original.]*

The NC authors assembled a cohort model which they conclude has technical limitations related to the point in time their analysis was conducted. The Indiana and Tennessee studies, coming a decade or more later *and* after the adoption of new rules, are not as limited, and the Indiana study particularly makes use of a time-refined NC cohort scenario.

As seen in Table 2, the NC study concludes that it is less expensive to incarcerate a defendant charged non-capitally for aggravated first degree murder and kept in prison for “life.” However, the outputs and conclusions of this study cannot be apples-to-apples compared with IN or TN in that at the time NC did not have a LWOP scenario. The authors thus use a LPP-20

scenario where a percentage of “lifers” become eligible for parole at 20 years and a percentage of them of them are paroled at year 20.^{xi} Other lifers trickle out of prison on parole with virtually all exiting the corrections system at year 40. Not accounting for the differences between 1992 dollars, 2001 dollars and 2003 dollars (as this research paper does not do), this means that the NC study will underestimate the total incarceration costs – LPP-20 *vis-à-vis* LWOP – under its case and cohort scenarios. Thus, the total additional cost they find between death and LPP-20 will be smaller if LWOP had been a consideration and all other factors held constant. On the other hand, the NC study may under-value death penalty costs imposed by higher procedural requirements via evolving controlling case law, corresponding changes in the states’ capital statutes and new rules imposed on processes.

§VI: Evaluation of Indiana Criminal Law Study Commission’s Cost Analysis

A cursory visual examination of this study shows that principal investigator Mark Goodpaster cited, examined, embraced and appropriately modified the study performed by Cook *et al* about nine years earlier for the state of North Carolina. Second, the visualizations of data in the IN study drive demonstrate improvements in both data availability, quality and information technologies. Only a few visualizations are included in the NC and TN reports; some of the data in Table 2 have to be gleaned from the narrative, citations and appendices. The Indiana study made extensive use of visualizations which may have been beyond the technological reach or fiscal constraints in the NC study. Third, it is evident that the IN cost assessment conducted was influenced by NC’s definitions, methodologies and rules for case studies and for cohorts. With regard to cohorts, the IN study appears to have benefited by having been conducted nine years (and post CR-24) further in time from *Furman* perturbations.

The Indiana cost assessment concluded that charging, trying and implementing cases capitally is, on the average (mean), considerably more expensive than LWOP (please again refer to Table 2 values). This outcome (that is, the differences between aggravated first-degree murder cases tried capitally v. cases not charged capitally).

Based upon a thorough examination of all three studies, the Indiana analysis may well be the new “gold standard” in this unique area of capital v. non-capital cost assessments. The American Bar Association (ABA) examined the Indiana study and has commented very favorably on its techniques.

§VIII: Evaluation of the State of Tennessee’s Comptroller of the Treasury Cost Analysis

The Comptroller of the Treasury’s 2004 study is significantly different from the Indiana Criminal Law Commission product.^{xii} At the time the TN study was finalized, under the state’s post-*Gregg* death penalty statute and judicial regulations only one execution had occurred. This, and the previously stated biases found in post-*Furman* legacy cases, limited researchers to this single case study of actual qualitative data. The condemned who was executed on 19 April 2000 was Robert Glen Coe. From arrest in 1979 to execution, Coe spent 21 years incarcerated in maximum security prisons by the state of Tennessee with 19 of those years on death row. Coe was indigent, so all of the costs for this case – defense and prosecution – were borne by the county, state and federal governments. Coe’s extensive use of super due process was made even more extensive by evolving case (constitutional), federal remands back to the state courts, and several changes the state implemented in its criminal justice laws. Among these were the availability of LWOP and changing the minimum time in prison for a first-degree murder conviction from 25 years to 51 years. The authors of the TN study explicitly states that “readers should review Exhibit 29 [the cost estimates summary table] with caution because of these factors.”^{xiii}

Using a case study model, the researchers make the following statements (quoting directly from the report):

1. *The execution of an inmate saves the state approximately \$773,736 for future imprisonment of the inmate compared to an inmate sentenced to life without parole. Executions save \$680,549 when compared to inmates sentenced to life with the possibility of parole [page 36].*
2. *Estimated Incarceration Costs for First-Degree Murder Sentence Types: Capital: \$491,202; LWOP: \$1,264,938; LPP: \$1,171,751 [page 47].*

