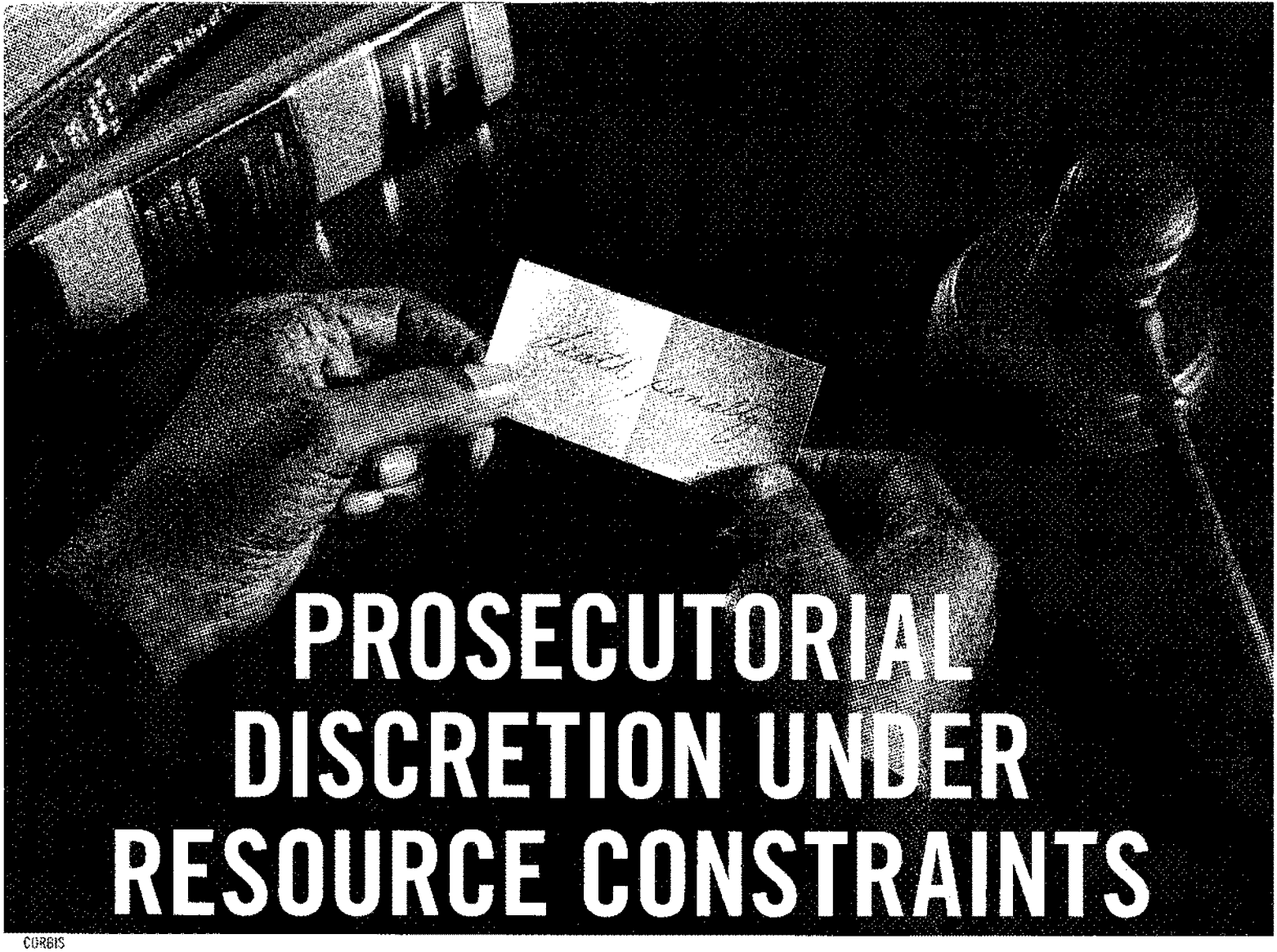

CORBIS

PROSECUTORIAL DISCRETION UNDER RESOURCE CONSTRAINTS

BUDGET ALLOCATIONS AND LOCAL DEATH-CHARGING DECISIONS

Do prosecutorial resource constraints influence death-charging decisions? Using new data on death-charging decisions from 301 prosecutorial districts across 34 states, the results presented here suggest that the conventional wisdom is wrong. The probability of facing a death charge is higher in prosecutorial districts with larger budgets. The results inform our understanding of the politics of prosecutorial behavior and the policy debate over capital punishment.

by GREG GOELZHAUSER

When asked whether resource constraints would influence his decision to seek the death penalty, local prosecutor Steve Tucker said that filing a death charge "is about seeking justice" and that resources do "not play into [the decision] at all."[1] Although some local prosecutors admit that budget constraints necessitate fewer death charges,[2] the prevailing view among practitioners is that resources do not influence their decision-making in prospective capital cases.[3] Although scholars have offered competing anecdotes concerning the relationship between budgets and death-charging decisions, the limited empirical evidence (from a single state) supports the conventional wisdom that resource availability does not influence prosecutorial

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1. The Seattle Times, *Prosecutor: Death Penalty Hinges on Justice, Not Money*, The Seattle Times, August 15, 2000.

2. *See* e.g., Cuevas, *New Riverside County DA slashes spending, blames budget woes on predecessor*, Southern California Public Radio, March 1, 2011.

