

RISK AND EXECUTION: THE LOCAL IMPACT OF CAPITAL CASES ON MISSISSIPPI COUNTIES

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INTRODUCTION

Mississippi codified the death penalty because people thought a death sentence was a fair punishment for the most heinous of crimes.¹ And, as predicted by behavioral economics, people were willing to sacrifice their own material well-being—in other words, willing to pay—to punish wrongdoers.²

But the death penalty is not fair. Regardless of whether the death penalty is a just punishment,³ the financial toll that this policy places on citizens and counties is unfair. Because citizens have continually paid the costs of punishment, the costs have slowly disappeared from sight and knowledge in correlation to their growth. As the cost of a death penalty trial rises through subsequent appeals, counties must levy additional taxes to pay trial expenses, instead of using these taxes to pay for paving roads or repairing bridges. Few officials discuss the financial burden and

¹ See, e.g., Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1509 (1998) (“[M]any laws on the books appear to be difficult to justify on efficiency grounds . . . and seem to benefit groups that do not have much lobbying power We argue that the explanation for the ‘anomalous’ laws is typically a quite simple one: Most people think the result is fair.”).

² *Id.* at 1494 (“People are willing to sacrifice their own material well-being to punish those who are being unkind.” (quoting Matthew Rabin, *Incorporating Fairness Into Game Theory and Economics*, 83 Am. Econ. Rev. 1281, 1282 (1993))).

³ See, e.g., Valena Elizabeth Beety, *The Death Penalty: Ethics and Economics in Mississippi*, 81 MISS. L.J. 1437, 1465-70 (2012) (discussing the case of Kennedy Brewer, a man on death row who was ultimately proven innocent by DNA evidence).

consequences of the death penalty. This Article seeks to remedy that silence.

When Robert Simon and his codefendant Anthony Carr were on trial for murder, Quitman County, Mississippi, may not have known the financial catastrophe that awaited its citizens. The cost of those trials has since been compared to a natural disaster, depleting the county's resources.⁴ Years later, citizens of Quitman County—including the victim's family members—were still paying for that trial.

National research has repeatedly shown that sentencing a person to death is much more costly than placing that same individual in prison for life.⁵ Included in the decision to seek the death penalty are all the costs of trying a capital punishment case, defense counsel's efforts to appeal a verdict of death, the lodging on death row, and the ultimate execution of the individual.⁶ What is less clear than the overall higher cost is the financial risk that counties undertake when they carry the burden of paying for capital cases. In Mississippi in particular, such a financial risk can be particularly devastating to a county that may have only 10,000 people to pay the high costs of a death penalty trial. Rural communities may be forced to forgo repairing a bridge or roads in order to pay for a capital trial—a trial that costs thousands of dollars more than a trial with a sentence of life without parole. And yet most counties decide to fund a capital trial, and most prosecutors seek a death sentence without knowing the financial repercussions for the county as a whole.

The Simon trial was the first case in which a county acknowledged the strains of the death penalty on its county budget and sued. The county could not afford such a trial and hoped the Mississippi Supreme Court would rule that the State of

⁴ Russell Gold, *Counties Struggle with High Cost of Prosecuting Death-Penalty Cases*, WALL ST. J., Jan. 9, 2002, at B1.

⁵ See, e.g., D. Von Drehle, *Bottom Line: Life in Prison One-sixth as Expensive*, MIAMI HERALD, July 10, 1988, at 12A.

⁶ *Id.*

Mississippi was financially obligated to pay the costs of a capital case, instead of the county.⁷ The county lost.⁸

After the Mississippi Supreme Court ruled that counties had to financially fend for themselves when prosecuting capital cases, the financial figures and fallout from those trials receded from public knowledge and awareness. This Article attempts to calculate the cost for counties of paying for capital cases and to discuss the financial risk county boards take when such cases arise.

Risk can be a framework within which to see events and issues and then analyze those issues. In this Article, the financial risk is a framework for understanding the death penalty. To establish this framework, Part I of this Article broadly examines the concept of risk. Part II provides background on the death penalty, describing its history in the United States and in Mississippi. Part III describes the death penalty in Mississippi today—as well as the constitutional requirements and legal precedent that a defendant facing the death penalty be provided counsel.

Part IV details the costs of the death penalty nationally and in Mississippi. The greatest finding is that although we have some financial numbers across the state, in general, Mississippians and their county governments do not know how much death penalty cases have cost in the past, nor how much one would cost today. The next section, Part V, attempts to discuss why counties do not know these costs, and what, if any, motivations may lie for ignoring the costs and simply paying the bill through taxing citizens and cutting back on other functions or services. The final section, Part VI, suggests that Mississippians use this knowledge as an opportunity to make conscious decisions about the death penalty, rather than hide from the information.

Mississippians are at risk. Ultimately, many counties do not know how much they spend on capital cases and cannot allocate funds easily for them. However, risk is an opportunity for society

⁷ *Quitman Cnty. v. State*, 910 So. 2d 1032 (Miss. 2005) (en banc) (affirming the trial court judgment that the county had failed to prove financial injury, and ruling for the State).

⁸ *Id.*

to use choice to shape the future, rather than relinquish that future to fate. Such choices are available for Mississippians to avoid the financial catastrophes of capital cases.

I. RISK: REAL VERSUS PERCEIVED RISK, CHOICE VERSUS FATE

Risk is a familiar concept, but as a reality most people would rather avoid it.⁹ The word has a number of possible origins, one of which is the Greek word “rhiza,” referring to the “hazards of sailing too near the cliffs: contrary winds, turbulent downdraughts, swirling tides.”¹⁰ The modern definition of “risk,” according to the Oxford English Dictionary, includes “to hazard, endanger; to expose to the chance of injury or loss; to take or run risks.”¹¹

Despite these gloomy associations, the concept of risk has been a major catalyst of development in modern western society.¹² Risk has pushed society to develop from a mindset of fate to one of choice.¹³ If we use knowledge, look at facts, and take anticipatory steps, we can take control of risk.¹⁴

Real risk is the combination of probability that an event will occur and the negative, real-world consequences should the event occur.¹⁵ Perceived risk, on the other hand, is a guess—a rough estimate—of real risk by an untrained member of the public.¹⁶ The

⁹ See, e.g., Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *ECONOMETRICA* 2, 263-292 (1979), available at <http://chelt.anu.edu.au/sites/default/files/hero/Althaus.pdf> (analyzing risk aversion and discussing how traditional utilitarian theory is challenged by human decisions under risk).

¹⁰ Catherine E. Althaus, *A Disciplinary Perspective on the Epistemological Status of Risk*, 25 *RISK ANALYSIS* 567, 570 (2005) (citing BRITISH MEDICAL ASSOCIATION, *LIVING WITH RISK: THE BRITISH MEDICAL ASSOCIATION GUIDE 1* (John Wiley & Sons 1987)).

¹¹ OXFORD ENGLISH DICTIONARY 987 (2d ed. 1989).

¹² See generally PETER BERNSTEIN, *AGAINST THE GODS: THE REMARKABLE STORY OF RISK*, (1996). Peter Bernstein has elaborated on this finding in this seminal, and popular, book.

¹³ *Id.*

¹⁴ See generally STEPHEN BREYER, *BREAKING THE VICIOUS CYCLE: TOWARD EFFECTIVE RISK REGULATION* (1993).

¹⁵ Althaus, *supra* note 10, at 568. Objective risk is “the variation that occurs when actual losses differ from expected losses.” *Id.*

¹⁶ *Id.*

goal is to be able to calculate real risk, rather than simply rely on perceived risk.

While such a response is a rational response, most individuals do not respond rationally and logically to risks.¹⁷ Perceived risk, for better or worse, is what often shapes and influences public policy. Perceived risk remains influenced by biases that catastrophic events *cannot happen*.¹⁸ As noted in this Article, most counties do not believe that a financially catastrophic event, such as a capital death penalty case, will happen.¹⁹ Counties refuse to calculate the risk and willingly place constituents in a position of fate, doom, and ignorance.

Many counties in Mississippi remain ignorant of the financial risk of the death penalty in Mississippi. Although citizens often assume that policy makers are better equipped to make decisions than citizens, policy makers in general exhibit the same perception problems as lay people regarding what can be catastrophic events.²⁰ Thus, county boards, circuit clerks, and other government financial decision makers generally react the same way as any other citizen.²¹ This is particularly true for small, populist governments, subject to the same biases and errors of their citizens.²² The one exception to keep in mind is that of elected and political officials who also consider the loss of their office and power; in such a situation, officials may not have sufficient incentives to make decisions that benefit the public

¹⁷ S. Jasanoff, *Bridging the Two Cultures of Risk Analysis*, 13 RISK ANALYSIS 123, 123-29 (1993).

¹⁸ See Jolls, *supra* note 1, at 1541-42 (“We emphasize that these problems are not ones of insufficient information per se; they are ones of insufficient ability to process accurately the information one possesses insofar as that information bears on one’s own risks.”).

¹⁹ See *infra* Part IV.B.ii (discussing counties that do not anticipate a capital case).

²⁰ See generally Roger G. Noll, *The Complex Politics of Catastrophe Economics*, 12 J. RISK & UNCERTAINTY 141, 141-46 (1996).

²¹ *Id.*

²² See Jolls, *supra* note 1, at 1543 (“The prospects for productive and useful intervention may be smallest in the case of populist government; the actions of such a government, based heavily on pressures coming from citizens, may tend to be subject to the very same biases and errors that afflict citizens.”).

interest.²³ Otherwise, like most citizens, government officials act on perceived risk rather than on real risk.²⁴

A concept that appropriately captures the falsity of perceived risk is known as the availability heuristic. In this concept, people's behavior reflects misperceptions about probabilities and the enormities of risks, depending on whether something has previously been brought to their attention.²⁵ People tend to think a car accident is more likely to occur if they just saw a car accident happen.²⁶ In Mississippi, counties may be poorly prepared for managing the costs of a death penalty trial, because if the county has not had such a case in recent memory, the misperception is that those cases must not happen very often. Rationally, the actual frequency of an event should play a role in preparing for such an event.²⁷ This would mean that, in Mississippi, the frequency of capital trials should mean counties are more prepared for their occurrence.²⁸ Unfortunately, the misperception that leads individuals to underestimate the likelihood of a catastrophe also affects policy responses to prepare for such a catastrophe; governments are generally prone to do too little before such an event and too much afterwards.²⁹

II. THE DEATH PENALTY: ITS HISTORY NATIONALLY AND IN MISSISSIPPI

In 1972, the U.S. Supreme Court halted the death penalty, ruling that capital statutes allowed the jury too much discretion; the Court ruled that the system, as it stood, was too arbitrary.³⁰ A number of states passed new capital statutes to limit the discretion of the jury and comply with *Furman v. Georgia*. Four

²³ *Id.* (citing Robert C. Clark, *Contracts, Elites, and Traditions in the Making of Corporate Law*, 89 COLUM. L. REV. 1703, 1719-20 (1989)).

