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Examining the Death Penalty Insider Perspective: Capital Bench & Bar Interviews

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ABSTRACT

This study conducted semi-structured interviews with 27 death penalty insiders (9 capital judges, 9 prosecutors and 9 defense attorneys) across three states. Prior research examined whether knowledge of capital punishment correlates with death penalty support (the Marshall Hypothesis). While prior research focused on opinions of laypeople, this study interviewed those with direct, hands-on experience to explore the knowledge-based, insider perspective. The majority (80%) of interviewee-respondents did not believe the death penalty is necessary in light of Life without the Possibility of Parole as an available sentencing option, and 62% did not support capital punishment. Qualitative data analysis reveals a wealth of insider information that advances death penalty knowledge and informs policy.

Introduction

It has been over 25 years since the first death row prisoner was released due to wrongful conviction. Since then, there have been 17 more DNA exonerations for death row prisoners; and, in terms of total criminal cases, 315 more exonerations (The Innocence Project, 2014). Despite wrongful convictions being publicized, the majority of the American public still supports the death penalty. Some scholars have attributed this persistence to Americans being ignorant of death penalty procedures or over-inflating procedural safeguards (Acker, Bohm, & Lanier., 1998; Gross, 1998; Mello, 1996; Johnson, 1998). While death penalty insiders are fully informed and even contribute to procedural safeguards in capital cases, currently the “literature provides little scholarly assessment of the general subjective outlooks of any criminal court practitioner” (Weiss, 2003, p. 3)

Justice Thurgood Marshall wrote in *Furman v. Georgia* (1972) that the more informed people are about the death penalty, the more anti-death penalty they will be. A surfeit of public opinion research has been published on the death penalty (e.g., Durham, Elrod, & Kinkade, 1996; zeisel & Gallup, 1989), and studies have been published that examine the issue from the perspective of capital juries (e.g., Bowers, 1995; Foglia, 2003, Geimer & Amsterdam, 1988), appellate capital defense counsel (Sheffer, 2013), and prison officials (Cabana, 1996; Lifton & Mitchell, 2000). Research has also been done with college students where their opinions on capital punishment were sought prior to learning about the death penalty and then were sought again after information acquisition to determine if support level changed. For undergraduate students, findings were that—even if increased knowledge temporarily decreased support—opinions tended to revert back over time (Bohm, 2007). An *opinion hardening* phenomenon was also found where initial views on capital punishment were merely strengthened after death penalty knowledge was acquired (Lord, Ross, & Lepper, 1979). It may be that lay people narrowly hone in on information that best supports a pre-established, emotion-based opinion (Bandes, 2008).

In comparison to the general public or college students, death penalty insiders are more fully informed, and their knowledge is firsthand because it is derived from direct, hands-on experience. Emotions should also play a lesser role in how capital case practitioners process and filter new knowledge because their training, experience, and practice (e.g., graduating from law school, passing a state bar exam, and participating in trials) require advanced reasoning skills and the ability to logically analyze information (DeGroff & McKee, 2006). The current study provided these death penalty insiders with the opportunity to voice their views on capital punishment.

Literature review

There is a substantial body of literature on death penalty opinion. Findings confirm the complexity of this controversial issue because a multitude of variables, both individual and societal, correlate with death penalty support. Correlations have been found with micro-level variables, such as age (Bohm, 1987; Fox, Radelet, & Bonsteel, 1991; Unnever & Cullen, 2005); education (Britt, 1998; Grasmick & McGill, 1994; Halim & Stiles, 2001; Payne, Gainey, Triplett, & Danner, 2004; Stack, 2003; Tyler & Boeckmann, 1997; Young, 1991); fear of crime (Keil & Vito, 1991; Longmire 1996; Rankin, 1979; Seltzer & McCormick, 1987; Tyler & Weber 1982); gender (Applegate, Cullen, Fisher, & Vander Ven, 2000; Bohm, 1991; Durham, Elrod, & Kinkade, 1996; Robbers, 2004; Sandys & McGarrell, 1995; Soss, Langbein, & Metelko, 2003; Stack, 2000; Unnever & Cullen, 2006; Vogel & Vogel, 2003; Whitehead & Blankenship, 2000); political affiliation (Bohm, 1991; Boots & Cochran, 2004; Britt, 1998; Cochran, Boots & Heide, 2003; Fox et al., 1991; Grasmick, Cochran, Bursik, & Kimpel, 1993; Sandys & McGarrell, 1995; Stack, 2000; Unnever & Cullen, 2006; Vogel & Vogel, 2003); race and/or ethnicity (Baker, Lambert, & Jenkins, 2005; Barkan & Cohn, 1994; Bobo & Johnson, 2004; Bohm, 1991; Boots et al., 2004; Cochran et al., 2003; Kinder & Sanders, 1996; Longmire, 1996; Robbers, 2004; Soss et al., 2003; Unnever & Cullen, 2005; Vogel & Vogel, 2003; Young, 1991, 1992, 2004); religiosity factors such as church attendance (Grasmick et al., 1993; Grasmick & McGill, 1994; Harvey, 1986; Perl & McClintock, 2001; Unnever & Cullen, 2005, 2006) and/or religious institution indoctrination (Grasmick et al., 1993; Young, 1992); socioeconomic status (Soss et al., 2003); and victimization experience (Borg, 2006; Seltzer & McCormick, 1987).