3. Gershowitz, *Statewide Capital Punishment: The Case for Eliminating Counties' Role in the Death Penalty*, 63 VAND. L. REV. 307, 323 (2010).

decision-making.[4] However, the importance of the question and lack of available data led one scholar to contend that "[a] careful consideration of the impact of budgets...on prosecutorial charging decisions is long overdue."[5] This article begins to fill this gap in the literature by examining the relationship between budget constraints and death-charging decisions, while locating the discussion within the broader theoretical literature on prosecutorial behavior.

The relationship between budget constraints and death-charging decisions has important policy implications. Some scholars contended that a death-charging decision based on resource availability is arbitrary and capricious, thereby violating the defendant's constitutional rights.[6] Moreover, basing death-charging decisions on budget constraints may contribute to the perception that the implementation of capital punishment resembles a "geographic lottery."[7] Many reforms have been proposed for mitigating the impact of this geographic lottery, but the merit of these proposals will ultimately be judged by empirical evidence concerning the extent to which such a lottery exists.

The question of whether prosecutorial decisions are based on extra-legal factors is also of special interest to law and courts scholars. The local prosecutor has been called "the single most powerful figure in the administration of criminal justice."[8] This singular power derives from the extraordinary discretion that prosecutors have to decide whether to bring charges against criminal suspects and which charges to bring. To constrain this "practically unlimited discretion,"[9] the American Bar Association's rules of professional responsibility require prosecutors to "seek justice."[10] But the extent to which local prosecutors remain faithful to this command remains unclear.

Law and courts scholars have devoted comparatively little attention to local prosecutors notwithstanding their prominence in the criminal justice system.[11] This is particularly unfortunate because many of the theoretical issues concerning prosecutorial behavior, such as the exercise of discretion and demands of political accountability, are central to the study of other political institutions. Although scholars have made substantial progress studying other prosecutors, including United States Attorneys[12] and state attorneys general,[13] it is important to further develop our understanding of local prosecutorial behavior. This article contributes to the study of prosecutorial behavior and the policy debate over capital punishment by presenting the first systematic empirical analysis of the relationship between budgets and death-charging decisions. Using data on death-charging decisions in 2004 and 2005 from 301 prosecutorial districts across 34 death penalty states, the results suggest that larger budgets are associated with an increased likelihood of prosecutors seeking death.

Death-Charging Decisions in Legal Context

Administering the death penalty fairly is a central concern in the implementation of capital punishment. The Supreme Court addressed this concern in *Furman v. Georgia* (1972), holding that the arbitrary implementation of capital punishment by the states violated the Eighth Amendment's prohibition against cruel and unusual punishment.[14] Justice Stewart, concurring, argued that the death sentences at issue in *Furman* were "cruel and unusual in the same way that being struck by lightning is cruel and unusual," adding that the defendants in the case were "among a capriciously selected random handful upon whom the sentence of death ha[d]...been imposed."[15] According to the Court, state capital punishment statutes provided prosecutors, judges, and juries with too much discretion when imposing the death penalty. And this discretion paved the way for extra-legal factors such as race to play a paramount role in determining which defendants were ultimately sentenced to death.

State legislatures responded to *Furman* by passing new laws designed to limit discretion. Many states split the guilt and sentencing phases of their capital trials. Legislatures also developed lists of aggravating circumstances (e.g., burglary or arson), at least one of which must be proven beyond a reasonable doubt before imposing death. Aggravating factor requirements limit the jury's discretion to impose death, but they also constrain the prosecutor's charging decision by shifting the expected probability of conviction. With new procedural safeguards in place, the Supreme Court effectively reinstated state death penalty regimes in *Gregg v. Georgia* (1976).[16]

Notwithstanding these post-*Furman* procedural safeguards, debate continues over whether the death penalty is implemented fairly. Local prosecutors enjoy nearly unbridled discretion to determine which death-

4. Baldus, Woodworth, Grosso & Christ, *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973-1999)*, 81 NEB. L. REV. 486 (2002).

5. Rupp, *Death Penalty Prosecutorial Charging Decisions and County Budgetary Restrictions: Is the Death Penalty Arbitrarily Applied Based on County Funding?*, 71 FORDHAM L. REV. 2735, 2738 (2003).

6. *Id.*

7. Barnes, Sloss & Thaman, *Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making in Death-Eligible Cases*, 51 ARIZ. L. REV. 305, 360 (2009).

8. Bubany & Skillern, *Taming the Dragon: An Administrative Law for Prosecutorial Decision Making*, 13 AM. CRIM. L. REV. 473, 477 (1976).

9. Davis, *The American Prosecutor: Independence, Power & the Threat of Tyranny*, 86 IOWA L. REV. 393, 397 (2000).

10. This duty is detailed in the Standards for Criminal Justice, Model Code of Professional Responsibility, and Model Rules of Professional Conduct.

11. Gordon & Huber, *The Political Economy of Prosecution*, 5 ANNUAL REV. L. & SOCIAL SCI. 135 (2009).

12. Gordon, *Assessing Partisan Bias in Federal Corruption Prosecutions*, 103 AM. POL. SCI. REV. 534 (2009); Whitford & Yates, *Policy Signals and Executive Governance: Presidential Rhetoric in the "War on Drugs,"* 56 J. POL. 995 (2003).