²⁴ See Noll, *supra* note 20, at 141.

²⁵ *Id.*

²⁶ Jolls, *supra* note 1, at 1477 (citing Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in JUDGMENT UNDER UNCERTAINTY 3, 11 (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982)).

²⁷ Noll, *supra* note 20, at 141.

²⁸ *Id.* In 2012 alone, there were six executions.

²⁹ *Id.*

³⁰ *Furman v. Georgia*, 408 U.S. 238, 256-57 (1972).

years later, in 1976, the Supreme Court reviewed five of the newly created statutes and upheld three of the five statutes as constitutional.³¹ Since 1976, the Supreme Court has continued to limit and regulate the use and applicability of the death penalty.

Like the rest of the country, Mississippi suspended the death penalty in 1972 in the wake of the *Furman* decision.³² Four years later, the Mississippi Supreme Court held that if capital trials bifurcated the sentencing proceeding and incorporated aggravating and mitigating circumstances as a factor in jury sentencing, then the death penalty could proceed in Mississippi.³³ The court's opinion was in response to *Gregg v. Georgia*, a Supreme Court case confirming that capital trials could follow the bifurcated trial standard with guided discretion, creating one trial to determine guilt or innocence and one trial to determine whether to implement the death penalty, such that the trials were fair and constitutional.³⁴ The Mississippi legislature acted promptly to pass legislation comporting with the court's decisions, thus reinstating the death penalty in Mississippi with statutes that remain in effect and fairly unchanged today.³⁵

Changes in the death penalty in Mississippi have been primarily due to U.S. Supreme Court cases that require compliance with further protections. For example, after the Court decided that the execution of a mentally handicapped prisoner violates the Eighth Amendment, constituting cruel and unusual punishment, Mississippi followed by amending its own standards.³⁶ Mississippi likewise followed suit when the Court banned the death penalty for juvenile offenders in 2005, at a time when Mississippi had five men on death row who had been

³¹ See *Roberts v. Louisiana*, 431 U.S. 633 (1977); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

³² *Furman*, 408 U.S. 238 (1972). Justices Brennan and Marshall were the only two Justices who decided the death penalty was inhumane in all circumstances. *Id.*

³³ *Jackson v. State*, 337 So. 2d 1242, 1256 (Miss. 1976).

³⁴ *Gregg*, 428 U.S. at 195; see also *Jackson*, 337 So. 2d at 1256.

³⁵ *Jackson*, 337 So. 2d at 1256.

³⁶ *Mitchell v. State*, 886 So. 2d 704, 712 (Miss. 2004).

sentenced as juveniles.³⁷ Otherwise, the standard of review for death sentences is largely the same now as it was in 1976: “heightened scrutiny,” where “all doubts are to be resolved in favor of the accused because what may be harmless error in a case with less at stake becomes reversible error when the penalty is death.”³⁸ The death penalty itself has not been found to be cruel and unusual punishment, nor has the method implemented in Mississippi—death by lethal injection.³⁹

III. LEGAL COUNSEL FOR CAPITAL CASES

The national precedent for legal counsel in capital cases was created in the founding years of the United States. In the Crimes Act of 1790, the First Congress required that two defense attorneys be assigned for federal capital cases.⁴⁰ In the twentieth century, the U.S. Supreme Court, in *Powell v. Alabama*, otherwise known as the “Scottsboro Boys” case, decreed that indigent defendants be appointed counsel in state death penalty cases.⁴¹

³⁷ *Juvenile Offenders Who Were on Death Row*, DEATH PENALTY INFO. CTR., <http://deathpenaltyinfo.org/juvenile-offenders-who-were-death-row> (last visited Apr. 8, 2013). Ronald Chris Foster’s execution was suspended two days before it was scheduled to take place by Governor Ronnie Musgrove who anticipated the U.S. Supreme Court’s decision in *Roper v. Simmons*, 543 U.S. 551 (2005). See *Foster v. State*, 848 So. 2d 172, 173 (Miss. 2003) (en banc).

³⁸ *Bennett v. State*, 990 So. 2d 155, 158 (Miss. 2008) (internal quotations omitted); *Chamberlin v. State*, 989 So. 2d 320, 330 (Miss. 2008); *Havard v. State*, 988 So. 2d 322, 346 (Miss. 2008).

³⁹ *Bennett*, 990 So. 2d at 161; *Branch v. State*, 882 So. 2d 36, 80 (Miss. 2004).

⁴⁰ 1 Stat. 112, 118-19, § 29 (1790) (“[A]ny person who shall be accused and indicted of treason . . . shall also be allowed and admitted to make his full defence by counsel learned in the law; and the court before whom such person shall be tried, or some judge thereof, shall, and they are hereby authorized and required immediately upon his request to assign to such person such counsel, not exceeding two, as such person shall desire, to whom such counsel shall have free at all reasonable hours; and every such person or persons accused or indicted of the crimes aforesaid, shall be allowed and admitted in his said defence to make any proof that he or they can produce, by lawful witness or witnesses, and shall have the like process of the court where he or they shall be tried, to compel his or their witnesses to appear at his or their trial, as is usually granted to compel witnesses to appear on the prosecution against them.”). Much of the language is similar to that of the Sixth Amendment of the U.S. Constitution, which had not yet been ratified.

⁴¹ See *Powell v. Alabama*, 287 U.S. 45, 71 (1932). This was thirty years before the U.S. Supreme Court ruled that the 14th Amendment required defense counsel

The court reversed the convictions of the defendants, holding that “in a capital case, where the defendant is unable to employ counsel . . . it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law.”⁴²

For a number of years after *Powell v. Alabama*, state courts limited the right to counsel to capital cases or cases with a severe penalty.⁴³ Then, thirty years later, the Supreme Court, in *Gideon v. Wainwright*, unanimously recognized the Sixth Amendment constitutional right to counsel for indigent defendants in the criminal justice system, a right also applicable to the states.⁴⁴ In examining the equities of representation, the Court stated, “In our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”⁴⁵ The Court memorably noted, “[L]awyers in criminal courts are necessities, not luxuries.”⁴⁶ The right to counsel is now generally accepted as a fundamental principle in our criminal justice system.⁴⁷

In January 1999, the Mississippi Supreme Court ruled that death row inmates are entitled to county-paid attorneys on second and subsequent appeals in state court, as well as the trial and first appeal.⁴⁸ In Mississippi, each defendant in a capital trial has two attorneys, one of whom is generally provided by the state, while the other is generally provided by the county. Previously, Mississippi counties had only paid for the trial and first appeal. In *Jackson v. State*, the Mississippi Supreme Court determined that death row inmates had been unable to obtain counsel or adequate

appointed for all indigent defendants in criminal cases in *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁴² *Powell*, 287 U.S. at 71.

⁴³ *Betts v. Brady*, 316 U.S. 455, 467-72 (1942).

⁴⁴ 372 U.S. 375 (1963).

⁴⁵ *Gideon*, 372 U.S. at 344. Twenty-three states filed an *amicus curiae* brief supporting Gideon’s right to counsel. See ANTHONY LEWIS, *GIDEON’S TRUMPET* 147-52 (1963).

⁴⁶ *Gideon*, 372 U.S. at 344.

⁴⁷ National Right to Counsel Committee, *Justice Denied: America’s Continuing Neglect of Our Constitutional Right to Counsel*, CONST. PROJECT (Apr. 2009), <http://www.constituionproject.org/pdf/139.pdf>.

⁴⁸ See *Jackson v. State*, 732 So. 2d 187, 191 (Miss. 1999).

help from institutional lawyers.⁴⁹ The court observed it was almost impossible for death row prisoners to obtain pro bono counsel for post-conviction proceedings because the proceedings are complex and time consuming.⁵⁰ The court thus concluded that it could “no longer sit idly by” and allow this problem to persist.⁵¹ The court held that death row inmates in Mississippi were

⁴⁹ In *Jackson*, the petitioner was convicted of four murders and was given a capital sentence. *Id.* at 188. Jackson was represented by Johnnie Walls at trial and on direct appeal. *Id.* After both Jackson’s conviction and sentence were affirmed by the Mississippi Supreme Court, Walls failed to file a petition for rehearing within the applicable time period. *Id.*

Two weeks before his execution, Jackson’s new attorney, C. Jackson Williams, filed a motion for stay of execution and filed an application for leave to file a petition for rehearing. *Id.* at 188-89. The Mississippi Supreme Court stayed the execution but denied the petition for rehearing. *Id.* at 189. The Supreme Court of the United States then denied Jackson’s petition for writ of certiorari. Jackson’s execution was reset by the Mississippi Supreme Court, and Williams filed a motion for post-conviction relief in the Mississippi Supreme Court. *Id.*

Williams then filed a motion for appointment of counsel and payment of litigation expenses. *Id.* Williams asserted that he was handling issues for Jackson “that require[d] paid expert assistance and investigation in order to be adequately addressed.” *Id.* In the motion, Williams also stated that if he were given these funds, he would hire a forensic psychiatrist to perform mental evaluations on Jackson to determine whether the insanity defense was an option. *Id.* Jackson’s previous attorney abandoned the insanity defense, and Williams hoped that if Jackson did have a valid insanity defense, then Jackson would have an ineffective assistance of counsel claim. *Id.* In sum, Williams wanted compensation for his representation, and for the psychological evaluation of Jackson. *Id.*

The Court granted Williams’s motion for payment of litigation expenses. The Court distinguished *Murray v. Giarratano*, 492 U.S. 1 (1989), in which a plurality of the Supreme Court Justices held that an indigent death row inmate did not have a constitutional right to counsel. *Id.* at 10. Justice Kennedy, concurring in the judgment, stated that in Virginia, prisoners on death row could easily obtain counsel because Virginia’s prison system was staffed with institutional lawyers to assist in post-conviction proceedings. Kennedy stated that he was “not prepared to say that this scheme violate[d] the Constitution.” *Id.* at 14-15 (Kennedy, J., concurring).