Tennessee researchers did find, however, that the costs of processing aggravated first degree murder cases capitally is more costly than non-capital processing. This finding is consistent with the NC and IN studies. However, Tennessee's court costs were significantly lower than those found in the two other studies. Capital *trials* cost an average of \$46,791; LWOP *trials* cost an average of \$31,494 and LPP *trial* costs are \$31,662.^{xliii}

The Tennessee study found high rates of reversals of capital convictions: 29 percent of all capital sentences were reversed *on direct appeal*; these cases never required PCR and *habeas* processes.^{xliv} As was done in the NC and IN studies, the TN study made use of survey instruments. However, the extent and purposes of the surveys were focused on one major challenge faced by TN researchers: very poor data and information quality. Quoting directly from the report:

1. *Neither attorneys nor judges in Tennessee track the time they spend on individual cases. This makes it difficult, if not impossible, to estimate time [and consequently costs].*
2. *No accurate record of death notices [charges] and life without parole notices [charges] exists in Tennessee.*
3. *Tennessee Rule 12 requires that trial court judges file reports on all first-degree murder convictions. However, the Office of Research staff that judges do not file these reports for every case and in a timely manner. A considerable number of cases where defendants convicted of first-degree murder did not have a Rule 12 report, as required by law.*
4. *The state of Tennessee does not have a comprehensive, integrated criminal justice system.*^{xlv}

In an attempt to correct data and information deficiencies, staff researchers sent out detailed surveys to 608 individuals in the following categories: court clerks (212), trial judges (94), district attorneys/lead counsels (111), public defenders/lead counsels (35), and state attorney general and senior staff (156). While the survey completion rate for court clerks was reasonably good at 88 percent, other return rates were not good: trial judges returned only 39 percent of the surveys, prosecutors 46 percent, public defenders 57 percent, and AG and staff 65 percent.^{xlvi} The TN researchers note, however, that a significant number of surveys were incomplete; however, the exact number or percentage of "incomplete" surveys is not provided, nor is it clear how researchers treated such supplemental but incomplete information.

The author of this paper found other flaws in the data. For example, court clerks – those with the highest survey completion rate – reported on a question to determine the percentage of aggravated first degree murder cases in which a jury was impaneled. For *capital* cases, the clerks reported that 15 percent of all cases did not have a jury – but jury trials are *required* for all cases charged capitally. State rules in TN (as well as NC and IN) forbid the use of charging capitally to plea bargain. The surveys showed similar flaws and errors with regard to sequestration of juries, percentage of capital cases where a mental health evaluation was performed (required by Rule 13), and Court of Criminal Appeals per case cost information.^{xlvii}

Small samples, only one actual execution for a case studies and an inability to trust the numbers cited make the TN study a flawed cost analysis. Office of Research staff say as much, and make numerous recommendations to improve data and information in Tennessee's judicial and

correctional systems. Legislation was introduced in the Tennessee House to implement some of the reports recommendations but it did not pass and saw no equivalent initiative in the Senate.

§IX: Brief Summary

1. The North Carolina study was valuable not just for its numbers (which had post-*Furman* problems) but for its design. It provided a very good path for future death penalty cost analyses (as was noted in the Indiana study).
2. The Indiana Criminal Law Sentencing Commission study employed the types of tools and methods which should produce good outputs (provided the data and information are good, which very much appears to be the case). Among the things Indiana did well are:
 - a. Use of sound, generally-accepted accounting rules, including net present value, opportunity cost, well-defined and identified fixed costs, and thorough consideration of variable costs.
 - b. Use of random samples.
 - c. Having enough death cases to produce good models.
3. The Indiana study benefited from this state having an integrated judicial – correctional data and information system and, as best could be determined, having good data.
4. Tennessee researchers attempted to conduct a good study but, fundamentally, the available data and information are so irregular that the study’s results must be questioned.
5. The survey instruments that TN Office of Research staff attempted to use to address data concerns suffered from very poor rates of return and returns that call into question whether those that did respond had enough expertise to answer the questions.
6. The Indiana study should be used as a model by other states and institutions seeking to answer questions about the costs of administering justice, particularly for aggravated first-degree murder. However, studies should not be attempted by other state entities without first examining whether the data, information and samples will support an academically-sound research result.