13. Clayton, *Law, Politics and the New Federalism: State Attorneys General as National Policymakers*, 56 REV. POL. 525 (1994); Provost, *The Politics of Consumer Protection: Explaining State Attorney General Participation in Multi-State Lawsuits*, 59 POL. RESEARCH Q. 609 (2006).

14. *Furman v. Georgia*, 408 U.S. 238 (1972).

15. *Id.* at 309-10.

16. *Gregg v. Georgia*, 428 U.S. 153 (1976).

eligible defendants face the death penalty at trial. Numerous decision points preceding the charging decision and trial may all but guarantee the influence of extra-legal factors on prosecutorial decision-making.[17] Indeed, it is now common to analogize the prosecutor's death-charging decision to a lottery.[18] The challenge for policymakers and scholars is to unpack the extra-legal determinants of death-charging decisions. Much of the existing literature focuses on a single jurisdiction or state. Although this approach allows scholars to analyze rich case-level data, it limits the consideration of how political and economic pressures shape prosecutorial decision-making.

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Budget Constraints and Death-Charging Decisions

Administering the death penalty is costly. One comprehensive estimate, for example, suggests that North Carolina would save $11 million per year by abolishing its death penalty.[19] New Jersey legislators, meanwhile, cited cost savings as a primary justification for abolishing capital punishment in 2007.[20] Much of the cost discussion focuses on the difference between sentencing defendants to death and life without parole. However, a prosecutor's decision to seek death over some lesser punishment at trial is also associated with a substantial cost differential. For example, trial costs are more than three times higher in death-eligible cases in Maryland[21] and ten times higher in Indiana when prosecutors seek death rather than life without parole.[22]

This cost differential arises in large part due to the added procedural protections put in place to ensure that defendants in death cases receive a fair trial. Many states require indigent defendants to be represented by two attorneys in capital cases.[23] Furthermore, jury selection tends to run longer in capital trials because each side is allotted additional peremptory challenges and potential jurors are often excused due to financial hardship or their normative views on capital punishment. More money is also spent on investigators and experts in diverse areas such as psychiatry, ballistics, and blood spatter analysis as capital trials grow increasingly complex due to advancements in forensic sciences. States must also provide reasonable expenses to attorneys appointed to represent indigent defendants.

Total costs for capital trials routinely surpass $1 million and may run as high as $5 million.[24] Local prosecutors and governments where the crimes occur incur most of the financial burden associated with capital trials. According to one commentator, capital trial costs can represent a "severe budgetary shock" to local governments, who may be forced to "raise taxes, cut services, or both" in response.[25] Parke County, Indiana, for example, raised an economic development income tax 0.25 percent to offset expenses from one capital trial.[26] And Jasper County, Texas raised property taxes 6.7 percent to pay for a capital trial.[27] Local governments have also cut services and halted development plans to offset budget shortfalls induced by capital trials.[28]

Do prosecutors consider resource constraints when making death-charging decisions? Chief local prosecutors are almost uniformly elected.[29] As a result, securing re-election is thought to be the principal motivating factor influenc-

17. Black, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE (New York: W.W. Norton, 1981); Radelet & Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 L. & SOC'Y REV. 587 (1985).

18. Berk, Boger & Weiss, *Chance and the Death Penalty*, 27 L. & SOC'Y REV. 89 (1993); Barnes *et al. supra*, n 7.

19. Cook, *Potential Cost Savings from Abolition of the Death Penalty in North Carolina*, 11 AM. L. & ECON. REV. 498 (2009).

20. Richburg, *N.J. Approves Abolition of Death Penalty; Corzine to Sign*, Washington Post, December 14, 2007.

21. Roman, *et al.*, THE COST OF THE DEATH PENALTY IN MARYLAND (Urban Institute: Justice Policy Center 2008).

22. The results from this study, conducted by Indiana's Legislative Services Agency, are available online at www.in.gov/ipdc/general/DP-COST.pdf.

23. White, LITIGATING IN THE SHADOW OF DEATH: DEFENSE ATTORNEYS IN CAPITAL CASES (Ann Arbor: University of Michigan Press, 2005).

24. *See* Sullivan, *King County's death-penalty dilemma: Soaring cost worth it?*, The Seattle Times, August 15, 2011.

25. Gold, *Counties Struggle with High Cost of Prosecuting Death-Eligible Cases*, Wall Street Journal, January 9, 2002.

26. Wilson, *Seeking Death Penalty in Indiana is Expensive, Often Unsuccessful*, Evansville Courier & Press, August 6, 2011.

27. Gold, *supra* n. 25.

28. *See* Baicker, *The Budgetary Repercussions of Capital Convictions*, 4 ADVANCES ECON. ANALYSIS & POL'Y 1 (2004).

