

STARVING THE DEATH PENALTY: DO FINANCIAL CONSTRAINTS LIMIT ITS USE?

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Death penalty cases are expensive for judicial systems to administer, in terms of both time and money. This is a potential problem for the equitable administration of justice when such cases are financed by local governments. The relative wealth of local jurisdictions varies, giving some a greater ability to raise revenues for public purposes. Given the scarcity of resources, especially in poorer jurisdictions, it is possible that cost considerations play a part in the decision over whether to file capital charges. We explore this issue in South Carolina through both interviews of local prosecutors and analysis of death penalty caseloads for 2005-07. While local prosecutors recognize that cost can be a concern, they claim that money issues do not influence their decisions regarding whether to file capital charges. In contrast, we find in our quantitative analysis a positive relationship between county wealth and death penalty caseloads.

One argument by opponents of the death penalty is that the money needed to prosecute capital cases is simply too much to justify seeking that penalty (see Dieter, 1994). The American Civil Liberties Union (ACLU, 2007) maintains that capital-punishment cases waste scarce public resources, costing as much as 70 percent more than life imprisonment. Former California judge Donald McCartin complains: "It costs 10 times more to kill these guys than to keep them alive in prison. It's absurd. And imagine the poor victims' families having to go through this again and again" (Dillow, 2008). There is little doubt that death penalty cases are very expensive, and thus it is important to examine the extent to which cost affects prosecutors' decisions to file capital charges. This is an especially salient question for states where trial court operations are dependent upon local governments for funding. If officials in jurisdictions with fewer resources are unwilling or unable to finance capital cases, then there is the potential for serious inequities in the administration of justice within a state. We address whether the death penalty has become an option that only wealthy jurisdictions can afford by examining the decisions of solicitors to file capital charges within their judicial circuits in South Carolina.

We chose South Carolina for study because it is one of twenty-one states where local counties pay for a majority of trial-court expenses.¹ This reliance on local funding makes South Carolina a good case through which to assess the extent to which the disparities between counties' ability to pay for court activities are affecting judi-

¹ Those states are Arizona, Arkansas, California, Florida, Georgia, Idaho, Illinois, Indiana, Louisiana, Michigan, Minnesota, Mississippi, Montana, Nevada, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, Washington, and Wisconsin (Tobin, 1996).

cial decision making. Another obviously important characteristic that makes South Carolina appropriate for this study is that certain crimes within the state are in fact subject to the death penalty. South Carolina law permits use of the death penalty in cases involving either murder with aggravating circumstances or criminal sexual conduct with a minor with aggravating circumstances (BJS, 2007). At the time of this study in 2008, South Carolina had a total of 58 inmates on death row, ranking it fourteenth in this regard among the thirty-eight states where the death penalty is legal (median number of death-row inmates = 38) (DPIC, 2008a). So, the death penalty option is both available and used in South Carolina. South Carolina has executed thirty-seven people since 1976, including one as recently as 2007 (DPIC, 2008b).

LOCAL FUNDING AND THE ADMINISTRATION OF JUSTICE

Advocates of the judiciary have long argued that unequal funding across the judicial system risks inequality in the administration of justice (Tobin, 1999). The problem for the courts is not unlike that faced by local school systems. Because school funding in many states is dependent upon local resources, poorer jurisdictions have complained about their inability to match the lavish spending on education in high-income areas. The resulting imbalance negatively affects the quality of education for children in the former. Empirical evidence makes clear that differences in funding levels affect academic achievement across schools (Condrón and Roscigno, 2003:18-36; Murray, Evans, and Schwab 1998:789-812). Similarly, funding disparities among court systems can have a negative effect on court performance, particularly in the area of case-processing times, in jurisdictions with less wealth (Wolfson, 1994; Tobin, 1999).

To reduce financial inequities, reformers have pushed states to take over the funding of trial court systems to create more uniform quality of justice across local jurisdictions (Baar, 1975; Hays, 1978; Tobin, 1999). If local funding does result in inequities in the administration of justice, we should expect to see the wealth of local jurisdictions influence the willingness of prosecutors to file capital charges. Studies have shown that death penalty cases are more expensive than cases in which only life imprisonment is sought (Ehrmann, 1952; Costanzo, 1997; Radelet and Borg, 2000). This being the case, local officials have to ask themselves if there are not better ways to spend their finite resources. They have to ask whether they can afford the death penalty.