Government distrust has also been found to be a whites-only predictor of death penalty support (Soss et al., 2003; Messner, Baumer, & Rosenfeld, 2006). In addition, the following macro-level factors have been found to be statistically significant: Geographical region (Barkan & Cohn 1994; Baumer, Messner, & Rosenfeld, 2003; Bohm 1991; Fox et al., 1991); and murder rates and percentage of minority populations (Baumer et al., 2003).

Research has looked at the relationship between death penalty knowledge and death penalty support (Bohm, 1989, 1991; Lambert & Clarke, 2001; Lambert, Camp, Clarke, & Jiang, 2011; Sarat & Vidmar, 1976; Vidmar & Dittenhoffer, 1981; Wright, Bohm, & Jamieson, 1995). The majority of that research was

stimulated by Justice Marshall's *Furman* ruling (1972) in which he stated that people more informed about the death penalty would be less supportive of it, excepting those with an underlying belief in retribution. Studies were conducted with college students whose opinions on capital punishment were sought prior to being informed on the death penalty and who were then questioned again after information acquisition to determine if support level changed (e.g., Bohm, 1990, 2007; Lord, Ross, & Lepper, 1979). While some support was found for *Marshall's hypothesis* (Bohm, 1989; Bohm, Clark, & Aveni, 1991; Bohm & Vogel, 1991; Cochran, Sanders, & Chamlin, 2006; Patenaude, 2001; Sandys & McGarrell, 1995; Sarat & Vidmar, 1976; Vidmar & Dittenhoffer, 1981), studies also demonstrated that increased knowledge polarized opinions (Bohm, 1990; Lord et al., 1979). Students who declared themselves pro death penalty at the onset ended up being even more supportive after receiving additional information, and the same was found for death penalty opponents. Researchers concluded that the opinion-strengthening effect of new knowledge resulted from people focusing only on those facts which reinforced their own preexisting, emotion-based opinions (Bandes, 2008; Bohm, 2007; Bohm, Vogel, & Maisto, 1993; Lord et al., 1979). A rebound effect was also identified; the impact of new knowledge on death penalty support appeared to diminish over time (Bohm et al., 1993; Bohm & Vogel, 2004).

While all of these past studies greatly contributed to death penalty knowledge, the samples were comprised of people without direct knowledge of capital case proceedings. If practitioners were sampled, the study tended to target one issue such as reactions to newly implemented law (Lombardo & Olson, 2010) or on perceptions of systematic error (McGarrell & Sandys, 1996; Ramsey & Frank, 2007a, 2007b). Much of what has been published on the capital practitioner experience was written from single person perspectives (e.g., Kozinski, 2004; McCann, 1996; Salinas, 2006).

Multiple perspectives were somewhat explored when Whitehead, Blankenship, and Wright (1999) surveyed Tennessee legislators, chief prosecutors, and chief public defenders to determine differences in support levels. Whitehead et al. (1999) did not specify whether their sample had any capital case experience, but did find that chief public defenders were the only group not supportive of the death penalty. The other groups' death penalty support level decreased somewhat, however, when life without parole was offered as an alternative sentence option, and that finding is supported by extant literature (Bohm, 2007; Bowers, 1993; Durham et al., 1996; Jones, 2006). Both legislators and prosecutors revealed concerns about being politically harmed if they publicly opposed capital punishment, and their most frequent reason for favoring the death penalty was deterrence. Fairness was addressed; respondents were asked whether they agreed that Black-on-White murderers were most likely to be sentenced to death, and only 8% of prosecutors agreed with that statement, in comparison to 30% agreement by legislators and 90% by public defenders.

More recently, Sheffer (2013) interviewed 20 experienced post-conviction capital defenders in order to explore how death penalty appellate work impacted them emotionally. Her interviewees refer to themselves as adrenaline junkies who felt compelled to continue their work, despite the pressures and demands, due to the knowledge that they were vitally needed. They saw themselves as dedicated lawyers driven by a desire to represent the “underdog and to try to right wrongs” (p. 346).

Unlike the Sheffer (2013) study in which the objective was to specifically explore emotional experiences of post-conviction capital defense attorneys, the current study’s goal was less restrictive by comparing and contrasting direct experience across all three capital roles (the judge, the prosecutor, and defense attorney). Interviews were with public, private, appointed, assigned, and retained defense attorneys whose experience ranged from lower level state trial courts to the highest level appellate courts in both the state and federal system. All 27 interviewees were given full opportunity to tell their own stories and present their own unique perspective.

Research design

Because the goal of this study was to gain a deeper understanding of death penalty proceedings from the capital worker perspective, a qualitative research design was crucial. Tewksbury (2009) identified qualitative methods as “the approach that centralizes and places primary value on complete understandings, and how people (the social aspect of the discipline) understand, experience, and operate within milieus that are dynamic and social in their foundation and structure” (p. 39).