29. Local prosecutors are appointed in Alaska, Connecticut, and New Jersey.

ing prosecutorial behavior.[30] Local prosecutors are thus treated like other institutional actors who face accountability constraints, including members of Congress[31] and many state judges.[32] Securing re-election often means maximizing some combination of convictions and sentence length.[33] But prosecutors are evaluated across a range of criteria, including their ability to build relationships with law enforcement, plea bargaining, case backlogs, and ethical considerations.[34]

Local prosecutors regularly campaign on their commitment to controlling crime and enforcing the law.[35] Prosecutors in death penalty states may even campaign on their support for capital punishment.[36] A chief prosecutor in Harris County, Texas, for example, campaigned on his record of "put[ting] 14 murderers on death row where they belong."[37] As one local prosecutor noted, "[f]ailure to seek [the death penalty] will give political opponents an opening to air charges from the victim's family that a prosecutor has been 'soft on crime,'" which "could be very devastating for incumbent [district attorneys]."[38] Due to electoral pressure, local prosecutors may feel compelled to seek the death penalty notwithstanding budget constraints.

But prosecutors also have a responsibility to effectively manage their budgets. As one candidate for district attorney noted during a campaign, "lawyering ability...is not what [the office of chief prosecutor] is about; [i]t's about being able to direct your budget."[39] Considering the importance of budget oversight, it is not surprising to find incumbent prosecutors emphasizing their ability to manage scarce resources during election contests.[40] Conversely, challengers regularly pledge to manage office budgets more effectively if elected.[41] With budgets playing a central role in campaigns, prosecutors facing budget constraints may be less inclined to seek the death penalty relative to their better-funded counterparts.

These competing budget considerations are evident in prosecutors' public statements regarding the relationship between resources and death-charging decisions. Prosecutors sometimes admit that death charges are not filed due to budget constraints. A prosecutor in Mohave County, Arizona, for example, decided not to seek the death penalty against an individual accused of sexually abusing and killing a one-month old child due to budget constraints.[42] But most prosecutors are adamant that death-charging decisions are not a function of resources, claiming instead that they are dictated solely by legal factors—a position consistent with the view that "justice...should be the guiding principle for every aspect of the prosecutorial function."[43] When pressed on the deleterious effect of capital trial costs on the budget, for example, a prosecutor in Riverside County, California proclaimed: "[t]his is not a business; [t]he system is supposed to deliver justice."[44]

Scholarly debate over the relationship between budgets and death-charging decisions mirrors the uncertainty generated by theoretical and practical accounts. After reviewing anecdotes of prosecutors basing charging decisions at least in part on budget constraints, one scholar concluded that "although most elected prosecutors will not admit it publicly, money affects use of the death penalty."[45] Another scholar reached a similar conclusion based on anecdotes and a comparison between budgets and the number of individuals sentenced to death in two California counties, but cautioned that "[a] more in-depth study is needed to determine if this apparent correlation is only a fluke."[46] In addition to examining more than two districts across more than one state, looking at charging decisions rather than sentences imposed would offer a more direct test of the hypothesis.

While suggesting that the "proposition is difficult to test empirically," Baicker relies on anecdotal accounts to conclude that budget constraints are not a systematic influence on death-charging decisions.[47] Baldus et al.'s seminal Nebraska death penalty study contains the most comprehensive empirical analysis to date examining the relationship between death-charging decisions and budget constraints.[48] The authors find that "differences in prosecutorial resources do not explain the differences in the rates at which capital cases advance to penalty in... Nebraska."[49] Although the Baldus et al. study offers a substantial improvement over trading anecdotes, it is limited by its focus on one state where there may be relatively little variation in resource availability per capita across districts.

The existing literature on the relationship between budgets and charging decisions focuses on whether

30. Gordon & Huber, *Citizen Oversight and the Electoral Incentives of Criminal Prosecutors*, 46 AM. J. POL. SCI. 334 (2002); Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581 (2009).

31. Mayhew, CONGRESS: THE ELECTORAL CONNECTION (New Haven: Yale University Press, 1974).

32. Brace & Boyea, *State Public Opinion, the Death Penalty, and the Practice of Electing Judges*, 54 AM. J. POL. SCI. 360 (2008); Caldarone, Canes-Wrone & Clark, *Partisan Labels and Democratic Accountability: An Analysis of State Supreme Court Abortion Decisions*, 71 J. POL. 560 (2009); Cann & Willhelm, *Case Visibility and the Electoral Connection in State Supreme Courts*, 39 AM. POL. RESEARCH 557 (2011).

33. Landes, *An Economic Analysis of the Courts*, 14 J. LAW ECON. 61 (1971).

34. *See* Wright, *supra* n. 30.

35. *Id.*

36. Bresler, *Seeking Justice, Seeking Election, and Seeking the Death Penalty: The Ethics of Prosecutorial Candidates' Campaigning on Capital Convictions*, 7 GEO. J. LEGAL ETHICS 941 (1994).

37. Tolson & Brewer, *Harris County is a Pipeline to Death Row*, The Houston Chronicle, February 4, 2001.

38. DeMay, *A District Attorney's Decision Whether to Seek the Death Penalty: Toward an Improved Process*, 26 FORDHAM URB. L.J. 767, 770-71 n.18 (1999).

39. North, *Los Angeles County District Attorney candidates vie for office*, KABC-TV, May 31, 2012.

40. *See e.g.* Brogdan, *District attorney will seek another term*, The Brunswick News, June 1, 2012.

41. *See e.g.* Wickline, *Latah County Prosecutor Candidates Trade Barbs*, Lewiston Morning Tribune, May 20, 1992 at 5A.

42. Hanson, *Mojave County opts against death penalty in infant's killing*, Today's News Herald, April 20, 2011.

43. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669, 702 (1992).