The Mississippi Supreme Court concluded that its state system was very different from Virginia. In Mississippi, death row inmates had not been able to obtain counsel or adequate help from institutional lawyers. *Jackson*, 732 So. 2d at 191. The court concluded that it could “no longer sit idly by” while this problem was apparent. *Id.* The court therefore held that, in Mississippi, death row inmates were entitled to counsel in post-conviction proceedings. *Id.* The court did not grant the funds for Jackson’s psychological evaluation and remanded the issue to the circuit court. *Id.*

⁵⁰ *Id.* at 190.

⁵¹ *Id.* at 191.

entitled to paid counsel in post-conviction proceedings.⁵² Without such compensation, the court feared that prisoners would otherwise be denied access to capable attorneys and ultimately denied that greatest of all writs, access to the courts.⁵³

IV. COST OF THE DEATH PENALTY: NATIONALLY AND IN MISSISSIPPI

As of February 2013, Mississippi was one of thirty-three states with the death penalty.⁵⁴ Forty-eight people are currently on death row in Mississippi, including two women.⁵⁵ Since the U.S. Supreme Court reinstated capital punishment in 1976, 1321 executions have been conducted in the United States; Mississippi has executed twenty-one of these individuals.⁵⁶ Although more people are executed in the South than in any other region of the country, the number of executions in Mississippi is relatively low compared to other states in the South.⁵⁷ This relatively low number of executions may be due to Mississippi's lower socio-economic status and fiscal issues, as will be discussed later in this Article.⁵⁸

⁵² *Id.* The only Mississippi state decision to negatively implicate *Jackson* is *Wiley v. State*, 842 So. 2d 1280 (Miss. 2003). *Wiley*, however, is easily distinguishable from *Jackson*. *Wiley*, unlike *Jackson*, had adequate representation at every stage of his post-conviction proceedings. Also, unlike *Jackson*, *Wiley* did not file the motion for compensated counsel so that he could obtain representation in post-conviction proceedings; he filed the motion in an attempt to get the court to reconsider his already denied motion. The court in *Wiley* explicitly stated the *Jackson* decision did not apply because of the factual and procedural circumstances significantly differed from those of *Jackson*. See *Wiley*, 842 So. 2d at 1283-85.

⁵³ See *Jackson*, 732 So. 2d at 190. The "great writ" is that of habeas corpus.

⁵⁴ *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf> (last updated Mar. 15, 2013).

⁵⁵ *State by State Database*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/state_by_state. (last visited Apr. 8, 2013).

⁵⁶ *Facts About the Death Penalty*, *supra* note 54, at 3.

⁵⁷ *Id.*

⁵⁸ See *infra* Part V.

A. Cost of the Death Penalty in Other States

Nationally, death sentences are more costly than life sentences. Each stage of a capital case entails greater expenses than pursuing a punishment of life without parole, also referred to as a “death in prison” sentence. Indeed, on average a trial in which the prosecution is seeking the death penalty is likely to cost \$1 million more than a trial in which the death penalty is not sought.⁵⁹

The financial costs for the death penalty are sometimes shocking. For example, neighboring-state Tennessee reports that death sentences cost 48% more for the state to pursue, rather than death in prison.⁶⁰ One of the most comprehensive cost studies examined the death penalty in North Carolina and included the costs of extra time spent by prosecutors, judges, and other personnel on capital cases. The study concluded that a capital case cost \$2.16 million more in North Carolina, per execution, than a non-capital case with a maximum sentence of life without parole.⁶¹ In Kansas, the trial costs for a capital case were, on average, \$508,000, and the median legal costs through execution were \$1.2 million.⁶² The capital trial costs in Indiana were a similar total of

⁵⁹ MARK COSTANZO, *JUST REVENGE: COSTS AND CONSEQUENCES OF THE DEATH PENALTY* 63 (1997); see also Richard C. Dieter, *Smart on Crime: Reconsidering the Death Penalty in a Time of Economic Crisis*, DEATH PENALTY INFO. CTR. (Oct. 2009) [hereinafter, Dieter, *Smart on Crime*], <http://www.deathpenaltyinfo.org/documents/CostsRptFinal.pdf>.

⁶⁰ *Death Penalty Cost*, AMNESTY INTERNATIONAL USA, <http://www.amnestyusa.org/our-work/issues/death-penalty/us-death-penalty-facts/death-penalty-cost> (last visited Apr. 8, 2013).

⁶¹ Phillip J. Cook & Donna B. Slawson, *The Costs of Processing Murder Cases in North Carolina* 1, 78, (1993), <http://www.deathpenaltyinfo.org/northcarolina.pdf>.

⁶² STATE OF KAN. LEGISLATIVE DIV. OF POST AUDIT, PERFORMANCE AUDIT REPORT: COSTS INCURRED FOR DEATH PENALTY CASES: A K-GOAL AUDIT OF THE DEPARTMENT OF CORRECTIONS, at 11 tbl.I-1 (Dec. 2003), available at www.kslpa.org/docs/reports/04pa03a.pdf. The study found the trial costs of a non-death case was on average \$32,000. *Id.* Trial costs for death cases were sixteen times greater than for non-death cases, and the appeal cost for death cases were twenty-one times greater than for non-death cases. *Id.*

\$505,773,⁶³ while costs in Florida were estimated to be \$3.2 million.⁶⁴ In Texas, costs were \$2.3 million.⁶⁵

In federal death penalty cases, the average defense at trial costs \$620,932, which is eight times the cost of a non-capital federal murder case.⁶⁶ The prosecution costs in federal death cases were 67% higher than the defense costs, even before including law enforcement's investigative costs.⁶⁷

This expensive legal process includes the actual criminal investigation, the construction of the prosecution and defense cases (which includes finding and calling witnesses and criminological experts), and finally, jury selection, which requires a larger than usual jury pool in death eligible cases.⁶⁸ In some cases, the death penalty is sought but the defendant is found not guilty or is given a sentence other than capital punishment. In many cases, individuals sentenced to death are never actually executed because they die in prison, have their sentences commuted, or are exonerated. In these particular cases, the extra cost of the capital trial has ultimately been a waste of resources.⁶⁹

⁶³ *Fiscal Impact Statement*, STATE OF IND. LEGISLATIVE SERVICES AGENCY: OFFICE OF FISCAL AND MANAGEMENT ANALYSIS, at 2 (2010), <http://www.deathpenaltyinfo.org/documents/INCostAssess.pdf>.

⁶⁴ Richard C. Dieter, *What Politicians Don't Say About the High Costs of the Death Penalty* (1995), <http://www.fnsa.org/v1n1/dieter.html> (last visited Apr. 8, 2013) [hereinafter Dieter, *What Politicians Don't Say*]. On costs generally, see Dieter, *Smart on Crime*, *supra* note 59.

⁶⁵ Dieter, *What Politicians Don't Say*, *supra* note 64.

⁶⁶ Jon B. Gould & Lisa Greenman, *Report to the Committee on Defender Services: Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases* (Sept. 2010), <http://www.uscourts.gov/uscourts/FederalCourts/AppointmentOfCounsel/FDPC2010.pdf>.

⁶⁷ Subcommittee on Federal Death Penalty Cases, *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation*, COMM. ON DEFENDER SERVS. JUDICIAL CONFERENCE OF THE UNITED STATES, http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/Standards/National/federal_judicial_conference_recommendations.authcheckdam.pdf.

⁶⁸ COSTANZO, *supra* note 59, at 62-63 ("One reason that maintaining the death penalty is so expensive is that capital trials are more complex and time-consuming than other criminal trials at every stage in the legal process: crime investigation, pretrial preparation, jury selection, guilt trial, penalty trial, and appeals.")

⁶⁹ Dieter, *Smart on Crime*, *supra* note 59, at 6.

After a defendant is found guilty and sentenced to death, the appeals process begins. As with capital punishment trials, capital punishment appeals are more expensive than non-capital punishment appeals, ranging in cost from \$170,000 to \$219,000.⁷⁰ Capital appeals are more costly because of the complex legal issues involved and the multiple appeals required to safeguard the validity of the criminal justice system.⁷¹ A relatively high proportion of appeals in capital cases succeed in reversing the sentence or even the conviction itself.⁷² The cost of capital appeals, the success of such appeals, and the expenses of capital trials that end in a life sentence, aggregate into a financial loss that can be staggering.

Take Maryland as an example. The cost of a capital trial is exacerbated because a jury may choose a life sentence instead of a death sentence and a death sentence may be reversed on appeal.⁷³ A 2008 study estimated the cost of a death penalty trial in Maryland at \$1.9 million.⁷⁴ Out of these trials, roughly a third resulted in a death sentence.⁷⁵ Ultimately, after the defendant's appeal, only one in ten of the death sentences resulted in an execution.⁷⁶ According to one study, 68% of death sentences are reversed on appeal.⁷⁷ In 2007, the average time between the

⁷⁰ COSTANZO, *supra* note 59, at 64.

⁷¹ *Id.* ("Capital appeals generally cost more than noncapital appeals because of the complexity of the legal issues involved, the number of different issues that can be raised, and the availability of multiple avenues for appeal. Because a high proportion of appeals in capital cases are successful, and because the defendant's life is at stake, there is ample incentive for pursuing every avenue of appeal.")

⁷² *Id.*

⁷³ Capital defendants are entitled to full review of both their conviction, as well as their death sentence on appeal. A reversal can mean new sentencing with another jury, or more witnesses. The appellate process for a capital case can last over a decade before an execution. See *Time on Death Row*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/time-death-row> (last visited Apr. 8, 2013).

⁷⁴ John Roman et al., *The Cost of the Death Penalty in Maryland*, THE URBAN INST. (Mar. 2008), http://www.urban.org/UploadedPDF/411625_md_death_penalty.pdf.

⁷⁵ *Id.* In this study, 162 capital trials resulted in fifty-six death sentences. *Id.* at 3. This also does not account for cases where the death penalty was originally sought, but the case was settled without a trial or death sentence.

⁷⁶ *Id.* Of the fifty-six death sentences, five have resulted in executions.

⁷⁷ James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839, 1862-63 (2000).

sentencing of a defendant and his or her execution nationally was 12.7 years.⁷⁸

These costs have been a key consideration for states that have eliminated the use of the death penalty in recent years. Since the beginning of the financial crisis in 2007, state legislatures have grappled with the high cost of the death penalty in the face of collapsing budgets. By 2007, New Jersey had spent \$253 million over a twenty-five-year period on costs associated with the death penalty—a time period during which the state executed not a single prisoner.⁷⁹ That same year, New Jersey became the first state in forty years to legislatively repeal the death penalty.⁸⁰ In March 2009, New Mexico Governor Bill Richardson, a proponent of the death penalty, signed a bill to eliminate the death penalty in his state.⁸¹ Governor Pat Quinn of Illinois signed into law a bill abolishing the death penalty in March 2011, making Illinois the sixteenth state without the death penalty.⁸² A central concern for these politicians and legislatures was the large and unjustifiable

⁷⁸ *Capital Punishment, 2007—Statistical Tables*, BUREAU OF JUSTICE STATISTICS, <http://bjs.ojp.usdoj.gov/content/pub/html/cp/2007/tables/cp07st11> (last visited Apr. 8, 2013). In 2006, over 400 inmates nationally had been on death row for twenty years or longer. Dieter, *Smart on Crime*, *supra* note 59, at 21.