A total of 27 capital case workers were interviewed from within the following three states: Ohio, Oregon, and South Carolina. These states were chosen because each had active death penalty statutes at the time of the study; they are geographically diverse (Northwest, Midwest, and Southeast United States); and, altogether, they represent the full range of Elazar’s political culture typology (1972, 1984), which has been identified in the literature as a “powerful element” in explaining policy (Cook, 1979, p. 249), sentence severity, and criminal justice decision-making (Broach, Jackson, & Ascolillo, 1978; Eisenstein, Fleming, & Nardulli, 1988); and shown to be a determinant for death penalty implementation and frequency of use (Fisher & Pratt, 2004).

Elazar (1966) divided American states into three categories according to location, migration, civic commitment and customs. In traditionalistic states, such as South Carolina, political participation is generally left to elites. For individualistic states (e.g., Ohio), political involvement tends to be viewed as a professional career choice. A moralistic state, such as Oregon, would be where civic commitment is seen as each community member’s personal duty.

The two criteria used for selecting prospective interviewees are capital case experience and intrastate location. The semi-structured interview was the chosen format because it allows interviewees to tell

their story in their own words, and it allows an interviewer to probe more deeply for details from each narrative (Charmaz, 2006).

Interviews averaged one hour in length and took place between May 31 and July 15, 2011. As an initial icebreaker, interviewees were invited to reveal more about themselves, such as when they decided to go to law school, why criminal law became their career choice, and the progression to their current position. They were then asked to generally describe their capital case experience, the magnitude of that experience, and whether or not they anticipated future involvement. All interviewees were queried about whether they had suggestions or recommendations for improving capital case proceedings. They were also asked whether they believed the death penalty was a necessary component in the current criminal justice system, and why or why not. That was followed up with the question: “Realizing that capital case litigation may be part of your professional job responsibilities, how do you personally feel about the death penalty?” Interviewees were urged to explain the basis for those beliefs. Lastly, they were explicitly given the opportunity to expand or elaborate. Sessions were tape-recorded and subsequently transcribed verbatim.¹

A contents analysis was then conducted in order to uncover any emergent themes from within and across interviews. Charmaz (2006) stated that “Coding full transcriptions can bring you to a deeper level of understanding” (p. 70) because it allows the researcher to accomplish two things—to become immersed in the data and to go line by line to identify revealing words and phrases that may be thematic. In this study, once each interview was coded, the researcher compared across codes to determine possible “underlying patterns of meaning” (Gubrium & Holstein, 2009, p. 226) or conceptual categories. While the researcher remained alert throughout this entire coding procedure as to the ways her own perspective might be shading and shaping the data (Charmaz 2006), a third party was also asked to code the transcribed interviews (stripped of identifiers) to help ensure objectivity in the theme identification process.

Findings

Range of capital experience

All interviewees had firsthand, direct experience with capital cases.² That experience ranged from full participation in at least two bifurcated capital case trial proceedings (n=1) to direct involvement with over 50 capital cases (n=3). Some interviewees had multiple role involvement. Experience was grouped into three interval ranges. Slightly over 22% of interviewees had direct experience in 2-5 capital cases (n=6); 37% had direct death penalty experience in 6-19 cases (n=10); and 41% had direct participation in over 20 capital cases (n=11).

Thematic findings

Economic issues

“Super due process, to me, means you should have a Cadillac defense. Now what’s being said is that a Kia is good enough,” Anonymous Interviewee (AI) #6 stated. When wrongful convictions were revealed because of advances in DNA science, many states and counties jointly took action to provide more funding at lower court, post-conviction relief (PCR) and appellate levels. However, since that time, the economy has taken a steep down-turn, which may be impacting capital funding.

They have changed—you know—over my term of practice to being a little more penurious, a little more wary, and a little more savvy about—you know—the worst case scenario is they’re giving you a half of a loaf, and they know it. They’re giving you enough to insulate their record from a reversal, but they’re not really giving you enough to do what you need to have done. (AI #13)

By restricting funding, defense attorneys feel forced to either go to the second-rate expert or settle for state-employed consultants. All interviewees conceded that currently their death penalty system is underfunded.

The small counties can’t afford a death penalty case; so—you know—if you did it in one county, you get a life sentence. If you did it in another county, you get the death penalty because of cost issues. (AI #13)

In certain impoverished counties, capital charges are not filed (or *noticed*, depending on the state) merely because those counties cannot afford the expense. Once the capital case quota in a county has been reached, the death penalty will be off the table or will remain merely as a bluff to secure a plea bargain.

Using the death penalty as leverage

“Those who claim the death penalty is too costly never take into account the cases that are not litigated because of the death penalty existing as a leveraging tool” (AI #2).