44. Gang & McCoy, *County Tops Neighbors in Death Penalty*, The Press Enterprise, February 21, 2009.

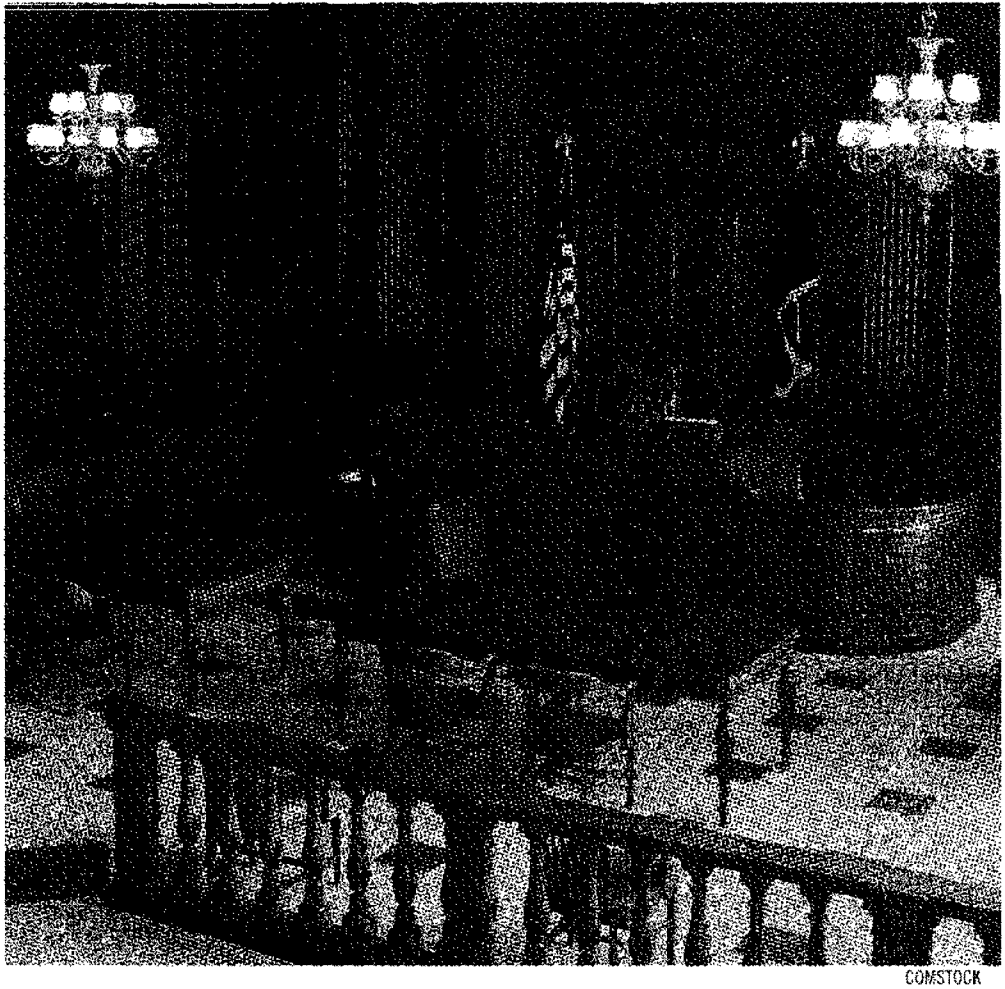
45. Gershowitz, *supra* n. 3, at 323.

46. Rupp, *supra* n. 5, at 2767.

47. Baicker, *supra* n. 28, at 9.

48. Baldus et al., *supra* n. 4.

49. *Id.* at 635.



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the prosecutor's ethos of seeking justice is disrupted by pragmatic considerations concerning resource availability. However, the underlying theoretical relationship between budgets and charging decisions may be more nuanced. Following the budget maximization model of bureaucratic behavior,[50] for example, prosecutors may have an incentive to seek death in order to signal to policymakers in the next period that they require more operating resources. If this incentive disproportionately influences districts with small budgets, we could observe a negative relationship between resources and charging decisions. Alternatively, just as a small number of cases from the previous period do not appear to influence state attorneys general budgets,[51] perhaps the relatively few and infrequent death-eligible cases that arise do not shape local prosecutors' budgets. Another possibility is that death cases initially shaped prosecutors' budgets, but that an equilibrium has been reached reflecting cultural or political expectations regarding the production of capital cases. Although potential endogeneity between budgets and death-charging decisions is addressed further below, fully untangling some of these theoretical nuances requires access to more prosecutor budget and death-charging data than are currently available.

Data and Measurement

Most studies of death-charging decisions focus on a single jurisdiction or state. Although this approach allows scholars to analyze rich individual-level data, it limits the consideration of political and economic pressures on death-charging decisions. To overcome these limitations, I use McCord's comprehensive collection of information on death-charging decisions from 2004-2005.[52] This is a national sample that includes extensive case-level information. After updating the collection with additional race and gender information from Department of Corrections' websites and other publicly availability sources, the sample includes charging decisions in 301 prosecutorial districts across 34 death penalty states. The dependent variable is scored 1 if the prosecutor filed a death charge in an eligible case and 0 otherwise. Overall, prosecutors sought death in 47.8 percent of cases in the sample.