⁷⁹ Aaron Scherzer, *The Abolition of the Death Penalty in New Jersey and Its Impact on Our Nation's "Evolving Standards of Decency,"* 15 MICH. J. RACE & L. 223, n.19 (2009).

⁸⁰ *Facts About the Death Penalty*, *supra* note 54; see also Bill Mears, *New Jersey Lawmakers Vote to Abolish Death Penalty*, CNN (Dec. 13, 2007) <http://www.cnn.com/2007/POLITICS/12/13/nj.death.penalty/>.

⁸¹ Elaine de Leon, *Money, Morality, and Repealing the Death Penalty*, RELIGION & ETHICS NEWS WEEKLY (Apr. 24, 2009), <http://www.pbs.org/wnet/religionandethics/episodes/april-24-2009/money-morality-and-repealing-the-death-penalty/2757/> (noting both Richardson's personal faith and state financial concerns as impetus for eliminating the death penalty).

⁸² Ray Long, *Quinn Signs Death Penalty Ban, Commutes 15 Death Row Sentences to Life*, CHI. TRIB. (Mar. 9, 2011, 11:59 AM), http://newsblogs.chicagotribune.com/clout_st/2011/03/quinn-signs-death-penalty-ban-commutes-15-death-row-sentences-to-life.html; see also Bill Chappell, *Illinois Abolishes Death Penalty, Clears Death Row*, NPR (Mar. 9, 2011, 4:14 PM), <http://www.npr.org/blogs/thetwo-way/2011/03/09/134399592/illinois-abolishes-death-penalty-clears-death-row>.

cost of the death penalty in the face of massive statewide budget cuts.⁸³

The *Wall Street Journal* has noted the financial burden on counties of accounting for death sentences.⁸⁴ The *Journal* pointed out how more affluent counties that can financially handle the costs of the death penalty may seek it more often, while other counties that cannot afford capital trials will focus on life sentences.⁸⁵ Similarly, some Texas prosecutors acknowledge how many smaller counties never send anyone to death row because capital cases are so costly.⁸⁶ Wharton County District Attorney Josh McCown told the *Houston Chronicle*:

This is one of those things a district attorney doesn't like to talk about. . . . You don't want to think that you're letting money come into play. You ought to consider the facts of a case and make your decisions in a vacuum. In a perfect world, that's the way you do it. But in a county this size, you have to consider the level of expertise, the financial resources. If you don't, you're stupid. This is not a perfect system or a perfect world.⁸⁷

Similar to some government officials in Mississippi, the *Wall Street Journal* likened the burden of the death penalty on county

⁸³ See, e.g., Tom Kacich, *Death Penalty in Quinn's Hands*, NEWS-GAZETTE (Jan. 12, 2011, 8:00 AM), <http://www.news-gazette.com/news/courts-police-and-fire/2011-01-12/death-penalty-quinn-hands.html> (quoting Sen. Dan Duffy, R-Lake Barrington: "We have spent over \$100 million of taxpayer money defending and prosecuting death row cases. The death penalty does not make our society safer, I believe. It has been an ineffective and expensive use of our scarce resources."); Mary Massingale, *House Narrowly Approves Abolition of Death Penalty*, FOX. ILL. (Jan. 6, 2011), <http://www.foxillinois.com/news/illinois/House-Narrowly-Approves-Abolition-of-Death-Penalty-113053599.html?m=y> (quoting Rep. Pat Verschoore, D-Milan: "I was on both sides of this issue. But then you think of the potential cost savings of this bill, and the state needs all of the savings we can get.").

⁸⁴ Russell Gold, *Counties Struggle with High Cost of Prosecuting Death-Penalty Cases*, WALL ST. J., Jan. 9, 2002, at B1.

⁸⁵ *Id.*

⁸⁶ Allan Turner, *Death Penalty May Carry Heavy Price for Austin Co.*, HOUSTON CHRONICLE (Oct. 4, 2009), <http://www.chron.com/news/houston-texas/article/Death-penalty-may-carry-heavy-price-for-Austin-Co-1725370.php>.

⁸⁷ *Id.*

budgets to that of a natural disaster.⁸⁸ A paper from the National Bureau of Economic Research concluded that capital cases often force counties to increase local taxes.⁸⁹ The paper estimated additional expenses for counties due to capital cases as \$1.6 billion over fifteen years.⁹⁰ Some counties have come close to bankruptcy because of a capital case that was tried and then retried two or three times.⁹¹

Although these appeals and other legal safeguards are financially burdensome, scientific developments have shown they are necessary. DNA evidence has increasingly revealed and exonerated innocent people on death row, showing how the accuracy and thorough nature of our criminal justice system is all the more vital for capital cases.⁹²

B. Cost of the Death Penalty in Mississippi

The costs of the death penalty in Mississippi are many and varied. Between 1989 and 2002, no individuals were executed in Mississippi, but the state continued to provide high-security, separate housing for death row inmates, incurring additional costs.⁹³ Mississippi taxpayers spend \$102.27 each day to house a death row inmate; the cost is \$41.61 each day to house other inmates.⁹⁴ According to the *Biloxi Sun-Herald*, not only does it

⁸⁸ Gold, *supra* note 84 (quoting former Quitman County Administrator Butch Scipper that a death penalty case “is almost like lightning striking . . . It is catastrophic to a small rural county”); *see also Public Defender System Needed*, YAZOO HERALD (July 6, 1991) (“A capital trial is the worst financial nightmare any government body could envision”).

⁸⁹ Katherine Baicker, *The Budgetary Repercussions of Capital Convictions*, NAT'L BUREAU OF ECON. RESEARCH (July 2001), <http://www.nber.org/papers/w8382>.

⁹⁰ *Id.*

⁹¹ *See generally*, Richard Dieter, *Millions Misspent: What Politicians Don't Say About the High Costs of the Death Penalty*, DEATH PENALTY INFO. CTR (revised Fall 1994), <http://www.deathpenaltyinfo.org/node/599>.

⁹² *See, e.g.*, Beety, *supra* note 3. Finally, employing cheaper methods of executing individuals might be deemed a violation of the Eighth Amendment protection against cruel and unusual punishment. *See COSTANZO, supra* note 59, at 66-69.

⁹³ *Mississippi and the Death Penalty*, MISS. DEP'T OF CORR., http://www.mdoc.state.ms.us/mississippi_and_the_death_penalt.htm (last visited Apr. 8, 2013).

⁹⁴ M. Baker, *The faces of Mississippi's death row*, BILOXI SUN-HERALD, July 14, 2012, available at <http://www.deathpenaltyinfo.org/time-death-row-faces-mississippi-death-row>.

cost twice as much to house death row inmates as inmates in the general population, but the state has spent more than \$1 million housing just one inmate who has been on death row since 1977.⁹⁵

Currently, Mississippi houses fewer people on death row, because more people have been executed in the past three years than in the previous twenty. The state of Mississippi executed three men in 2010, two men in 2011—with a third scheduled and deferred; and six men in the spring and summer of 2012.⁹⁶

In comparison to the legal process, the actual cost of conducting an execution is relatively minor. According to the Mississippi Department of Corrections, each execution conducted in the state since the advent of the lethal injection in 2002 cost an average of \$11,400.⁹⁷ This figure includes the cost of the drugs, use of facilities, security, and any overtime.⁹⁸ This is less than the cost of experts alone in a federal capital case, which averages \$83,029, in contrast to non-capital federal case expert costs of \$5,275.⁹⁹

The true cost of these executions and the legal process behind them impacts local communities and counties throughout Mississippi. Mississippi is one of sixteen states that require more than 50% county funding for indigent defense in the criminal justice system in general.¹⁰⁰ Counties and citizens pay for court-appointed defense attorneys, expert witnesses, and appeals. By compiling these costs, Mississippians may compare money spent on the death penalty with resources spent on other government services.

The case of death row inmate Robert Simon provides particular insight into the financial externalities of prosecutors

⁹⁵ *Id.*

⁹⁶ *See Mississippi and the Death Penalty, supra* note 93. Since the death penalty was reinstated in 1976, Mississippi has executed twenty-one individuals. *Id.* Eleven people have been executed since 2010. Between 1989 and 2009, seven people were executed. *Id.*

⁹⁷ E-mail from Tara Booth, Office of Commc'ns, Miss. Dep't of Corrs., to author (Feb. 1, 2012) (on file with author).

⁹⁸ *Id.*

⁹⁹ Gould, *supra* note 66.

¹⁰⁰ National Right to Counsel Committee, *supra* note 47, at 54; *see also* Jackson v. State, 732 So. 2d 187 (Miss. 1999).

seeking a death sentence. The State of Mississippi scheduled Simon to be the third man executed in 2011.¹⁰¹ On the day of Robert Simon's scheduled execution, the U.S. Court of Appeals for the Fifth Circuit granted a stay and halted the execution.¹⁰² The Court ordered a competency hearing for Simon in federal district court.¹⁰³ In the months before his execution, Simon suffered a head injury when he fell, or jumped, off his top-level bunk bed onto the cement floor.¹⁰⁴ Simon must be competent and able to understand the proceedings in order to be executed.¹⁰⁵

The cost of Simon's death penalty case was controversial from the beginning—it sparked a lawsuit by Quitman County against the State of Mississippi in 2003.¹⁰⁶ Quitman County challenged the indigent defense system by which the county pays part-time public defenders, rather than a statewide public defender system financed by the state.¹⁰⁷ The cost of prosecuting Robert Simon and his codefendant Anthony Carr was simply too much. As T.H. Scipper, the Quitman County Chancery Clerk, said at the time: "Let's put it this way . . . Quitman County had a flood in 1989, the

¹⁰¹ See *Simon Asks Court to Block Execution*, JACKSON FREE PRESS (May 24, 2011, 8:48 AM), <http://www.jacksonfreepress.com/news/2011/may/24/simon-asks-court-to-block-execution/>. Simon was the last of three men scheduled to be executed in May 2011. See *Three Executions at Parchman, Mississippi, Set for May; More Possible*, DEATH PENALTY NEWS (May 7, 2011) <http://deathpenaltynews.blogspot.com/2011/05/3-executions-at-parchman-mississippi.html>.