One reason given for support is because without the death penalty as the high level mark, aggravated murder cases will settle at a lower level. If life without the possibility of parole (LWOP) was, instead, the highest level of punishment, then the concern is that aggravated murders would end up eventually being released. “For any type of criminal case, the most severe penalty option moves the goal post where most cases will settle” (AI #1).

The morality of the death penalty

There have been times when I said that I’m going to have to answer to God for what I have done. And at times that has given me some angst, and then I thought: Well, did you do it responsibly?

Did you do it for the right reasons? Did you do anything unethical? If you can answer those questions, then you can answer to God for it. (AI #20)

Many of the 27 interviews were intense, to the extent that the researcher-interviewer herself could not help feeling emotionally impacted by the cracking voices, watering eyes, or shaking hands. Twice, interviewees broke down and cried. That provided insight as to how difficult it must sometimes be to maintain professional composure during death penalty proceedings.

[I]n order to do this job, you have to pour your soul into it. If you do it [strictly] as a lawyer, this is pretty cool; you get out of it without getting hurt. It hurts a lot to do it right because you have to basically immerse yourself. (AI #6)

When interviewees were asked whether their death penalty opinions were based on moral or religious beliefs, 73% said they were morality-based (n=19). A little over 62% percent of judges felt that way (n=5); 67% of prosecutors (n=6); and 89% of defense attorneys (n=8). None of the interviewees believed that their opinions were founded on religious beliefs.

I'm not a rabid "he's got to die" kind of guy. I mean it's just—I certainly believe in it. But, to me, if a jury decides to sentence him to life imprisonment, I don't go out and kick the dog or anything. Its like—you know—hey, that's their decision. And I don't—if they decide to sentence somebody to death, I don't pop the cork either. (AI #16)

Some prosecutors expressed distaste for the death penalty but were resigned to the fact that it was what the voters wanted. Others felt that in order not to be overwhelmed with personal angst, they had to believe in the morality of the death penalty. Some interviewees claimed that they hated the fact that the death penalty was necessary, but the presence of evil in the world made it so.

Um, I hate that we have to have it. Okay? I do. I wish that people were not as evil as they are; that would be such a wonderful society to live in. All right? But we have mean and evil people that live amongst us, and I think they need to go, and so it's a hard decision. (AI #20)

Some judges expressed frustration with the system because of the requirements placed on them to regulate it and make it work perfectly when so many uncontrollable variables exist. More than a few judges confessed that the interview made it difficult for them because they were sworn to uphold the law (and the death penalty was the law in their state), and now they were being asked to look beyond the law and reveal personal feelings. For them, the law was often seen as a blinder, similar to what is placed on racehorses, so that they would not be distracted from the task in front of them. A few had experienced times during the course of a death penalty trial when they woke from a sound sleep besieged with doubts about the morality of it.

The best of the best

Neither capital prosecutors nor capital defenders make the kind of money that their level of education, skill, and trial experience would earn them in the private sector. The ones who stay in the field for any extended length of time tend to be strongly committed to their profession. “Most successful defense attorneys don’t believe they’re on a mission for God and separate themselves from their client. The ones that are the most obnoxious are the ones who take it all so very personally” (AI #7).

Those who specialize in capital litigation may find that their commitment over time becomes a crusade. Many capital defenders admit that unlike other major felony work where they strive to inject reasonable doubt and to hold the government accountable for proving guilt, in death penalty proceedings their goal is strictly to save the client’s life. Prosecutors, on the other hand, feel a similarly strong responsibility to protect society. When prosecutors were asked about the necessity of the death penalty now that LWOP is available as a sentencing option and now that maximum security prisons have been built to resolve safety concerns, they expressed fears for the prison guards, the medical staff, and even other inmates.

The refrain heard over and over again from attorneys on both sides of the death penalty debate was, “I want to do right.” Prosecutors and defense attorneys alike stated a preference for having their opponents be highly skilled capital litigators because that helped alleviate their fears about mistakes being made in the process,

I would rather have a good lawyer on a case than a bad lawyer on a case. I don’t worry about the—one, I know that the person on the other side from me is doing [the] job; so if something has happened wrong in the process, hopefully it will be found by the advocate on the other side. (AI #14)

Many defenders admitted to feeling like David to the government’s Goliath and having had a lifelong desire to stick up for the underdog. A common sub-theme was found with the prosecutors being very service-oriented. As an example, most offered (without being asked) to help the researcher/interviewer navigate their cities by drawing maps or giving detailed directions. Many interviewees had been influenced by television shows they were exposed to in early childhood; others originally planned to go into corporate law or private defense law but were permanently sidetracked by taking on internships or first jobs at either a prosecutor’s or public defender’s office.

Respondents/interviewees revealed that it was not unusual for courtroom workers, whether prosecutor, defense attorney, or even judge,³ to get assigned to one death penalty case and then, no matter what the outcome, to declare “Never again!” This may be unfortunate because, according to interviewees, it takes multiple involvements before participants will stop feeling as if they are walking

on eggshells, and it is common for novices to second-guess everything. The possibility also exists that capital case workers will become so efficient that their focus on form will be at the expense of substance. Super due process requires capital defenders to leave “no stone unturned” in representing their clients, according to AI #6. Anonymous Interviewee #18 stated:

I think ethically it's a real problem to be filing a motion that has no merit, but I'm doing it because it's a death penalty case; so I should just do everything. And I don't agree with that; so that's a problem. And, um, even though on one hand counsel are going through all these motions, a lot of times to me what is stressful is it just looks like that's all they're doing—is going through motions as opposed to using a more case-specific, refined, focused effort in a case.