Budget data comes from the 2001 National Prosecutor's Survey by the U.S. Department of Justice, Bureau of Justice Statistics (BJS). Unlike other prosecutor surveys conducted by the BJS, which rely on small samples of chief prosecutors, the 2001 project surveyed all chief prosecutors with a response rate after follow-up of 96 percent. The key explanatory variable is the prosecutorial district's budget per capita.[53] According to the BJS, half of the districts received 85 percent or more of their funding from county governments; about half received partial funding from their states; and some received partial funding from city governments or grant funds.[54]

A variety of control variables are included to account for alternative explanations of a prosecutor's decision to seek death. To account for legal factors, I include several variables based on information coded by McCord.[55] These variables, the presence of which should be expected to increase the probability of a prosecutor seeking death, include whether the defendant: committed one contemporaneous felony; committed two or more contemporaneous felonies; engaged in one common

50. Niskanen, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (Chicago: Aldine-Atherton Press, 1971).

51. *See* Ray & Spill, *The States in Federal Appellate Court: Litigation Trends Over Time*, 23 JUST. SYSTEM J. 97 (2002).

52. McCord, *Lightning Still Strikes: Evidence from the Popular Press that Death Sentencing Continues to be Unconstitutionally Arbitrary More than Three Decades after* Furman, 71 BROOK. L. REV. 797 (2005); McCord, *Should Commission of a Contemporaneous Arson, Burglary, Kidnapping, Rape, or Robbery be Sufficient to Make a Murderer Eligible for a Death Sentence? An Empirical and Normative Analysis*, 9 SANTA CLARA L. REV. 1 (2009).

53. Alternative specifications using the raw budget or a log transformation yield similar results.

54. This information was obtained from the BJS Bulletin on Prosecutors in State Courts (May 2002, 4).

55. *Id.*

aggravating activity; engaged in two or more common aggravating activities; committed two murders; committed two or more murders; had committed a prior murder; or had committed a prior violent crime.

Because the existing literature suggests that prosecutors may be more likely to seek death against a nonwhite defendant and less likely to seek death against a woman,[56] I include variables scoring the defendant's race and gender using the methodology described above and information coded by McCord.[57] The models include variables denoting whether a defendant was black, Hispanic, or otherwise nonwhite, with white serving as the excluded category. The gender variable indicates whether the defendant was female. Unfortunately, although race of the victim has been shown to be a predictor of whether death charges are filed,[58] this information was not available for such an expansive sample.[59]

Including district-level explanatory variables that may help explain charging decisions poses a challenge because prosecutorial districts are often comprised of multiple counties. In general, however, county-level and district-level data are highly correlated (e.g., the murder rate variables are correlated at r = 0.96). To minimize aggregation issues (e.g., population weighting and missing data for counties that do not appear in this sample) and since much of the extant literature focuses on the importance of county-level factors in death-charging decisions[60] because that is where the trial typically occurs and where the prosecutor's decision is likely to be most salient, I include several county-level explanatory variables. County ideology is captured with the percentage of votes cast for George W. Bush in the 2004 presidential election. I also include measures for a county's urbanity, murder rate, and unemployment rate.[61] Table 1 presents descriptive statistics for the independent variables.

Table 1 Descriptive Statistics

	Mean	S.D.	Min	Max
Budget Per Capita	12.99	8.04	0.01	71.38
Felonies (one additional)	0.38	0.49	0	1
Felonies (two or more)	0.26	0.44	0	1
Aggravating Factors (one)	0.25	0.42	0	1
Aggravating Factors (two or more)	0.07	0.25	0	1
Additional Murders (one)	0.26	0.40	0	1
Additional Murders (two or more)	0.13	0.37	0	1
Prior Murder	0.04	0.20	0	1
Prior Violent Crime	0.18	0.38	0	1
Black Defendant	0.44	0.50	0	1
Hispanic Defendant	0.10	0.30	0	1
Nonwhite Defendant	0.02	0.14	0	1
Female Defendant	0.06	0.24	0	1
Conservatism	52.16	12.89	16	79
Murder Rate	7.77	4.66	1.28	36.99
Urbanity	2.97	1.54	1	9
Unemployment	5.67	1.34	2.70	15.60

Analysis and Results

Table 2 presents predicted probabilities based on a logistic regression analysis, with standard errors clustered by prosecutorial district, of death-charging decisions from 2004-2005.[62] Predicted probabilities were calculated setting continuous variables at their means and binary vari-

56. *See e.g.* Radelet, *Racial Characteristics and the Imposition of the Death Penalty*, 46 AM. SOCIOLOGICAL REV. 918 (1981); Songer & Unah, *The Effect of Race, Gender, and Location on Prosecutorial Decisions to Seek the Death Penalty in South Carolina*, 58 S.C. L. REV. 161 (2006); Streib, *Gendering the Death Penalty: Countering Sex Bias in a Masculine Sanctuary*, 63 OHIO ST. L.J. 433 (2002); Streib, *Rare & Inconsistent: The Death Penalty for Women*, 33 FORDHAM URB. L.J. 101 (2005).

57. McCord (2005), *supra* n. 52; McCord (2009), *supra* n. 52. The McCord data includes information on a defendant's race for those individuals ultimately sentenced to death and nearly complete gender information. I updated missing gender and race information using Department of Corrections' websites and other publicly available sources.