¹⁰² Barry Leibowitz, *Miss. Execution of Robert Simon Jr. Halted over Doctor Access to Killer*, CBS NEWS (May 27, 2011 8:29 AM), http://www.cbsnews.com/8301-504083_162-20066600-504083.html.

¹⁰³ *Fed Panel Orders Review of Robert Simon Jr. Mississippi Death Row Case*, GULF-LIVE.COM (Mar. 2, 2012 6:39 PM), http://blog.gulflive.com/mississippi-press-news/2012/03/fed_panel_orders_review_of_mis.html.

¹⁰⁴ Monica Land, *Lawyers for Death Row Inmate Issued Stay of Execution to File Today*, MISS. LINK (June 6, 2011), <http://themississippilink.com/2011/06/06/lawyers-for-death-row-inmate-issued-stay-of-execution-to-file-today/>.

¹⁰⁵ The execution of an incompetent criminal constitutes cruel and unusual punishment under the Eighth Amendment. *Ford v. Wainwright*, 477 U.S. 399, 417 (1986). In *Ford*, the Court found that the eighth amendment prevented the execution of "one whose mental illness prevents him from comprehending the reasons for the penalty or its implications." *Id.*

¹⁰⁶ *Quitman Cnty. v. State*, 910 So. 2d 1032 (Miss. 2005) (en banc) (affirming the trial court judgment that the county had failed to prove financial injury and ruling for the state).

¹⁰⁷ *Id.*

Parker trials in 1990-91, and another flood in 1992. All three events were about equal economic catastrophes.”¹⁰⁸ Mr. Scipper also noted that “roads didn’t get paved, the county didn’t buy the sheriff a patrol car he needed and other needs went unaddressed because of the Parker murder trial expenses.”¹⁰⁹ Quitman County was forced to raise taxes for three years and borrow \$150,000 to hire legal counsel for the two codefendants.¹¹⁰ According to the 2010 census data, Quitman remains one of the poorest counties in the nation and is still paying for part-time public defenders.¹¹¹

The Quitman case also highlighted what happens when less money is spent on cases: defense attorneys are not able to capably represent their clients. Without funding, lawyers do not interview witnesses, hire investigators, examine evidence, or even file motions.¹¹²

1. Representation by the State and the County and Corresponding Expenses

The Mississippi Constitution states, “The expenses of criminal prosecutions shall be borne by the county in which such prosecution shall be begun”¹¹³ The State of Mississippi,

¹⁰⁸ Sid Salter, *Stay of Execution Granted for Death Row Inmate Robert Simon at the 5th U.S. Circuit for His Role in the Most Heinous Crime This Writer Ever Covered*, MISS. ST. U. LIBR. (May 24, 2011, 11:28 PM), <http://blogs.library.msstate.edu/sidsalter/?p=371>.

¹⁰⁹ *Id.*

¹¹⁰ Ronni Mott, *The Cost of Executions*, JACKSON FREE PRESS (Oct. 28, 2009) (citing Dieter, *Smart on Crime*, *supra* note 59); *see also* *Poor County Forced to Finance Killers’ Appeals*, L.A. TIMES (Mar. 28, 1999), <http://articles.latimes.com/1999/mar/28/news/mn-21958>.

¹¹¹ *See Selected Economic Characteristics: 2006-2010 American Community Survey 5-Year Estimates*, U.S. CENSUS BUREAU, http://www.census.gov/acs/www/data_documentation/2010_release/ (last visited Apr. 16, 2013). Quitman County is one of the ten counties across the United States with the lowest annual median household income. Dan Joseph, *America’s Ten Poorest Counties Are in Gulf Coast States, Kentucky, and on Indian Reservations*, CNSNEWS.COM (Dec. 17, 2010), <http://www.cnsnews.com/news/article/america-s-10-poorest-counties-are-gulf-coast-states-kentucky-and-indian-reservations>.

¹¹² Brief for Reuben V. Anderson, Rhoda B. Billings, Charles B. Blackmar, Harold G. Glarke, Armis E. Hawkins, James L. Robertson & Albert W. Thompson as Amici Curiae, at 5, *Quitman Cnty v. State*, 910 So. 2d (1032) (Miss. 2005).

¹¹³ MISS. CONST. art. 14, § 261.

however, pays for part of a capital defense team.¹¹⁴ Two attorneys always represent a defendant in capital cases, one of which is often provided by the state through the Office of Capital Defense Counsel. This arrangement is due to the Capital Defense Litigation Act of 2000, a bill aimed at reducing the cost of capital defense for the counties, as well as improving the quality of defense representation.¹¹⁵ If the defendant is indigent, the second defense attorney is appointed counsel by the local court and paid by the county where the trial is held.¹¹⁶ Because of client conflicts, it is estimated that about twenty-five percent of cases are handled entirely by local counsel, including the costs of investigation and experts.¹¹⁷

In 2005, Mississippi ranked last in the nation in per capita spending on indigent defense, leaving the burden on the counties.¹¹⁸ In 2006, the Mississippi legislature responded by creating two state-wide, state-funded offices for capital cases: the Office of Capital Defense Counsel and the Office of Capital Post-Conviction Counsel.¹¹⁹ In 2011, the legislature passed a bill consolidating the Office of Capital Defense Counsel, Office of Indigent Appeals, and the Division of Public Defender Training, all into the Office of the State Public Defender.¹²⁰ Despite the

¹¹⁴ *Id.*; see also interview with Wanda Fancher, Cir. Clerk, Attala Cnty. Miss. (Oct. 12, 2012) (on file with author) (noting that because the state pays for part of the capital defense team, the county pays less of that cost).

¹¹⁵ *Strengthening our Criminal Justice System: Extending the Innocence Protection Act*, U.S. SENATE COMM. ON THE JUDICIARY (Nov. 10, 2009), http://www.judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da152f589&wit_id=e655f9e2809e5476862f735da152f589-0-4 (testimony of Andre de Gruy).

¹¹⁶ Interview with Andre de Gruy, Capital Defense Counsel (Nov. 6, 2012) (on file with author).

¹¹⁷ *Id.*

¹¹⁸ In 2005, the population of Mississippi was 2,921,088 and the state's indigent defense expenditures were \$12.8 million. ABA/TSG FY 2005 INDIGENT DEFENSE EXPENDITURES, Ch. 2, at 17, 36.

¹¹⁹ See MISS. CODE ANN. §§ 99-18-1 to -19 (2007) (creating the Office of Capital Defense Counsel); §§ 99-39-101 to -119 (2007) (creating the Office of Capital Post-Conviction Counsel).

¹²⁰ S.B. 2563, Reg. Sess. (Miss. 2013). The Office of Capital Defense Counsel represents defendants in death penalty trials while the Office of Capital Post-Conviction Counsel represents defendants in their death penalty appeals.

titled Office of the State Public Defender, Mississippi does not have a state-wide public defender system.

Because both the state and the county fund the costs of a death penalty case, from arrest through execution, good data on the expenses of a death penalty case are difficult to obtain. The Office of Capital Defense Counsel, funded by the state, pays for the investigation and experts, which is an estimated \$50,000 per case.¹²¹ If the state defender contracts with someone else to appear as counsel because of a conflict, the estimated cost is about \$75,000 per case.¹²² In a case where no local counsel will represent the defendant, the costs can run even higher.¹²³ If Mississippians choose to have the death penalty, then the state is mandated to provide certain safeguards and legal procedures.¹²⁴ Thus, if Mississippians want the death penalty, constituent attorneys must be willing to step up and represent defendants, or incur even greater costs. The costs noted above do not include the added expenses of juries or witness fees for the prosecution; these expenses are paid by the county.¹²⁵

Despite what seems to be the high costs for the defense, a study by the Mississippi Public Defender Task Force found that funding for the prosecutors was approximately twice the level of funding as for the defense.¹²⁶

¹²¹ Interview with Andre de Gruy, *supra* note 116.

¹²² *Id.* About 25% of cases are handled entirely by local counsel, including the cost of investigation and experts. *Id.*

¹²³ *Id.*

¹²⁴ See Carol S. Steiker & Jordan M. Steiker, *Cost and Capital Punishment: A New Consideration Transforms an Old Debate*, 2010 U. CHI. LEGAL F. 117, 137-50 (2010) (detailing how costs for death penalty litigation—and maintaining the constitutionality of the death penalty—have increased since the *Furman* decision).

¹²⁵ It should be noted that eighteen states place the financial burden of indigent defense entirely or primarily on the counties. See, e.g., Lisa R. Pruitt & Beth A. Colgan, *Justice Deserts: Spatial Inequality and Local Funding of Indigent Defense*, 52 ARIZ. L. REV. 219, 221-22 (2010) (“[T]he primary funding source for the local court system . . . is local tax revenue. An inconsequential amount of funding for indigent defense comes from centralized state revenue.”); see also Mark Sherman, *Gideon v. Wainwright 50th Anniversary: Serious Problems Persist in Indigent Legal Defense*, HUFFINGTON POST (Mar. 18, 2013 3:54 AM), http://www.huffingtonpost.com/2013/03/18/gideon-v-wainwright-50th-anniversary-_n_2899646.html.

¹²⁶ Miss. Pub. Defender Task Force Rep. to the Miss. Legis. (2006).

2. Capital Trial Expenses by County

To gather information for this Article, the author called, e-mailed, and wrote letters to the Circuit Clerks of counties that currently have an inmate on death row. Many clerks shared their experiences with local capital cases, and also shared their general yearly budget.¹²⁷ None of the budgets allocated funds specifically for capital cases.

Under Mississippi state law, each county must have its annual budget complete by September 15.¹²⁸ This budget includes allocated costs for specific courts; the Circuit Clerk looks at cases coming to trial in the next year and submits a budget for the County.¹²⁹ In DeSoto County, the County Board meets each month of the fiscal year and proposes changes to the county budget, where necessary.¹³⁰ If there are extra costs for a death penalty case, such as jury costs or witness fees, then money is taken from other line items in the budget to make up the difference between the Circuit Clerk's anticipated costs and the actual costs.¹³¹ DeSoto County pays the Circuit Clerk for these additional trial expenditures.¹³² For DeSoto County, the Circuit Clerk budgeted between \$618,000 and \$644,000 for court expenses for FY

¹²⁷ The author was unable to obtain budgets and information on expenditures from every county represented on death row or from every county in Mississippi. The responding counties were: Adams, Alcorn, Amite, Attala, Benton, Bolivar, Calhoun, Carroll, Chickasaw, Choctaw, Clarke, Clay, Coahoma, DeSoto, George, Greene, Harrison, Itawamba, Jackson, Marion, Oktibbeha, Pike, Prentiss, and Yazoo.