§X. Four Practical Recommendations for Improving Public Information and Policymaking on “life versus death” cost determinations, and for making general improvements to state criminal justice systems, data and information

In §IV, the author of this paper notes that none of the studies evaluated captures federal government public expenditures or expenditures by private parties. Since many federal expenditures occur only with regard to death penalty cases, it is obvious that the lack of data and information about federal government expenditures understates the total costs associated with application of the death penalty but the extent to which total DP costs are understated is not known. If cost studies in this “life or death” area of public policy are to have validity and value, knowing total costs is essential. A first recommendation is to capture at least federal costs. This may require reports and forms that currently do not exist, which in turn suggests that other federal authorities – including but not limited to the Paperwork Reduction Act of 1995 (“PRA,” as amended) – may be triggered. In the author’s view, going through the rigor of a full PRA process with the Office of Management and Budget (OMB) would be positive and result in higher quality metrics because that process includes cost-benefit analysis and consideration of data quality.

It is also evident from these three studies and a larger literature review conducted for this paper that the quality of data and information found in the states’ criminal justice systems records varies substantially from state-to-state. This is an issue that is far broader than capital crimes. Quality data is a prerequisite for informed public policymaking, and it would be helpful beyond the issues

examined in this paper if there was greater qualitative consistency among the states' criminal justice systems.

A second recommendation is that the federal government provide grants to state-based organizations such as the National Council of State Legislatures (NCSL), the National Governors Association (NGA) or the National Association of Attorneys-General (NAAG) to produce model guidelines for state criminal justice systems, particularly with regard to information technology systems, uniform criminal justice data definitions and metrics. By way of an existing example, the National Association of State Energy Officials (NASEO), through funds provided by the US Department of Energy (DOE), has produced model guidelines for states to use (at their discretion) in the development of energy emergency assurance plans. The NASEO guidelines are of potential value not just to the states but to DOE's planning and implementation of its Emergency Support Function 12 (ESF-12) pursuant to the Stafford Act and other federal authorities.

Similar guidelines and public – private partnerships could provide guidelines, sound practices and technical resources for state criminal justice systems. The US Department of Justice could, for example, provide grants to state-based governmental associations to seed the development of model guidelines for state criminal justice systems. Federal funding to the states would provide incentives for states to implement the “voluntary” guidelines and sound practices without creation of a new federal mandate. Thus, a third recommendation is that the Congress provide money to the US Department of Justice's Bureau of Justice Statistics, which in turn makes grants to the states “to develop, implement or improve unified criminal justice systems consistent with the model guidelines' criteria for data definitions and metrics.” A fourth and parallel recommendation is that Congress appropriate funds to the Administrative Office of the US Courts specifically targeted to providing states with “technical assistance for the development, implementation or improvement of electronic technologies for their criminal justice systems.” The Administrative Office of the US Courts has developed considerable experience and expertise as it has designed and built systems such as PACER, Case Management and Electronic Case Files (CM/ECF) for the federal courts. This expertise can be shared with the states, but realistically so only if AO is given additional money and resources. It is important to note that only one recommendation is targeted on improving cost-based analyses comparing the death penalty with life in prison without parole. The other three recommendations are to provide federal incentives to improve state criminal justice systems and the quality of associated data in general, irrespective of whether a state law's authorize the death penalty.

To provide the right incentive balance, availability of grants to the states should be tied to a degree of faithfulness to the guidelines/sound technical practices, which DOJ and AO evaluate on based upon proposals from states for the grants and assistance. Enabling federal legislation should require transparency in setting criteria for the proposals and their evaluation. One of the shortcomings the author has observed regarding the DOE - NASEO model is that the sole requirement placed upon a state receiving federal money is that it provide DOE with its energy emergency assurance plan which is not typically in the public domain and for this DOE has no existing information-sharing protocols in place with the states. DOE does not require the states to be reasonably faithful to the guidelines as a condition for receiving federal money. The result has been a large variation in the consistency and quality of state plans. Some states, such as Florida and Washington, have been quite consistent with the NASEO guidelines and framework; other states seemed to have disregarded NASEO almost entirely in constructing their plans.

Technically sound comparison of costs associated with sentencing alternatives for those convicted of first degree murder is just one measure citizens of a state and their elected officials should consider when evaluating the death penalty versus LWOP. In the author's view, it is perhaps one of the least important measures and is overshadowed by constitutional, ethical and moral considerations. The value of conducting sound such cost studies is that it provides a framework for

researchers and readers alike to better appreciate the full range of complex processes and procedures that come into play in prosecuting capital cases and implementing sentences to conclusion.

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ⁱ Philip J. Cook, Donna B. Slawson and Lori A. Gries. *The Costs of Processing Murder Cases in North Carolina*, p. 4. Durham, NC: Terry Sanford Institute of Public Policy, Duke University (May 1993).

ⁱⁱ *Ibid.*, p. 5.