Interviewees told of times where written motions were filed that contained the wrong name of either the victim or defendant because filings were prepared hurriedly from templates. Due to the enormity of the task, there is a recognized risk that capital defenders will scramble to check off all their required to-do items and then not have any time or energy left over to put forth quality witness examinations, impassioned pleas, or creative arguments. This is what interviewees referred to as a *rote defense*, which may look marginally acceptable on the official transcript of proceedings (the appellate linchpin) but which falls far short of impressing the jury or of being effective.

The worst of the worst

We're not really charging the death penalty in the worst of the worst cases. So I would much rather see something—whether it's a grand jury review or whether it's a commission review, whatever it is—but to try to limit the number exposed to the death penalty to those really sociopathic, dangerous people who can't be held safely without an expense that's beyond what society can burden—or take on the burden, if that makes sense. It just seems like it's a very rare case where the state can't charge a death penalty case now. (AI #4)

The majority of interviewees expressed concern that the death penalty in their states is not being reserved for the worst of the worst. Respondents related instances where the most vicious killers were allowed to plead to lesser sentences. One serial killer pled to LWOP in exchange for revealing where his victims' bodies were buried. Another multiple-victim killer fled the country, and the harboring country would not allow extradition until the state agreed not to seek the death penalty.

Super due process

“Presumption of innocence is an artificial bubble you place in one place and one place only: the courtroom” (AI #7). One judge admitted to being discouraged because many defense attorneys start out their case in the first phase by saying, “Okay. Let's talk about the death penalty.” This gives everyone in the courtroom, including the jury, the impression that even the defendant's own attorney believes he's guilty.⁴

And, of course, it is difficult to deal with the qualification of a jury without in some way mentioning the fact that—you know—we talk about the death penalty, but he hasn't even been found guilty yet, and so there's sort of like a seed being planted out there. (AI #21)

Interviewees explained how hard it is to keep the high threshold of beyond a reasonable doubt from being lowered in capital case proceedings. Courthouse wisdom seems to be that the death penalty is only sought when the state's case is airtight. Also, everyone knows upfront—and even the *venire* learns on the first day—that the death penalty is the potential penalty, which may add a dire dimension to death penalty proceedings. This is in stark contrast to non-capital proceedings where merely mentioning a potential penalty can result in a mistrial.

When interviewees recounted their experiences, this refrain was often heard: “Guilt was not an issue in that case.” When asked outright about the presumption of innocence during death penalty trials if guilt was never in doubt, one defense attorney expressed certainty that prosecutors would not risk going to trial on a capital case without insurmountable evidence of guilt.

There's so much about capital law that is not only hollow and hypocritical but just flat-out topsy-turvy. You know, death is different; more process is due; all these pretended Pontius Pilate hand-washings repeatedly just to pretend that we are affording this person all the great protections twice, three times over. (AI #13)

Prosecutors were adamant that due process was present to an even greater extent than it was in noncapital cases. However, reservations were revealed. The biggest concern seemed to be the jurisdictional variation with capital charging and death penalty outcomes. Certain counties in all three states were known for aggressively seeking the death penalty and for having jury-eligible citizens who would always vote for death. Juries in one particular county were referred to as “the 12 Dobermans” (AI #25). Other counties never seek the death penalty regardless of the numbers of aggravated murders committed within their jurisdiction. Some counties consistently seek the death penalty but are known for having juries that always compromise with an LWOP verdict.

Another concern was the quality of the defense, which also appeared to be jurisdictionally related. In some areas, there was the perception that aggressive defending was not tolerated; that appointments were given to a certain favored few who were more willing to compromise their client in order to maintain good relations with those having the most political power and/or controlling the purse strings. “I suppose it's like everywhere else in the country. There are certain house pets in the private bar that play the patron's game for appointments who keep getting them because they don't really put up a big fight” (AI #13).

Sometimes the client might be compromised inadvertently. This may occur merely as an unintended consequence of local courthouse culture.

When we're here and we're trying cases in front of judges we see all the time—you know—sometimes there's a reluctance to try to cross that judge; so maybe death penalty counsel should be trained individuals in a central office and really not locally tied. Maybe you need some local counsel to assist in the jury selection or something to know more about the folks here, but if I'm beginning to try cases all the time in front of these judges, I may—whether I want to admit it or not, it may very well hamper me in really making a real—you know—really going to the mat when it's needed. (AI #19)

Concern about capital jurors' understanding of how to apply the law was also an issue. Anonymous Interviewee #12 opined that capital jurors probably used a preponderance of evidence standard (charges are more likely true than not) despite being instructed by the court to use the standard of beyond a reasonable doubt. In one state, new restrictions have recently been placed on *voir dire* examinations which prevent defense attorneys from effectively screening the *venire*. Also, instead of allowing individual *voir dire*, a new trend has been to question prospective jurors in small groups. Some jurisdictions have discontinued capital jury sequestration. While all of those interviewed supported America's jury system, many had reservations about capital juries being death-qualified.