¹²⁸ Interview with Tom Arnold, in DeSoto Cnty., Miss. (Sept. 12, 2012) (on file with author).

¹²⁹ *Id.* In particular, the judicial line items for the budget are 160-179.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* As Mr. Arnold noted, DeSoto County is fortunate to have the resources to adapt to these kinds of continual changes in the budget. *Id.* As he also noted, other counties are not as fortunate and have to borrow money when a county has several costly trials in a fiscal year. *Id.*

2010/2011 through 2012/2013.¹³³ DeSoto County also pays for nine public defenders serving the county.¹³⁴

The difficulty with the DeSoto County financial data is that it does not separate the cost of capital punishment cases from the general docket of state cases in the county. The numbers do indicate, however, how a county's budget could be completely disrupted by a few high-cost cases, such as death penalty trials. If a death penalty case costs three times that of a non-death penalty trial, having just one capital case could throw off not simply the budget for the Circuit Clerk, but the budget for the entire county.

Other counties follow the same budget structure as that of DeSoto County. In Amite County, for example, the Circuit Clerk generally adopts last year's budget with small changes, and then, if there is a need for more money than anticipated, the Clerk will request additional funds from the Board of Directors.¹³⁵ Amite County also does not separate costs of capital cases from regular court costs.¹³⁶ Attala County does not separate or consider the costs of capital cases; the Clerk simply submits the regular court budget, renewing last year's budget.¹³⁷ If necessary, the Circuit Clerk may request more funding from the Board of Directors.¹³⁸ Chickasaw County likewise has no special appropriation for the cost of a capital case.¹³⁹ In Jackson County, according to Circuit

¹³³ These numbers come from the public records county budget for DeSoto County over the past few years. FY 2010/11: \$639,558 budgeted, \$443,584.69 actually spent. FY 2011/12: \$644,249 budgeted, \$449,848.06 actually spent. FY 2012/13: \$618,746 budgeted. At this time the costs for FY 2012/13 are unknown.

¹³⁴ These numbers also come from the public records county budget for DeSoto County. FY 2010/11: \$528,834 budgeted, \$526,540.93 actually spent. FY 2011/12: \$544,808 budgeted, \$519,139.24 actually spent. FY 2011/12: \$544,808 budgeted, \$519,139.24 actually spent. FY 2012/13: \$556,767 budgeted.

¹³⁵ Interview with Debbie Kirkland, Cir. Clerk, Amite Cnty. Miss. (Oct. 12, 2012) (on file with author).

¹³⁶ *Id.* Ms. Kirkland also shared that approximately 96 jurors respond to summons each week and a person is paid \$30 per day for jury service. *Id.*

¹³⁷ Interview with Wanda Fancher, Cir. Clerk, Attala Cnty. Miss. (Oct 12, 2012) (on file with author). The court summons approximately 200 jurors each week and has 60-100 that come to the courthouse; they are paid \$25 per day of jury service. *Id.*

¹³⁸ *Id.*

¹³⁹ Interview with Sandra N. Willis, Circuit Clerk, Chickasaw Cnty. Miss. (Oct. 12, 2012).

Clerk Joe Martin Jr., the judges decide on the judicial budget, and then submit this to the County Board.¹⁴⁰

A capital case is considered an “unexpected” circumstance, one that is not included in a state budget.¹⁴¹ Indeed, a number of counties will go years without a capital case.¹⁴² In Pike County, Circuit Clerk Roger Graves expressed that because Pike County “seldom” has a capital case, it does not budget the costs.¹⁴³ As costs arise, they are submitted to the county for payment.¹⁴⁴ Likewise, in Prentiss County, Circuit Clerk Mike Kelly indicated that the county did not have enough cases to budget for them, and that it “can’t plan” for those cases.¹⁴⁵ Soon after this conversation, Prentiss County had a capital case go to trial.¹⁴⁶ After the defendant was found guilty, the prosecution offered a life sentence in part because the sentencing phase of the trial would have been so expensive.¹⁴⁷

¹⁴⁰ Interview with Joe Martin, Jr., Cir. Clerk, Jackson Cnty. Miss. (Oct. 1, 2012) (on file with author) (noting that Jackson County is part of the 19th Judicial District, which includes Jackson, Greene, and George; judges for this district submit their budgets to each county).

¹⁴¹ See, e.g., Interview with Carlton Baker, Cir. Clerk, Calhoun Cnty. Miss. (Oct. 12, 2012) (on file with author) (noting the County has assured the Circuit Clerk’s office that it will help with any expenditures that may occur because of unexpected circumstances such as capital punishment cases).

¹⁴² See, e.g., Interview with Peggy Miller, Cir. Clerk, Choctaw Cnty. Miss. (Oct. 12, 2012) (on file with author) (noting that there is very little court activity in Choctaw County and there are even terms without a single trial; the Circuit Clerk stated the Board would have to approve the costs of a death penalty trial and pay those costs, but that Circuit Clerk Miller has been Circuit Clerk for five years and has never had a capital case.).

¹⁴³ See Interview with Roger A. Graves, Cir. Clerk, Pike Cnty. Miss. (Nov. 14, 2012) (on file with author).

¹⁴⁴ *Id.*

¹⁴⁵ Interview with Mike Kelley, Cir. Clerk, Prentiss Cnty. Miss. (Oct. 1, 2012) (on file with author).

¹⁴⁶ *Id.* Although Mr. Kelley did not name the case, the author believes it to be that of Charles Burleson. *Capital Murder Case Heading to Jury*, WTVA (Oct. 12, 2012 10:49 AM), http://www.wtva.com/content/news/prentiss_co_ms/story/Capital-murder-case-heading-to-the-jury/820p1nTji0GfyEnaTFhY7Q.csp.

¹⁴⁷ See *id.* Prentiss County previously had a high profile death penalty conviction, that of Cory Maye, that was reversed. Ultimately, Cory Maye was offered a manslaughter plea with time served. Police mistakenly broke into Maye’s home late at night instead of the correct address next door; Maye shot the officer who broke into his bedroom during the botched drug raid. Radley Balko, *Cory Maye Freed After 10 Years in Prison: The Back Story*, HUFFINGTON POST (July 6, 2011 11:10 AM),

The Circuit Clerk of Clay County detailed exactly what the additional costs could be for a capital offense where the District Attorney seeks a death sentence. These additional costs included jurors, additional bailiffs for security, additional public defenders, expert witnesses, witnesses from out of state and their lodging, motion days where everyone is present, and sheriff's costs of serving and transporting inmates.¹⁴⁸ Clay County has two public defenders, and additional counsel from the state is appointed in capital cases. In the Clerk's view, capital offenses place a financial burden on a small county.¹⁴⁹ Circuit Clerk Robert Harrell also pointed out that the court reporter may have several volumes of transcripts that are necessary, and costly, for the appeal.¹⁵⁰

The Clerk of Itawamba County was one of the few who had available the actual cost of a recent capital case. The last capital case in Itawamba was in 2007, with a total cost of \$50,500.¹⁵¹

http://www.huffingtonpost.com/2011/07/06/cory-maye-freed-after-10-years_n_890456.html#s303264&title=Bob_Evans_Cory.

¹⁴⁸ Letter from Robert D. Harrell Jr., Cir. Clerk, Clay Cnty. Miss., to author (Oct. 10, 2012) (on file with author). Likewise, the Circuit Clerk of Jackson County, Joe Martin, Jr., stated the budget covered \$40 a day for jury duty, plus all expenses such as mileage, lodging, food, or medical care. Interview with Joe Martin Jr., *supra* note 140. In Marion County, the costs include: printing and mailing of 250 to 300 Jury Summons; labor to check in juror forms, take phone calls, record excused jurors, and to process payment for jurors; clerk and one deputy to attend jury selection and trial; payment to jurors—approximately \$75 for voir dire (one day at \$40 plus mileage); payment to jurors for trial (three to five days) with two alternates (fourteen jurors at \$40 a day plus mileage); recording of minutes and transcripts at \$2 a page; cost of refreshments for jurors; cost of travel for court staff (court administrator, staff attorney, court reporter); cost of bailiffs and additional security if requested by the court; cost of public defenders if defendant is indigent (always two appointed on capital cases); cost of appeal if defendant is indigent; additional possible costs can be incurred if there is a change of venue or sequestered jury, and there may be additional costs for the District Attorney's office, witnesses, or special medical evaluations. Email from Janette Nolan, Cir. Clerk, Marion Cnty. Miss., to author (Nov. 13, 2012 10:41 AM) (on file with author).

¹⁴⁹ Letter from Robert D. Harrell Jr., Cir. Clerk, Clay Cnty. Miss., to author (Oct. 10, 2012) (on file with author). Again, in Clay County, the Circuit Clerk submits the budget to the Board of Directors for the county for approval, with adjustments as needed. *Id.*

¹⁵⁰ *Id.*

¹⁵¹ E-mail from Carol Gates, Cir. Clerk, Itawamba Cnty. Miss., to author (Nov. 15, 2012 11:47 AM) (on file with author). Gates estimate was \$5000 for investigative fees and witness expenses, \$36,500 for attorney fees, \$6000 for cost of the hotel, and \$3000

Itawamba County also does not request a specific financial amount for a capital case when submitting the general budget.¹⁵² Instead, the Clerk submits, along with the court budget, a written notification of the upcoming capital case on the docket with the status of the case at the time and when the case is estimated to go to trial.¹⁵³

In some counties, budgets are handled by the judges' offices. For example, in Bolivar County the Senior Judge's Office handles all the budget issues for court, with each judge managing his or her own budget.¹⁵⁴ In Jackson County, Circuit Clerk Joe Martin indicated that the judges in the 19th Judicial District, which includes Jackson, Greene, and George counties, decide the budget and then submit the budget to the respective county.¹⁵⁵ As an example of costs, in a recent George County case with two codefendants, the costs for counsel, a private investigator, and a mitigation specialist, were \$92,000 for one defendant and \$125,000 for the other defendant.¹⁵⁶

In George County, on September 2012, Fred Sanford Spicer was sentenced to life in prison without parole after District Attorney Tony Lawrence offered for him to plead guilty to spare the county the added expense of seeking the death penalty.¹⁵⁷ In District Attorney Lawrence's own words:

George County has had three murder trials, including two capital murders, within the last year. In an effort to avoid unnecessary expense and delay, the state waived seeking the imposition of the death penalty. It is time that Mr. Spicer's legal follies ended, and the imposition of life without parole was just the way to do it.¹⁵⁸

for cost of the immediate appeal. *See id.* This total did not include cost of food for the jury, copies, postage, or jury pay, which is \$30.00 per day and \$0.50 per mile. *See id.*

¹⁵² *See id.*

¹⁵³ *Id.*

¹⁵⁴ E-mail from Marilyn Kelly, Cir. Clerk, Bolivar Cnty. Miss., to author (Feb. 12, 2012 9:27 AM) (on file with author).