58. *See e.g.* Baldus et al., *supra* n 4; Paternoster, *Prosecutorial Discretion in Requesting the Death Penalty: The Case of Victim-Based Discrimination*, 18 L. & SOC'Y REV. 437 (1984); Unah, *Choosing Those Who Will Die: The Effect of Race, Gender, and Law in Prosecutorial Decisions to Seek the Death Penalty in Durham County, North Carolina*, 15 MICH. J. RACE & L. 135 (2009).

59. Although the possibility of omitted variable bias cannot be ruled out, there is little correlation between a district's budget per capita and the percentage of the relevant county's citizens who are black (r = -0.03). A better test would compare the correlation between a district's budget per capita and the percentage of murder victims who are black. Although the FBI's Uniform Crime Reports include aggregate national data on the percentage of murder victims who are black, disaggregated data do not appear to be available. Nonetheless, these two measures should be correlated.

60. *See e.g.* Gershowitz, *supra* n. 3.

61. Urbanity is captured with the USDA's rural-urban continuum codes, which offer "a classification scheme that distinguishes metropolitan counties by size and nonmetropolitan counties by degree of urbanization and proximity to metro areas." The codes are based on a 9-point scale. See http://www.ers.usda.gov/data-products/rural-urban-continuum-codes.aspx (last visited November 27, 2012).

62. Clustering the standard errors by state or county yields similar results. Models fit including state, judicial district, or county random effects also yield similar results, as do hierarchical specifications including a random intercept for judicial district and a random coefficient for budget per capita.

TABLE 2: Change in the Probability of Seeking Death

	Min→Max	95% C.I.
Budget Per Capita	0.62	[0.25, 0.83]
Felonies (one additional)	0.10	[0.01, 0.19]
Felonies (two or more)	0.15	[0.06, 0.23]
Aggravating Factors (one)	0.07	[0.01, 0.15]
Aggravating Factors (two or more)	0.25	[0.09, 0.41]
Additional Murders (one)	0.19	[0.11, 0.28]
Additional Murders (two or more)	0.15	[0.04, 0.27]
Prior Murder	0.18	[0.01, 0.37]
Prior Violent Crime	0.22	[0.11, 0.33]
Black Defendant	0.01	[-0.07, 0.09]
Hispanic Defendant	-0.01	[-0.10, 0.10]
Nonwhite Defendant	0.00	[-0.10, 0.11]
Female Defendant	-0.11	[-0.20, -0.01]
Conservatism	0.21	[-0.04, 0.44]
Murder Rate	0.15	[-0.20, 0.56]
Urbanity	0.12	[-0.12, 0.26]
Unemployment	0.25	[-0.17, 0.65]

Note: Predicted probabilities are based on a logistic regression with standard errors clustered by judicial district (N=898). Predicted probabilities were calculated setting continuous variables at their means and binary variables at their modal values.

ables at their modal values.[63] Overall, the model fits the data well. The area under the ROC curve, which conveys the percentage of correct classifications from a random draw of 0,1 pairs on the dependent variable, is 0.70. Moreover, the model correctly predicts 64 percent of the outcomes correctly for a 25 percent reduction in error over simply picking the modal category.

The estimated coefficient on the budget per capita variable is positive and statistically distinguishable from zero, suggesting that larger prosecutorial budgets are associated with an increase in the probability of a prosecutor seeking death against a defendant in a death-eligible case.[64] Moreover, the substantive effect is considerable: Moving the budget per capita variable from its minimum to maximum value is associated with a 0.62 [0.25, 0.83] increase in the probability of a prosecutor seeking death. A change from one standard deviation below the mean of the budget per capita variable to one standard deviation above increases the probability of a death charge being filed by 0.14 [0.05, 0.23].

Each of the legal factors included in the model are associated with increases in the probability of a prosecutor seeking death. The probability of a death charge increases by 0.10 [0.01, 0.19] for defendants alleged to have committed one additional contemporaneous felony and 0.15 [0.06, 0.23] for those alleged to have committed two or more contemporaneous felonies. The presence of one common aggravating factor increases the probability of a death charge by 0.07 [0.01, 0.15], while the presence of two or more increases the probability by 0.25 [0.09, 0.41]. Allegedly killing two individuals is associated with a 0.19 [0.11, 0.28] increase in the probability of a prosecutor seeking death, while three or more alleged murders is associated with an increase of 0.15 [0.04, 0.27]. The probability of a death charge being filed increases by 0.18 [0.01, 0.37] for defendants who have committed a prior murder, while a having committed a prior violent crime is associated with an increase of 0.22 [0.11, 0.33].

None of the defendant race variables are associated with death-charging decisions, which suggests that black, Hispanic, and other nonwhite defendants were not more or less likely to face the death penalty at trial than white defendants in this sample. As noted previously, however, a lack of data availability precludes examining whether there is an interactive effect for race of the defendant and race of the victim. The probability of death charges being filed against a female defendant decreases by -0.11 [-0.20,

63. All predicted probabilities were calculated using Clarify. King, Tomz & Wittenburg, *Making the Most of Statistical Analyses: Improving Interpretation and Presentation*, 44 AM. J. POL. SCI. 347 (2000).