The timing for appointment of defense counsel was identified as being problematic. Because the vast majority of defendants capitally charged are indigent, they are not appointed counsel until after the death penalty seek decision has already been made. Once elected prosecutors publicly announce that they are going after the death penalty, it may be difficult for them to back down from that position even when new information later surfaces that might justify a softening stance. A privately retained attorney brought in early (at the suspect stage or even before) is in a much better position to advocate on the client's behalf and protect the defendant's rights. When the defense comes in later, important case decisions have already been made. Interviewees revealed that the state proceeds more cautiously and is more receptive to case disposition discussions when it knows the murder suspect has representation. On the other hand, problems can occur with privately retained counsel lacking sufficient trial skills and experience. One judge stated that the system works best when the capital defendant is either very wealthy or very poor (AI #10). Occasions were also recalled when prosecutors told defense attorneys upfront that even though the death penalty was being sought due to media scrutiny, the case would just get dragged along until public focus shifted, and then a deal would be offered.

Besides lower court level variations, higher level court variances were identified. Certain federal circuit courts are known to the inner circle as being very liberal in their practice of reversing and remanding capital cases back for retrial on what might be considered as trite issues, whereas other

federal circuit courts have the reputation for never ruling in favor of a capital defendant, no matter how valid the constitutional claim. It is similar with the three state supreme courts. In one state, it was identified as a running joke that its highest court will “stretch the taffy to affirm every capital conviction” (AI #13). Harmless error was seen by some as the catch-all phrase to keep capital convictions intact.

Measuring the value of the victim’s life

“A civilized society is not one that punishes less and less and less. It’s one that is more discriminating about it” (AI #7). One aspect in particular was brought out by prosecutors which might explain, in part, some of the findings from past research regarding bias in death sentencing. The system itself forces its workers, as well as capital juries, to compare the value of a life by measuring one person’s worth as compared to another.

You and I both know when we get to a jury that the jury is going to care a lot more about the armored car driver who was shot than about some damned crack-head who’s out there selling poison to the kids. So which case are we going to get death on? (AI #14)

Prosecutors, in screening out cases in which to seek the death penalty, evaluate the crime, the criminal, and even the victim. The latter assessment, rather than being racially motivated, is—as was explained—based on the prosecutor’s perception of whether the victim is a true innocent, how much the impaneled jurors will care about that particular person’s death, and whether their outrage will be sufficient to sustain a death penalty verdict. “We know in our experience that you’re never going to get the death penalty unless you have a true innocent victim. It’s just not going to happen” (AI #16).

The prosecutor is compelled to make these calculations because of the high costs attached to a death penalty pursuit. Experience has demonstrated to prosecutors that victims who have a shadier past—possibly as a consequence of low socio-economic status, chronic unemployment, substance use or abuse—are viewed by sworn-in jurors as being less valuable to society; therefore, the price for murdering him/her will end up being discounted. As AI #14 explained it, the reality of the situation is that community members just “do not give a damn about the crack addict who is murdered.”

A sporting event

“Death penalty has now become a giant game that only benefits the cottage industry” (AI #1). More than one interviewee used sports analogies to describe their experience with capital litigation, such as referring to it as being “the Super Bowl of criminal law” (AI# 10) or the “Lawyers’ World Series” (AI #5). Death penalty litigation is “addictive” (AI #13); and in comparison, other felony cases seem trivial. “The thing about death penalty work is it’s so—you know—it’s just so intense. You get so into it” (AI #23).

Also, most of these experienced capital attorneys went into law in the first place to litigate in front of juries. In civil law, litigation has decreased over the years; and, when it comes to the high-money cases, the established civil firms will usually not allow associates to try them. In criminal law, novice attorneys can try cases immediately at the misdemeanor level and get moved up the ladder to try felony cases fairly quickly. Now, in the modern era, with 95% of criminal cases being settled (Maguire, 2003), a considerable amount of capital cases can still be counted on to go to trial; and those trials are more grandiose than noncapital trials due to extended *voir dire*, the 2-phase proceedings, and the risk of death being attached. Anonymous Interviewee #7 said that trying a capital one is “the most fun you can have with your clothes on.” Others felt a let-down when a capital case was over, and they had to go back to more mundane criminal matters. Anonymous Interviewee #25 stated that it was like being forced to tail-gate after having recently been the star quarterback. Even capital judges may not be immune.

There are a lot of judges who want to do death penalty cases. And I don't mean to sound disparaging of brothers and sisters on the bench, but some of them want to do it for the wrong reason. They want to do it because they're the big cases; they want to do it because they get a lot of attention. (AI #4)

In this study, however, the judicial interviewees were the least likely to appreciate the thrill aspect of these cases. Instead, they felt intense pressure to create a reverse-proof record.