¹⁵⁵ Interview with Joe Martin Jr., *supra* note 140.

¹⁵⁶ Interview with Andre de Gruy, *supra* note 116.

¹⁵⁷ Royce Armstrong, *Spicer Resentenced from Death to Life in Prison*, GEORGE CO. TIMES, Oct. 25, 2012.

¹⁵⁸ *Id.*

Spicer was convicted of killing Mr. Edmond Hebert on October 11, 2001, and sentenced to death.¹⁵⁹ In 2007, the Mississippi Supreme Court affirmed the murder conviction, but remanded the case for a hearing on whether Spicer had received ineffective assistance of counsel in the sentencing phase of the trial.¹⁶⁰ In 2011, Judge Harkey found Spicer did receive ineffective assistance of counsel, and Mr. Spicer's death sentence was reversed, with a new trial scheduled for the sentencing.¹⁶¹ District Attorney Lawrence's offer for Spicer to plead guilty to life without parole ended ten years of legal battles, with costs borne by George County.

Retrials of overturned death convictions add to the financial burden placed on counties.¹⁶² The most well-known example is that of Curtis Flowers in Montgomery County: over the course of fourteen years, Mr. Flowers had *six trials* for the same underlying charges.¹⁶³ The first five trials ended either in hung juries or with overturned convictions; these trials cost over \$300,000.¹⁶⁴ Mr. Flowers went to trial for the sixth time in June 2010; he was found guilty and sentenced to death.¹⁶⁵ His case is still on appeal.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² A number of death sentences are also being challenged based on alleged forensic fraud: that of Dr. Stephen Hayne and Dr. Michael West. See K.C. Meckfessel Taylor, Marielle Elisabet Dirx, William McIntosh, and W. Tucker Carrington, *CSI Mississippi: The Cautionary Tale of Mississippi's Medico-Legal History*, 82 MISS. L.J. 1271 (2013).

¹⁶³ Tom Mangold, *Curtis Flowers Faces 6th Trial for the Same Crime*, BBC NEWS (Nov. 26, 2009), <http://news.bbc.co.uk/2/hi/americas/8377236.stm>.

¹⁶⁴ Bill Quigley, Audrey Stewart & Davida Finger, *African-American Mississippi Man Starts Record Sixth Murder Trial*, TRUTHOUT (June 10, 2010), <http://archive.truthout.org/african-american-mississippi-man-starts-record-sixth-murder-trial60297>; see also MISS. PUB. DEFENDER TASK FORCE REP. TO THE MISS. LEGIS. 39 (2006). The Task Force Report details the costs of the first four trials for Curtis Flowers in Montgomery County: the first trial cost \$78,000; the second cost \$85,000; the third cost \$60,000. *Id.* The fourth trial had not taken place yet at the time of the Report, but \$52,580 had been budgeted for the fourth trial. *Id.* If the cost exceeded that budgeted, the county was expected to use its cash reserves. *Id.*

¹⁶⁵ Jay Elias, *Curtis Flowers Sentenced to Death After Record 6th Trial*, DAILY KOS (June 20, 2010 10:59 AM), <http://www.dailykos.com/story/2010/06/20/877803/-Curtis-Flowers-Sentenced-to-Death-After-Record-6th-Trial>.

An older, but poignant, story is that of Jasper County, which spent three times more on one death penalty trial than it did on its entire public library system for 1995.¹⁶⁶ These death penalty trial costs are often covered by raising property and car taxes in a county.¹⁶⁷

3. Counties Holding Capital Trials in Fiscal Year 2012-2013

Greene County provides an opportunity to calculate those additional costs of a capital case. Between 2008 and 2012, Circuit Clerk Cecelia Bounds did not have a single capital trial.¹⁶⁸ To the best of her knowledge, Greene County had not had a capital trial for more than fifteen years.¹⁶⁹ For the fiscal year 2012-2013, Clerk Bounds has budgeted for her first death penalty trial, noting the difficulty of doing so for the first time.¹⁷⁰ Ms. Bounds calculated the cost of housing, meals, transportation, juror compensation, and bailiff compensation. She included the amount in her budget proposal for the fiscal year and submitted it to the county governing authority.¹⁷¹ In her experience, this kind of an expense request will be followed by a court order directing the county governing authority to approve it.¹⁷² If the actual costs are more than the approved budget, amendments will be made to the county budget to cover those costs.¹⁷³

Yet, Ms. Bounds's budget for the capital trial is a separate request from the general court budget. The Circuit Court budget for Greene County for 2012-2013 was \$108,412.92.¹⁷⁴ In 2011-

¹⁶⁶ *New Voices: The High Cost of the Death Penalty in Mississippi*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/new-voices-high-cost-death-penalty-mississippi> (last visited Apr. 8, 2013).

¹⁶⁷ *Id.*

¹⁶⁸ E-mail from Cecelia Bounds, Cir. Clerk, Greene Cnty. Miss., to author (Oct. 15, 2012 10:28 AM) (on file with author).

¹⁶⁹ E-mail from Cecelia Bounds, Cir. Clerk, Greene Cnty. Miss., to author (Feb. 12, 2013 6:23 PM) (on file with author).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ See Greene County Accounting 2012 – , General Ledger Budgeted Expenditures, 2012-2013 Fiscal Year through February.

2012, the Circuit Court budget was the exact same, \$108,412.92, and in 2010-2011, the budget was \$109,508.¹⁷⁵ Greene County has 14,338 citizens, with a per capital income of \$14,759; 18.8% of the people of Greene County live below the poverty line.¹⁷⁶ It is unclear how the county governing authority raised the additional funds for the death penalty trial in 2013.

The cost of prior capital trials could be helpful in anticipating the cost of an upcoming trial. For example, Circuit Clerk Bounds of Greene County reports that she has no prior experience with calculating the cost of a death penalty case. And yet some, if not many, counties are unable to keep an ongoing record of past death penalty costs. In counties that had experienced death penalty trials, cost records had never been entered into the computer, there was not enough manpower to go back and find financial documents and establish a financial knowledge now, those financial documents were missing, or the receipts and records had likely been destroyed.¹⁷⁷

V. FINANCIAL RISK AND WHY WE DO NOT KNOW THE TRUE COST OF THE DEATH PENALTY IN MISSISSIPPI

Mississippi counties have held and paid for capital trials and capital appeals for the past few decades. Yet many counties do not retain financial records, and many counties do not provide leeway in their budgets should a capital case arise. Although the costs of a capital trial have been compared to a natural disaster, capital trials are far more frequent in Mississippi. The State currently has forty-eight inmates on death row, the longest serving of whom

¹⁷⁵ E-mail from Cecelia Bounds, Cir. Clerk, Green Cnty. Miss., to author (Apr. 9, 2013 12:58 PM) (on file with author).

¹⁷⁶ *State and County QuickFacts Greene Cnty. Miss.*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/28/28041.html> (last visited Apr. 8, 2013).

¹⁷⁷ Phone calls to various circuit clerks in Spring 2012. This information is what led to my further investigation for precise numbers of current budgets, as well as anecdotal information on how counties cover the costs of death penalty trials. In an effort not to place a disparaging light on the counties that provided this information, and given that I did not call every county that had experienced a capital trial in the past twenty years, I am leaving those counties anonymous.

was originally sentenced to death thirty-five years ago.¹⁷⁸ The number of death row inmates fails to include the capital convictions that have been reversed, as well as the capital trials that never resulted in a death sentence. The costs can be damaging to a county budget, yet few if any counties prepare for a capital case with a rainy day fund.

Exposing the real financial risk of these capital cases enables counties and the state to appreciate the costs that every citizen—including victims—bears when the death penalty is implemented. The cost of the death penalty has remained out of the public eye in Mississippi. Why?

County decisions to pay for death penalty prosecutions are financially risky decisions, yet they are not discussed with the general public nor are they considered through a cost-benefit analysis. As a number of the circuit clerks made clear, when the prosecution notifies the court it is pursuing the death penalty, the circuit clerk estimates what the costs may be and presents those costs to the county board as a general part of the court budget. The death cases are not considered separately for their cost nor does the county board often, if ever, deny the court its budget request. Instead, money is taken from other line items in the county budget. In this way, the financial risk of each death penalty case is sublimated.

A. Society Is Created by Risk

Our society is created and shaped by risk as much as society chooses to create risk. If a county de facto accepts the costs of every death penalty case the state chooses to prosecute, the financial risk and economic harm shape the community and the lives of people in that county.¹⁷⁹ Even when these risky decisions remain unacknowledged and the financial impact remains obscured, the reality of the financial fallout affects communities

¹⁷⁸ *Miss. Death Row Demographics*, MISS. DEP'T OF CORR., <http://www.mdoc.state.ms.us/Current%20Death%20Row%20Facts.htm> (last visited Apr. 8, 2013). The currently longest serving death row inmate is Richard Jordan, MDOC #30990; he was originally convicted at his first trial on March 2, 1977. *Id.*

¹⁷⁹ Mitchell Dean, *Risk, Calculable and Incalculable*, in *RISK AND SOCIOCULTURAL THEORY: NEW DIRECTIONS AND PERSPECTIVES* 155 (Deborah Lupton ed., 1999).

and how they function and grow. To deny that result is to give one's government over to fate, rather than to choice.

The local government defines and creates this risk, and thus one must look to the county board decisions to understand the risk.¹⁸⁰ The County budget decisions explain why there are potholes and unfinished bridges in years of capital cases, and how the county responded to the financial risk.

Why would county actors accept budget changes that would negatively impact their citizens, without doing a cost-benefit analysis of capital cases? Public sector actors want to plan in advance similar to other citizens.¹⁸¹ Yet, government officials are not planning for these financial catastrophes and are not considering them in relation to the harm they cause to citizens.