JUDICIAL CIRCUIT FUNDING IN SOUTH CAROLINA

Trial courts in South Carolina are organized into sixteen circuits, each composed of between two and five counties (median number of counties = 2.5). Each county has its own courthouse for cases originating within its borders. Judicial agencies, including the solicitors' offices, receive funding from the state based upon a number of formulas, principally on a per-capita basis; factors such as the caseloads or crime rates are not considered in the formula, placing pressure on circuits with heavy workloads to ask for more resources from their counties.

A special fund does exist to help finance death penalty cases. The fund automatically provides \$25,000 to courts where death penalty charges have been filed. Trial court officials can request additional money from this fund, but the entire fund holds only \$500,000. The South Carolina Commission on Indigent Defense also provides money to help pay death penalty expenses for the local public defenders' offices.

Despite the resources provided by the state, trial court circuits are dependent upon their local counties for a significant portion of their funding. The solicitors interviewed indicated that an average of 60.4 percent of their budgets were received from their counties (range = 35 to 75 percent). Only two solicitors reported relying on their counties for less than 60 percent of their funding, and both stated that local money financed only 35 percent of their budgets. These two circuits had the lowest median household income, which provides a crude indicator that richer counties are appropriating more for their judicial systems while poorer counties depend more heavily on state funds.

THIS STUDY

As the chief prosecutors in South Carolina's sixteen judicial circuits, the solicitors are responsible for making decisions on which charges to file against defendants. The decision to seek the death penalty rests with them; how capital punishment is administered across South Carolina is shaped largely by their attitudes about the circumstances that justify the death penalty's use (Songer and Unah, 206:60). They are, therefore, the appropriate officers to query about the factors taken into account in the decision whether to bring capital charges in a particular case. We therefore sought to interview the solicitors, and nine agreed, a 56.3 percent participation rate.² The individuals who agreed to be interviewed had an average of 5.7 years of experience as solicitors and 16.6 years as prosecutors. There were no systematic differences along the dimensions of median household income, population, percent African-American, and crime rate between participating and nonparticipating circuits.

To help reduce selection bias further, we interviewed the executive director of the South Carolina Commission on Prosecution Coordination, who could provide a broad understanding of our research questions because his office is responsible for coordinating the administrative operations of the sixteen solicitors' offices and lobbying the state legislature on the solicitors' behalf. Interviews allowed us the flexibility to tease out differences between rich and poor counties within each circuit. Solicitors serving both rich and poor counties were able to discriminate between those counties when answering the questions.

Our interview format consisted of open-ended questions, which asked the respondents to provide some background on the use of the death penalty in their circuits, describe the factors most important in determining whether to bring capital

² Three solicitors referred us to their deputy solicitors. For simplicity, we refer to all respondents as "solicitors."

charges against a defendant, and provide information about budgetary issues related to death penalty cases. All interviews were conducted by telephone by the senior author. Each participant was promised that responses would not be attributed to individuals, particularly important because solicitors are elected. Because seven of the sixteen solicitors did not consent to interviews despite the promise of anonymity, we supplemented our qualitative analysis with statistical analysis of data concerning county wealth and capital caseloads.

SOLICITORS' COMMENTS REGARDING THE DEATH PENALTY

Use of the Death Penalty. To ascertain the extent to which death penalty cases occurred in each circuit of the state, we asked respondents about the last time that a capital charge was filed in their jurisdictions and how often such charges were filed. All but one of the solicitors interviewed reported that their circuits either were prosecuting a death penalty case or had done so at least once in the past four years. However, the frequency with which they claimed to prosecute such cases differed substantially across circuits. Three reported that no more than one case appeared in their circuits every ten years; three reported at least one every five years; two reported that they averaged about one per year; and one reported two to three cases per year.

Decision Calculus. One would like to believe that the decision to use the death penalty is not entered into lightly. After all, the authority of the government to take a human life is its most extreme power. The solicitors universally described sets of rigorously defined factors they use when deciding whether to pursue the death penalty. Of course, all respondents indicated that they first make sure potential cases meet the legal criteria for capital charges, but none believed that meeting the legal requirements alone was sufficient to warrant capital charges. Eight commented that they would consider only cases in which the crime was egregious in nature. Examples given included the murder of someone who was particularly vulnerable, such as a child or elderly person; multiple homicides; crimes that "terrorize" the community; crimes that put large numbers of innocent people at risk, such as a shoot-out in public; the murder of a law-enforcement officer; and murder combined with rape.

For five solicitors, the quality of evidence is extremely important. They generally remarked that they do not simply want to be confident that they will win their cases. They maintained that the severity of the death penalty is so great that guilt must be absolutely certain. One solicitor stated, "It is not enough to have evidence that will convict someone beyond a reasonable doubt. It must be beyond any doubt," and another said, "The evidence of guilt must be ironclad. The quality of evidence is vital to my decision."