They are a pain in the butt both from the standpoint of the nature of what you are doing as well as the stringency of the rules, the requirements, the not screwing up, the not wanting to try it two, three, or four times. All of that comes into play. (AI #24)

Death penalty paradoxes

When asked, “Has being an active participant in the capital punishment system created any personal or professional concerns, conflicts, or stresses?” prosecutors explained how capital litigation was considerably less stressful for them than noncapital litigation. There are a variety of reasons: Guilt or innocence is often not hotly contested; there is an established body of law regarding death penalty jurisprudence; more money is approved for hiring experts and/or consultants in capital cases; both capital prosecutors and capital defenders work in 2-member teams; and there is always advance knowledge on exactly when the case will be tried.

It isn't like a regular case where it's like a cattle call, and the docket tends to break out when cases plead out, and you scramble. For a capital case, you know it's coming. You have a specific date; you've got a job assigned to it; you've got a court reporter; you've got the lawyers lined up and all that. You have plenty of pretrial conferences to kind of get things on track if they start

getting derailed, and so there is more certainty to it so you can—it's more organized than other types of criminal cases. (AI #26)

The interviews revealed another paradox with capital litigation. The better job that a defense attorney does, the less reversible error in the record; therefore, if a jury decides to bring in a death verdict—and, as was revealed over and over again, no matter how skilled you are in litigation, you can never be 100% certain what a jury is going to do—then that defense attorney has hurt, rather than helped, his client. For those capital defenders whose ultimate goal is to save their client's life, the temptation is great to deliberately insert error into the record. "It's an irony because the more fair to the defendant in some ways, the more we're making it so that there's no reversible error on the record. Know what I mean?" (AI #19)

Judges who may be personally anti-death penalty or merely ambivalent can be similarly conflicted. If they step in to protect the record when they feel a defense attorney is doing an improper job, then they are, in essence, paving the way for the death penalty to be affirmed upon review.

Summary of interviews

Of the 27 interviews, 62% were non-supportive of the death penalty (n=16). One judge abstained from giving an opinion, as noted in Table 1. All prosecutors, except for one in Ohio, were supportive. In contrast, all but one of the nine defense attorneys were non-supportive. Out of the eight judicial responses, 88% were anti-death penalty (n=7).

Table 1. Summary of selected responses.

State	Role	Support	Needed	Prime suggestion(s)
Ohio	Jud	No	No	Commission for DP seek-decision
Ohio	Jud	Yes	--*	Leave it up to legislators
Ohio	Jud	No	No	Abolish
Ohio	Pros	No	No	Abolish
Ohio	Pros	Yes	Yes	State-funded DP prosecution, limit appeals

Ohio	Pros	Yes	Yes	No unanimous verdict
Ohio	Def	No	No	Open discovery, funding, 2 juries
Ohio	Def	No	No	Funding, individual voir dire, change venue
Ohio	Def	Yes	No	Bring in indigent defense earlier
Ore	Jud	No	No	Do away with PCR
Ore	Jud	No	No	Leave it up to voters
Ore	Jud	No	No	2 separate juries
Ore	Pros	Yes	No	Remove habeas corpus or PCR
Ore	Pros	Yes	Yes	Better funding across board
Ore	Pros	Yes	No	Oversight on def appellate/PCR costs
Ore	Def	No	No	Abolish
Ore	Def	No	No	Abolish
Ore	Def	No	No	Abolish
SC	Jud	No	No	Allow plea in phase 1/allow jury trial phase 2
SC	Jud	--*	No	Leave it up to legislators

SC	Jud	No	No	State prosecution panel for seek-decisions
SC	Pros	Yes	Yes	Oversight defense costs, shorten appeals
SC	Pros	Yes	Yes	No unanimous verdict, improve jury charges
SC	Pros	Yes	--*	Retain jury sequestration, appellate reform
SC	Def	No	No	Higher standards, individual voir dire
SC	Def	No	No	Funding, 2 juries, seek-decision reform
SC	Def	No	No	Abolish, narrow, defense, PCR order, habeas corpus

Note: * Felt it inappropriate to answer.

When interviewees were asked whether or not the death penalty was a necessary component in the criminal justice system, 80% of respondents (n=25) said that it was not necessary, and that included three of the nine prosecutors who agreed to answer that question. One prosecutor declined to respond because he/she felt that was a question best left for lawmakers to answer.

Interviewees were asked to make suggestions for improving the death penalty system in their state. One judge felt that was better left to the legislators. Six (one judge, one prosecutor and four defense attorneys) felt the death penalty needed to be abolished. The issue of abolition was not addressed outright; the question asked whether they had suggestions for improving the death penalty in their state.