ⁱⁱⁱ The Duke study employs a methodology that assumes the average (mean) life sentence results in parole after serving 20 years; it also has cost figures for “Hard 40/50” scenarios. At the time the Duke study was conducted, North Carolina’s criminal code had a separate class of felonies which *required* a prosecuting attorney to charge the defendant with the death penalty. The jury and judge still could convict the defendant on the capital crime but return a lesser penalty than death – including life in prison with or without parole. The legal environment at the time compelled the Duke researchers not to examine specifically the LWOP option. Changes in federal case law and changes in the criminal codes of many states, including NC, no longer have a separate class of heinous crimes for which a charge of the death penalty is required. Instead, most states which have the death penalty option now allow the prosecuting attorney with discretion in whether to bring an indictment seeking the death penalty or to charge LWOP.

^{iv} The term “death is different” is very well explained in Margaret Jane Radin’s law review article, *Cruel Punishment and Respect for Persons: Super Due Process for Death*. 53 S. Cal. L. Rev. 1143 (1980).

^v First-degree murder is further conditioned by controlling case law developed during the late 1980s – early 1990s which compel specific considerations of aggravating factors (*e.g.*, prior criminal history, particularly heinousness of the alleged crime, lack of remorse, etc). Mitigating factors can include lack of prior history of convictions of crimes, acknowledgement of remorse, acting “in the heat of the moment” and mental capacity. Aggravating and mitigating factors have been enshrined in state death penalty statutes and/or procedural rules that are required for charging and trying cases capitally. At the time of the IN and TN studies, procedural rules required or strongly encouraged (through carrots and sticks) implementation of new procedural rules in the mid-1990s. Typically, aggravating factors are written into such rules but mitigating factors are less defined and required.

^{vi} A preemptory challenge allows both defense and prosecution to strike prospective jurors from the pool of available jurors without reason.

^{vii} *Habeas Corpus* (Law Latin: “that you have the body”) is the doctrine enshrined in English Common Law and the Constitution of the United States (Article I, §9). The writ of habeas is most often employed to ensure that a person’s imprisonment or detention is not illegal. In addition to being used to test the legality of an arrest or commitment, the writ may be used to obtain review of (1) the regularity of extradition process, (2) the right to or the amount of bail, or (3) the jurisdiction of a court that has imposed the sentence. Source: Black’s Law Dictionary, 7th Edition, p. 715.

^{viii} Distinctions between this type of appeal and other forms of appeal will be defined in subsequent headings of this paper.

^{ix} Thomas P. Bonczar and Tracey L. Snell. *Capital Punishment, 2004*; and Bauer, L. (2004). Justice Expenditure and Employment in the United States, 2001. U. D. o. Justice, Office of Justice Programs, Bureau of Justice Statistics.

^x http://www.law.com/special/professionals/nynj/2002/death_penalty/geographic_distribution/nylj/2002.html. The New York Law Journal identified the urban counties as Albany, Erie, Monroe, Onondaga, Bronx, Kings, New York, Queens and Staten Island. All other New York counties were categorized as non-urban. Source of data is the New York capital Defenders Office.

^{xi} Stephen E. Robinson (Chairman) Ron Evans, Jeffrey D. Jackson, *et al. Report of the Judicial Council Death Penalty Advisory Committee* (November 2004). The 12-member committee was comprised of judges, former judges (both trial and appellate), attorneys, prosecutors and current and former state attorneys-general. Wyandotte County is unitary and includes Kansas City, KS; total population is 160,000. Sedgwick County (population 462,896) is larger in area than Wyandotte. The county seat is Wichita. The county government is not unitary.

^{xii} Source: Administrative Office of the Courts, *Capital Punishment in Tennessee: a timeline history of death penalty legal processes*.

^{xiii} The Duke – NC study refers to a nine step process but it did not include executive clemency. Page 14 of the study identifies the post-conviction process steps.

^{xiv} Source: Bureau of Justice Statistics, US Department of Justice, *Capital Punishment 2004*.

^{xv} Sources include data presented in the IN, NC and TN studies and from Bureau of Justice Statistics, US Department of Justice, *Capital Punishment 2004*.

^{xvi} At page 30, paragraph 3 (omitted costs), Cook *et al.* state that “our estimates provide information on the use of state resources [including those incurred by counties and not reimbursed by states], but understate the full costs of the death penalty.”

^{xvii} The NC study employed two definitions which the authors refer to as the “case perspective” and the “cohort perspective.” All NC values in Table 1 are the case perspective model. Differences between case and cohort will be explained in the NC-specific evaluation.