For five solicitors, the wishes of victims' families are important when they consider the death penalty. Families may ask prosecutors not to pursue capital charges because they are morally opposed to capital punishment or they do not want to go through the emotional strain of a capital case. One solicitor summed up the issue:

Capital cases are a lengthy process. They take 20 years. Family members must live with the case as long as it is going on. There are many appeals. Many family members ask me to go for life without parole instead because those types of cases take less time and are more likely to get a plea.

The background of the defendant is an important factor for four of the respondents. They stated that individuals with long criminal records or violent histories were more likely to be candidates for the death penalty. As one solicitor commented, "We try to separate bad people from normal people who do bad things." However, these solicitors claimed that they are not just looking for signs that an individual is a "bad" person; they are also looking for indicators of the defendants' culpability, particularly whether defendants knew that what they did was wrong. One solicitor went so far as to disqualify individuals who had below-average IQs from capital charges.

Cost as a Factor. Only three solicitors stated that they considered the cost associated with death penalty cases when deciding whether to file capital charges. Each, however, maintained that cost issues would never dissuade them from pursuing the death penalty in a case. Instead, they claimed that cost in both time and money was more a matter of which they needed to be acutely aware, rather than a factor that could eliminate the death penalty as a possibility. We queried each of the other six solicitors who did not mention cost as a factor in their decision calculus about whether it might affect their decision making. Each responded that they had never considered cost. However, one admitted that it was not beyond the realm of possibility for cost issues to affect decision making regarding the death penalty in the future. Two solicitors also indicated that county council members in their circuits have become concerned over the high cost of certain cases and made comments to them in that regard. They both argued, however, that no council member had ever tried to pressure them to avoid the death penalty for a case.

When asked about the specific costs associated with death penalty cases, all of the respondents indicated that the majority of the expenses fall on the defense and the court system more generally, not on their offices. A typical response was:

It is not more expensive for my office in terms of trial costs. My staff is all on salary, so my expenses are relatively constant. Jury costs can go up more because they are often sequestered; so hotel, meal, and police overtime to guard them runs costs up. Costs for expert witnesses might be higher. Most expert witness costs fall on the defense though because they are trying to show they did everything possible to defend their clients. Overall, the costs for a capital case are very high. These cases take 20 years. It is cheaper to put someone in prison for life than to try someone for the death penalty.

The solicitors reported a multitude of factors that drive up the costs of capital cases. These include a state requirement that all defendants be represented by two lawyers, increased use of investigators and expert witnesses by the defense, overtime pay for

court officials such as clerks and deputies, the length of the cases, and appeals. They also stated that jury expenses are much higher for capital cases because they often have to go out of their jurisdictions to find a jury, the jury pool needs to be larger, jury consultants are generally used by the defense, the jury is automatically sequestered, and the length of the trial tends to be much longer than for a regular murder case. Moreover, the position of the court tends to be one of caution. One solicitor pointed out that judges in South Carolina are very willing to support defense attorneys' requests for resources and time and that providing a thorough defense is not cheap.

The solicitors did admit that death penalty cases do not come without costs for their offices, but these costs come more in the form of case backlogs and overworked staff than in direct financial costs. Only two solicitors claimed that death penalty cases impose no extra costs on their offices; they stated that the counties in their circuits were relatively wealthy and provide them with all the resources they need. The remaining seven solicitors asserted that the tremendous amount of time involved in trying a capital case limited their offices' abilities to process other cases on their dockets. For example, one remarked, "I have a small staff. I only have one attorney for one of my counties and only two each for the others. Capital cases tax our resources. Who handles all the other cases while we work on the capital case?" And still another observed,

The cases are time consuming and stressful. If we have a capital case, besides myself, I need at least one lawyer working on it full-time. Since I only have a few prosecutors, cases get backed up. For the county where I only have one prosecutor, who is going to handle the rest of the caseload? This raises costs for the counties because many of the defendants for these other cases are locked-up while awaiting trial.

Thus, despite capital cases imposing relatively small monetary costs on solicitors' offices in South Carolina, it appears that these cases do limit the ability of some offices to administer the rest of their caseloads efficiently.