One reason may be that the financial burden of the death penalty may become a political issue if the impact is recognized throughout the county and the community.¹⁸² When roads remain unpaved, bridges are not repaired, and victims are paying more in taxes solely so that the state can have a death penalty trial¹⁸³—which may or may not result in the defendant being ultimately executed—such financial issues may indeed become political issues.¹⁸⁴ This leads to the reality of risk being ignored because of the way that risk is, or is feared to be, politicized and moralized.¹⁸⁵

Government actors have no incentive to draw any further attention to an issue that is politically controversial. If policy makers are most concerned with their own political welfare,¹⁸⁶ and if the political process tends to suppress acknowledgment of actions that create or impose risk,¹⁸⁷ then officials lack the incentive to make a decision that benefits the public interest.¹⁸⁸

¹⁸⁰ Althaus, *supra* note 10, at 577.

¹⁸¹ Noll, *supra* note 20, at 143.

¹⁸² See, e.g., Althaus, *supra* note 10, at 575 (“As soon as culture is introduced, risk becomes politicized.”).

¹⁸³ Salter, *supra* note 108.

¹⁸⁴ Richard Zeckhauser, *The Economics of Catastrophe*, J. OF RISK AND UNCERTAINTY 113, 115-16 (1996).

¹⁸⁵ Althaus, *supra* note 10, at 575.

¹⁸⁶ Zeckhauser, *supra* note 184, at 115-16.

¹⁸⁷ *Id.* at 128.

¹⁸⁸ See Jolls, *supra* note 1, at 1543 (citing Robert C. Clark, *Contracts, Elites, and Traditions in the Making of Corporate Law*, 89 Colum. L. Rev. 1703, 1719-20 (1989)).

Government actors lack the incentive to discuss the financial costs, benefits, and risks of capital cases. Instead, we have an incentive catastrophe¹⁸⁹: The political board determining county spending is incentivized to ignore the possibility of a death penalty trial. When faced with it, the board deals quietly with the additional costs in a dispersed manner. Government is supposed to handle not just problems and financial decisions, but the welfare of citizens.¹⁹⁰ And yet this may be another example of opaque government actions and hidden costs to citizens. Unfortunately, the very definition of a catastrophe is when one party imposes risk on many parties.¹⁹¹

B. Dispersal of Risk

One reason government officials—be they prosecutors, circuit clerks, or county boards—can support capital cases without much public discussion is because the associated costs are dispersed. The dispersed cost and financial impact on counties of a death penalty trial leads to less awareness of the impact and of the underlying costs. An example of dispersal by one scholar is how coal-based electricity generation may be lethal to citizens due to air pollution, but deaths are rarely traced back directly to the production process because they are dispersed.¹⁹² Similarly with capital cases, the failure to pave roads and the increase in taxes are rarely traced all the way back to their root source in the choice to fund the death penalty.

The size of a community also allows risk to be dispersed and less noticeable.¹⁹³ As noted above, a county with a large population would better be able to handle the financial risk of a death penalty trial because the ultimate cost would be dispersed. Indeed, a recent study documents that defendants are more likely to receive a death charge in prosecutorial districts that have

¹⁸⁹ Zeckhauser, *supra* note 184 at 124.

¹⁹⁰ *Id.* at 128.

¹⁹¹ *Id.* at 121.

¹⁹² *Id.* at 116.

¹⁹³ *Id.* at 129.

larger budgets.¹⁹⁴ Smaller counties are hurt more by the cost of the death penalty because there are fewer citizens to bear the costs. Of the Mississippi counties evaluated for this article, all of them, except for Pike, DeSoto, and Jackson counties, have fewer than 25,000 people.¹⁹⁵ Excluding Pike, DeSoto, Jackson, and George counties, the per capita income ranges from \$13,293 to

¹⁹⁴ See Greg Goelzhauser, *Prosecutorial Discretion Under Resource Constraints: Budget Allocations and Local Death-Charging Decisions*, JUDICATURE (Jan.-Feb. 2013), at 161.

¹⁹⁵ *State and County QuickFacts: Quitman Cnty., Miss.*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/28/28119.html> (In 2011, Quitman County had a population of 8,134 people; the per capita income over the past twelve months: \$13,293; percentage below the poverty line: 36.3%); *QuickFacts: Desoto Cnty., Miss.*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/28/28033.html> (In 2011, Desoto County had a population of 164,053; per capita income over the past twelve months: \$25,065; percentage under the poverty line: 9.5%); *QuickFacts: Amite Cnty., Miss.*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/28/28005.html> (In 2011, Amite County had a population of 13,064; per capita income over the past twelve months: \$17,681; percentage under the poverty line: 24.5%); *QuickFacts: Attala Cnty., Miss.*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/28/28007.html> (In 2011, Attala County had a population of 19,466; per capita income over the past twelve months: \$17,701; percentage under the poverty line: 26.7%); *QuickFacts: Chickasaw Cnty., Miss.*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/28/28017.html> (In 2011, Chickasaw County had a population of 17,124; per capita income over the past twelve months: \$15,978; percentage under the poverty line: 24.9%); *QuickFacts: Jackson Cnty., Miss.*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/28/28059.html> (In 2011, Jackson County had a population of 139,901; per capita income over the past twelve months: \$23,547; percentage under the poverty line: 15.0%); *QuickFacts: Pike Cnty., Miss.*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/28/28113.html> (In 2011, Pike County had a population of 40,406; per capita income over the past twelve months: \$18,454; percentage under the poverty line: 26.2%); *QuickFacts: Prentiss Cnty., Miss.*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/28/28117.html> (In 2011, Prentiss County had a population of 25,330; per capita income over the past twelve months: \$17,115; percentage under the poverty line: 22.6%); *QuickFacts: Clay Cnty., Miss.*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/28/28025.html> (In 2011, Clay County had a population of 20,456; per capita income over the past twelve months: \$18,057; percentage under the poverty line: 24.2%); *QuickFacts: George Cnty., Miss.*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/28/28039.html> (In 2011, George County had a population of 22,889; per capita income over the past twelve months: \$20,529; percentage under the poverty line: 14.7%); *QuickFacts: Jasper Cnty., Miss.*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/28/28061.html> (In 2011, Jasper County had a population of 16,777; per capita income over the past twelve months: \$18,696; percentage under the poverty line: 21.0%).

\$20,529, and the percentage of the population living below the poverty line is between 21% and 36%.¹⁹⁶

C. Over-Optimism, Under-Perception, and Probabilities

In terms of counties preparing for the possibility of a capital case, it should be recognized that in general, people and society do not use probabilistic information in the most effective manner.¹⁹⁷ Catastrophes are defined as low probability events that result in large losses. If the probability of such a catastrophe is not appropriately considered, and any assessment is not acted upon and made known, then poor results are likely to follow.¹⁹⁸ Under-perception, and a failure to recognize probabilistic information about the likelihood of a catastrophe, result in an insufficient response when preventative measures could have been taken.¹⁹⁹ Thus, when deciding whether to create a rainy day fund to pay for capital expenses, public officials will have the same mindset as citizens: Despite the numbers, it probably will not happen *here*.

General citizen over-optimism leads most people to believe they have a much lower risk of something negative happening to them than the average person.²⁰⁰ Even when citizens have accurate statistical information, that information may not be enough to encourage them to act. For example, individuals may have information about the risks of smoking, but they may not have appropriate perceptions of the risks if they themselves were to smoke.²⁰¹ A number of factors may lead to risks that citizens

¹⁹⁶ *See id.*

¹⁹⁷ Zeckhauser, *supra* note 184, at 115 (“Neither humans nor society deal effectively with information, particularly probabilistic information . . . [T]heir decisions stray far from what the prescriptive science of decision analysis would recommend.”).

¹⁹⁸ *Id.* (“This is a major reason why we do not deal effectively with catastrophes, which are low-probability events entailing large losses. If the probabilities of catastrophe are not appropriately assessed and if those values are not disseminated and acted upon, we must expect poor outcomes.”).

¹⁹⁹ *Id.* (“Underperception leads to inappropriate actions when preventative measures could have been taken.”).

²⁰⁰ *See* Jolls, *supra* note 1, at 1541-42 (“We emphasize that these problems are not ones of insufficient information per se; they are ones of insufficient ability to process accurately the information one possesses insofar as that information bears on one’s own risks.”).

²⁰¹ *Id.* at 1542 (discussing this example).

fail to appreciate.²⁰² Even though counties know the likelihood of a capital case arising in Mississippi, and even if they know the detrimental financial fallout of even one such case, general over-optimism and under-appreciation contribute to a lack of planning.

When counties are acting under conditions of uncertainty—they do not know whether they will have a capital case in the coming years—they fail to plan and strategize for handling the costs. When a county faces a request for funds for a current capital case, it often fails to make a cost benefit analysis or even have a robust discussion among the prosecutor's office, the court, and the county board. To fail to question the costs and benefits and simply pay for the costs because they can be easily dispersed and the source sublimated, is to give one's government over to fate, rather than to choice.

VI. NEXT STEPS

The necessary next steps are to record the costs of the death penalty, and have community discussions about community priorities. Counties need to create a cost-benefit analysis as to the value of the death penalty for their community, and whether their community, albeit a small, rural, low-income county, nevertheless has a strong commitment to the death penalty. If such is the case, the county needs to be prepared to carry out the wishes of the county citizens by preparing for what can be financially catastrophic expenses. On the other hand, such knowledge can also empower a community that would rather see those funds spent in different ways. Most importantly, knowledge creates an opportunity for citizens to make affirmative decisions, rather than leaving such risky possibilities to fate.

CONCLUSION

The death penalty has been a matter of fact in Mississippi for decades. The very regularity of capital cases has hidden whether the death penalty remains fair to citizens and the financial toll it takes on communities. Safeguards that are necessary to ensure

²⁰² *Id.* at 1544 (discussing such “unintended risk”).

that the true perpetrator is convicted rather than an innocent person by mistake make a capital case a financially expensive and risky endeavor. When many capital cases result in a life sentence, and roughly a third of death sentences are reversed on appeal, government officials have an obligation to openly explain the costs of such cases and discuss whether communities would rather have their tax dollars spent elsewhere. In a system where few people who initially receive a death sentence are ultimately executed, citizens are entitled to know how much more they spend in pursuit of a death sentence, than if the prosecution had simply sought a life sentence in prison from the beginning. Although government officials may have incentives to avoid a discussion of the costs and to simply disperse them, our citizens deserve to have the facts put before them. Capital cases inevitably affect all citizens. The time for discussion, whether a county is currently expensing a capital case or not, is now.