^{xviii} When comparing TN data with the two other studies, it is important to know that the state of Tennessee has serious problems with data availability, accuracy and adequacy. Sample sizes are very small.

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- ^{xix} LWOP became a sentencing option in Indiana capital cases in 1992; Rule 24 was issued in 1993.
- ^{xx} Under the scenarios developed in the Indiana study for death penalty costs, all death row inmates likely to be executed are executed no later than the end of year 2012 and impose no additional costs on the system thereafter.
- ^{xxi} To eliminate a potential source of bias, the Indiana study examined only actual cases after Criminal Rule 24 was implemented. The Tennessee study did not exclude capital and non-capital cases prior to implementation of Rules 12 and 13.
- ^{xxii} See Cook *et al.*, Table 6.1 (page 46) for more details on murder cases in trial sample.
- ^{xxiii} The numbers in parentheses refer to the “cohort perspective.” The number in LPP-20 is understated in this paper because in the cohort perspective, 35 of defendants tried capital are acquitted or sentenced by judge as the result of a plea. The authors of the NC study provide an explanation at pp. 54 – 56.
- ^{xxiv} A total of 84 offenders were given a sentence of death over the date range of the Indiana study. Of this number, nine have been executed *or are likely to be executed* (38 + 9 = 47) using assumptions made in the Indiana study. As of the date the Indiana study analysis had ended, 37 of those 84 prisoners originally condemned to death have had sentences reversed.
- ^{xxv} This is the total number of cases for capital, LWOP and LPP over the date range.
- ^{xxvi} Based upon BJS statistics.
- ^{xxvii} Death penalty costs were calculated for the group of 84 who were sentenced to death and stopped calculating costs when each of the 37 reversals resulted in a non-death outcome (37).
- ^{xxviii} The TN sample was proportionate to the number of death penalty and LWOP for the population of 737 first-degree murder cases. Of the original first-degree murder sample size of 250, 53 were death, 38 LWOP and 159 were LPP. The total sample declined to 240 due to “information gathered during survey data collection,” which suggests bad data for the first-degree population and in the sample.
- ^{xxix} While IN limits its average to post-CR-24 implementation, TN’s average includes death row statistics going back to 1977. This methodology may introduce a bias.
- ^{xxx} This is an actual mean from all capital trials in date range. In Goodpaster’s model, the average (mean) assumed is 1 year.
- ^{xxxi} The TN study uses a different measurement than NC or IN and it is not possible to reconcile TN’s anomaly with available information. TN counts the number of days from the date of the offense to the date sentence is imposed by the judge.
- ^{xxxii} Because only the IN and TN stages are directly comparable (if numbers are provided in these studies), NC Stage Costs are not apples-to-apples with IN and TN. The NC study further does some stage cost aggregation in the report. Where this author cannot find a roughly-comparable State Costs value for a given cell in Table 1, a NN value will be entered.
- ^{xxxiii} For first degree murder cases tried capital with a verdict of guilty but ended non-capitally in sentencing phase, the average cost is \$57,000. Cook *et al* estimate the extra costs to trial courts per death penalty imposed is \$194,000 per trial.
- ^{xxxiv} Assumptions are made that some will not be executed.
- ^{xxxv} TN SCR-12 applies primarily to judges and 13 applies primarily to defense and prosecuting attorney standards.
- ^{xxxvi} Cook *et al.*, *Supra* at p. 5.
- ^{xxxvii} Ibid.
- ^{xxxviii} The authors’ speculation about the use of data and information with immediacy to *Furman* and *Gregg* was correct. Their models estimate a five percent (5%) execution rate for death row populations whereas BJS statistics for actual cases in the year 2003 show that nine percent (9%) actually were executed.
- ^{xxxix} Ibid.
- ^{xl} Twenty years is not an arbitrary number but is the minimum number of years a lifer convicted on aggravated first degree murder is eligible for parole.
- ^{xli} John G. Morgan *et al. Tennessee’s Death Penalty: Costs and Consequences*. Nashville, TN: Comptroller of the Treasury, Office of Research (July 2004). The Coe case analysis and conclusions is found at pp. 34 – 46.
- ^{xlii} Morgan, *Supra* at p. 36.
- ^{xliii} Morgan, *Supra* at p. ii.
- ^{xliv} Ibid.
- ^{xlv} Morgan, *Supra* at pp. 44-46.
- ^{xlvi} Morgan, *Supra* at p. 4.
- ^{xlvii} Morgan, *Supra* at pp. 20-23.