Perceptions of the Local Funding System. As to the realities of forcing judicial circuits to rely upon county funding for parts of their budgets, we asked the solicitors if they believed that lower-income jurisdictions were constrained in their ability to administer justice. Six answered in the affirmative, two in the negative, and one did not know. Among those responding in the affirmative, one, who noted being in a poor circuit, said, "The most I have ever gotten from my counties is \$100,000, while others get millions. Of course, they often have more cases because of their larger populations. In general though, poorer counties have larger backlogs in South Carolina." And another reported:

Yes, it creates problems if you have poor counties. It would definitely be the case for me if my counties did not fund me so well. I would have to think long and hard about the circumstances of a case before bringing capital

charges. I don't know how they can handle it with more limited staffs. I have never heard of a solicitor not going for the death penalty because of money, but they are probably thinking about it. I know I would be thinking about it if I were in a poor circuit.

Interestingly, one solicitor who answered "no" believed that low-income jurisdictions were often more efficient: "Inefficiencies can be brought about by size. The smaller the system, the more efficient it is. If you only have court three times a year, it is easy to coordinate everyone's schedules—police, lawyers, judges, staff vacations, etc."

Next, because solicitors might be reluctant to admit that cost issues deterred them from bringing capital charges, we asked if the solicitors had heard of other jurisdictions avoiding capital cases because of cost considerations. Six said they were not familiar with such decisions, but the other three did. One reported knowing of "a very poor county where death penalty cases do not happen. I think they just can't afford them," while another had heard of "other counties putting pressure on solicitors to not bring expensive cases to trial. There are certainly some poor counties which just don't have the resources to invest in expensive trials." In a more extensive comment, the third said,

It's hard to say. The poorer circuits tend to bring fewer capital charges. However, they tend to be more heavily African American. African Americans are less supportive of the death penalty than whites. So, are there fewer capital cases because of resources or because the communities take a more negative view of the death penalty?

Finally, we explained that many states had moved away from local funding for their trial-court systems to provide their citizens with a more uniform quality of justice and asked the solicitors if they thought such a system would be good for South Carolina and would make it easier to file capital charges. Two solicitors did not know how a unified budget system would affect the circuits, and another argued that it would be better to reform the current system for allocating state money, saying, "Some circuits don't try a lot of cases but they still get the same per capita allowance. Circuits should be funded based on how much work they are doing. Right now some get more than they need, while others go without."

The remaining solicitors were split over whether full state funding was a good idea. Three argued for state funding, complaining that they should not have to "go begging" to counties for the money to do their jobs, with one saying, "Decisions about how many cases to bring to trial or the charges to bring should not be based on how wealthy a jurisdiction is." Not surprisingly, the three solicitors opposed to full state funding worked in relatively wealthy jurisdictions. One summed up their argument nicely:

I am happy with the generosity of my counties. I believe that wealthier counties such as mine would be opposed to full state funding. They want to make sure they get high quality. South Carolina just passed a law prevent-

ing the property tax from being used for education and they are paying for it by an increase in the sales tax. This has upset a lot of school districts because now they are stuck with the sales tax money the state gives them. If their citizens want to pay more money for better schools they don't really have any options now that the property tax is off the table. I think the same thing would happen if local funding were taken off the table for the courts.

Such comments comport with Tobin's (1999) findings that wealthier jurisdictions tended to be at the forefront of resistance to moves by states to eliminate local funding.

By and large, our interviews reveal that cost issues do not play a role in solicitors' decisions over whether to file capital charges. There is some speculation by the respondents that cost might be influencing solicitors' decisions in other jurisdictions, particularly in poorer areas. However, there are no concrete examples of solicitors shying away from the death penalty due to cost considerations.

COUNTY WEALTH AND CAPITAL CASES

Data and Measurement. Because South Carolina counties are expected to help pay for cases originating within their borders, we focus on the county level to ascertain whether the wealth of local jurisdictions affects the number of capital cases filed in their trial courts. A focus on the circuit would be inappropriate, because, if cost affects the decision to file capital charges, a judicial circuit comprising a large rich county and a small poor county might produce a large number of death penalty cases that all occur in the richer county.

To supplement what we have learned from our interviews, we analyzed data that allow us to test the relationships between county wealth and the number of capital cases filed in a county. Because the high cost of capital cases places wealthier jurisdictions in a better position to seek the death penalty, our hypothesis is that the number of capital charges filed in a county will be positively related to the county's median household income.

Data on the number of death penalty cases filed in each county between 2005 and 2007 were acquired from the South Carolina Judicial Department, which, although it began keeping a record of each judge assigned to a death penalty case in 1999, did not begin to record the location of each case until 2005. Thus, we are limited to data for 2005 to 2007.