64. Endogeneity between prosecutor budgets and death-charging decisions is a concern considering that current budgets may be a function of past charging behavior. This concern is mitigated to some extent by the use of 2001 budget data to explain 2004-2005 charging decisions. However, the strong possibility of temporal correlations in budgets means that use of a lag does not eliminate the endogeneity concern. Evidence that budgets are static would also mitigate the endogeneity concern. To examine whether prosecutor budgets are static, I compared 2001 and 2007 budget data—the only two years for which the BJS has collected comprehensive data. Adjusting for inflation (using the Consumer Price Index), the mean difference for all prosecutor districts is statistically indistinguishable from zero ($p = 0.11$). Furthermore, the mean difference for prosecutor districts in death penalty states is statistically indistinguishable from zero ($p = 0.38$). Budgets actually decreased slightly in those districts that appear in this sample, although the difference is also statistically indistinguishable from zero ($p = 0.75$). While not dispositive, these tests lessen the endogeneity concern by suggesting that prosecutor budgets were static during a time that includes the sample period.

-0.01]. None of the county-level factors are associated with changes in the probability of a local prosecutor seeking death at the 0.05 level.[65]

Overall, these results enhance our understanding of prosecutorial decision-making in death-eligible cases. Although prosecutors often claim that budget constraints are not associated with death-charging decisions, the results presented here suggest otherwise. Not only are death-charging decisions associated with the size of a prosecutor's budget, but the effect is considerable. Moving from one standard deviation below the mean budget per capita to one standard deviation above has a similar effect on the probability of a death charge being filed as the defendant having committed two or more contemporaneous felonies or three or more murders.

Notwithstanding the importance of these results, two data limitations must be acknowledged. First, the results are based on only two years of charging data and one year of budget data. Second, as noted previously, the lack of victim race data is unfortunate considering its importance as a predictor of death-charging decisions in previous research. Unfortunately, these data limitations are a necessary part of the tradeoff at this time for advancing the most extensive cross-sectional analysis of death-charging decisions to date. Future research would benefit from moving beyond single jurisdiction or state studies that hinder the consideration of political and economic factors while not sacrificing the obtainment of comprehensive case-level data that has been the hallmark of these studies. This project moves us closer to this goal.

Conclusion

The results presented here have important policy implications. Geographic variation in death-charging decisions is a prominent concern with the implementation of capital punishment. Some consider this variation a beneficial byproduct of federalism and the accountability of local law enforcement officials.[66] But others contend that geographic discrepancies raise constitutional and policy concerns.[67] Scholars have proposed a variety of institutional reforms in response to geographic disparities, including removing authority over capital cases, including the local prosecutor's charging decision, to the state level.[68] Ultimately, this debate will be shaped by empirical evidence concerning the extent to which a "geographic lottery"[69] exists to determine which defendants receive a death sentence.

This project also contributes to the empirical study of the death penalty by emphasizing the importance of political and economic pressures. Much of the existing literature focuses on case-level factors such as race and gender. These concerns are unquestionably important, and future work will undoubtedly continue to advance our understanding of how these factors influence outcomes in death penalty cases, but the study of how political pressures shape prosecutorial decision-making in capital cases remains in its infancy. This is due in part to the relative lack of cross-sectional data on plea bargaining and charging decisions in death cases. Scholars will continue to gain more leverage over questions concerning the political dynamics of prosecutorial decision-making as better data becomes available.

Advancing our understanding of prosecutorial behavior also helps fill an important gap in the law and courts literature. Notwithstanding the relative paucity of scholarly attention devoted to local prosecutors, their prominence in the criminal justice system is unrivaled. Moreover, prosecutors have much to offer law and courts scholars interested in the political dynamics of institutional decision-making, the exercise of discretion, and the pressures associated with political accountability. Future research would benefit from exploring how these issues impact prosecutorial decision-making in non-capital cases and at other stages of the judicial process. The challenges associated with budgetary constraints offer another avenue for future research on prosecutorial behavior.[70] Like other public servants, prosecutors are constrained by resource dependencies.[71] Furthermore, these resource dependencies play an important role in shaping the conflict public servants face between managing public pressures and administrative concerns.[72] Important questions include: How do budget constraints impact plea bargaining? How do budget constraints influence a prosecutor's charging priorities? And what is the opportunity cost of a prosecutor's decision to pursue salient but high-cost trials? This project advances our understanding of how political and economic pressures influence prosecutorial behavior, but much work remains. ★

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65. The county conservatism variable is marginally significant at $p < 0.10$ (one-tailed). Moreover, many of the alternative specifications noted in note 62 suggest that county conservatism is associated with an increase in the probability of seeking death.

66. Smith, *Localism and Capital Punishment*, 64 VAND. L. REV. EN BANC 105 (2011).

67. Rupp, *supra* n. 5.

68. Gershowitz, *supra* n. 3.

69. Barnes, Sloss & Thaman, *supra* n. 7 at 330.

70. *See also* Rasmusen, Raghav & Ramseyer, *Convictions versus Conviction Rates: The Prosecutor's Choice*, 11 AM. L. & ECON. REV. 47 (2009).

71. *See* Pfeffer & Salancik, THE EXTERNAL CONTROL OF ORGANIZATIONS: A RESOURCE DEPENDENCE PERSPECTIVE (New York: Harper & Row, 1978).

72. *See* Lipsky, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES (New York: Russell Sage Foundation, 2010).