To measure county wealth, we use median household income from the U.S. Census Bureau (as reported at <http://www.ors2.state.sc.us>). Median household income is a good proxy for resource availability for county governments. The higher the median income, the more revenue a county can draw from its citizens to finance important functions, such as trial court operations. To control for other factors that might affect the relationship, we employ county population, percent of the population that is African-American, the Index Crime Rate per 10,000 population, and par-

tisan identification of the solicitors. We expect population and crime rate to be positively related to the number of death penalty cases.³

Findings. The relationship between median household income and the number of capital charges filed in a county is statistically significant (p -value = 0.01), thus providing support for our hypothesis. Wealthier counties in South Carolina had more death penalty cases than less-wealthy counties. This finding seems to conflict with the solicitors' comments that resource availability does not affect decisions over whether to file capital charges. The only other variable that was statistically significant in our model was county population (p -value = 0.02); as population increases, the number of death penalty cases increases. Crime rate, percent African-American, and party identification of the solicitors did not appear to affect death penalty caseloads.⁴

DISCUSSION AND CONCLUSION

Were interview respondents hiding the fact that they use cost in their decision calculus when deciding whether to file capital charges? The solicitors claimed that their decisions were based upon the egregious nature of the crimes, defendants' backgrounds, wishes of victims' families, and quality of evidence. While they admitted that death penalty cases are expensive relative to other murder cases, they maintained that cost issues played no role in their decision processes. These claims lie in sharp contrast to the quantitative evidence that county wealth is related to death penalty caseloads. It appears that wealthier counties, because they can better afford to finance expensive cases, try more capital cases.

A closer inspection of the interview data reveals that the solicitors' comments may not be as inconsistent with the quantitative analysis as first appears. The solicitors recognized that richer counties were better able to provide for local trial court functions. Solicitors working in counties that provided them with ample resources questioned how their counterparts in less-wealthy jurisdictions could afford to file capital charges very often. Some solicitors also revealed that they knew of pressures put on other prosecutors to avoid expensive cases. Finally, three solicitors admitted that more state funding would make it "easier" for them to file capital charges.

There are several reasons why it should not be surprising that none of the respondents stated directly that money issues affect their decision-making processes regarding the death penalty. First, solicitors whose offices are well financed by their local governments do not experience this constraint. Therefore, we should not expect them to

³ A separate analysis using individual cases as the unit of analysis would be useful. Doing so would allow us to control for important variables, such as the nature of the case, the quality of evidence, wishes of victims' families, and criminal records. Unfortunately, collecting these data would be exceedingly difficult.

The model used here is appropriate given that we are not attempting to measure all determinants for bringing capital charges in each case but are instead attempting to ascertain whether county wealth plays a role in the decision-making process as a whole. Thus, using cases as the unit of analysis would not address our research question.

⁴ Detailed results of the statistical test and method used can be obtained from the lead author.

cite it as a problem. Second, because solicitors are elected in South Carolina, they have a strong incentive not to admit that money issues affect their decisions regarding cases. This may have caused solicitors who are more likely to consider cost to select themselves out of the interview process. Third, it is possible that solicitors do not recognize the extent to which a lack of resources is affecting the decisions they make.

Whatever the reason that no solicitors interviewed stated that cost had a direct effect on their death penalty decisions, our findings—both qualitative and quantitative—suggest that quality in the administration of justice is influenced by the availability of resources. This conclusion by itself is not earth shattering. However, ours is the first study to show systematically that resource availability affects the extent to which the most extreme power of government is utilized. While the death penalty may not be an option that only wealthy counties can afford, our evidence indicates that it is an option that wealthy counties can afford to use more often. This finding has serious implications for equality across jurisdictions in the administration of justice. It may be an inconvenience if low funding causes long delays. However, it is an injustice if low funding is the difference between life and death.

There are, of course, limitations to our findings that call for future research. We examined only one state, and that state does indeed provide some additional funding to judicial circuits to help defray the cost of death penalty cases. Our data analysis is based on death penalty cases for only a three-year period, and we lack data on how finances affect the quality of defense. Longer term, multistate studies would be ideal, perhaps with the present study as the groundwork for such efforts. **jsj**

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Appendix A
Descriptive Statistics

Variable	Minimum	Maximum	Mean	Standard Deviation
Number of Death Penalty Cases	0	7	0.96	1.46
Median Household Income	\$20,898	\$46,992	\$33,597	\$5,757
Population	10,108	407,383	92,502	96,477
% Black	6.7	72.3	37.1	16.4
Crime Rate	175.3	858.5	466.3	160.4