Seven interviewees suggested appellate reforms, and four of those suggestions were from prosecutors; one suggested eliminating the dual protection of Post-Conviction Relief (PCR) and habeas corpus because only one was sufficient to safeguard defendant rights; one prosecutor felt the process

should be streamlined to eliminate delay between sentence and execution; another prosecutor felt that the issues preserved should be the same as for noncapital cases except to allow for any residual doubt issue to be reviewed. One judge also felt that the state post-conviction relief was redundant and was concerned with how expensive it had gotten in recent years. That dovetails with the comments of two prosecutors who suggested that better oversight was needed on appellate defense funding. One defense attorney suggested reform at two of the post-trial stages, that the habeas corpus needed to be a more meaningful review and also that judges at the post-conviction relief hearings be required to draft their own orders instead of allowing the Attorney General's Office to do so (to ensure that the order is a more accurate and complete reflection of what actually occurred). A pernicious nationwide practice was described in PCR hearings where the winner has the power of the pen to subtly distort the facts in the court order, and those subtle distortions become presumptive truth in subsequent federal appeals.

Three suggestions were for bifurcated juries: one jury impaneled for the guilt/penalty phase, and a separate jury impaneled for the penalty phase. That suggestion was made by a judge as well as by two defense attorneys. Two judges and one defense attorney recommended that the decision to seek the death penalty in any case be taken out of a single prosecutor's discretion and either require a panel of statewide prosecutors or an appointed committee to make that decision.

Three defense attorneys recommended that defense funding be increased. One prosecutor suggested that death penalty prosecutions be state-funded. One prosecutor recommended better funding across the board.

Two prosecutors wanted to eliminate the requirement for unanimous verdicts in the sentencing phase and, instead, allow 11-1 or 10-2. Two defenders suggested that individual *voir dire* remain and that more meaningful jury-attorney exchanges be allowed. One interviewee suggested that standards for capital qualification be raised, and another defense attorney also expressed the need for better defendant representation. One interviewee was concerned about the jury sequestration rules being weakened and felt strongly that capital jury sequestration needed to remain regardless of the cost. Another recommended that the change of venue rule be relaxed, and one prosecutor recommended that jury charges be improved.

One Ohio respondent suggested an open file discovery more expansive than the one put in place earlier in the year. A South Carolina respondent recommended that statutory reform is needed to limit the amount of aggravated murders in which the death penalty could be sought. Another interviewee from South Carolina suggested that a capital defendant who wished to plead guilty be allowed to have a jury decide his penalty; at the present time the jury is required to be impaneled for both phases or for no phases; therefore, if a defendant pleads guilty, he must be sentenced by a judge. One Ohio

interviewee asserted that fairer outcomes would be accomplished if indigent defense was brought into the case earlier, before the death penalty seek decision had already been made.

Discussion and conclusions

This study examined death penalty opinions through the finely ground lens of knowledge and experience. To this researcher's knowledge, it is the first time that capital judges, capital prosecutors, and capital defense attorneys from three different states have been interviewed in depth about their views on the death penalty.

The majority (62%) of the interviewee-respondents in this study were not supportive of the death penalty. There were a number of reasons given for their non-support, such as the infallibility of the system; the moral opprobrium that killing is always wrong, even if done by the state; the idea that LWOP accomplishes the same objective; the high cost; the strain on the system; or the use of resources which would better serve society if applied elsewhere. However, the ones who did support it mainly did so for the reason stated by AI #7: "I have very little faith that true life will mean true life." This distrust in government aligns with Zimring's (2003) discursive analysis on cultural contradictions of American capital punishment because strong supporters of the death penalty "commonly express skepticism about alternative punishments such as life sentences without parole" (Messner et al., 2006, p. 583).

Qualitative analysis of the interviews revealed nine emergent themes: Likening death penalty trials to sporting events; economic issues; plea bargaining as leverage; the best of the best (quality representation); the worst of the worst (proportionality); measuring the value of a victim's life; super due process; morality issues; and death penalty paradoxes.

For capital attorneys, the two-stage death penalty proceeding has become their Super Bowl challenge. Capital judges did not appear to have that same appreciation for the sporting aspects of a death penalty trial, but the thrill aspects of capital work were previously noted by Sheffer (2013) during interviews with appellate defense attorneys.

Expense was a major theme, and the majority of all interviewees stated their belief that the death penalty is not needed because the LWOP sentence is a safer, more cost effective alternative. Public opinion research has also shown that when the death penalty support question is extended to include harsh and meaningful sentencing alternatives such as "life imprisonment with absolutely no possibility of parole," overall death penalty support decreases (Jones, 2006, para. 5).

Unlike the Whitehead et al. (1999) study in which deterrence was a reason given for prosecutor death penalty support, no interviewee here identified deterrence as a basis for support. Instead, the main rationale for the death penalty being needed was its use as leverage to secure an LWOP plea. However,

interviewees revealed that oftentimes capital defendants end up on death row because of their refusal to plead, even when doing so would be beneficial and life-saving. The concern is that too many death row inmates fit the description described by White (2006), who identified the typical capital defendant as being cognitively/emotionally deficient and averse to accepting favorable plea offers.

Suggestions were made to have some type of statewide oversight for capital charging decisions to eliminate geographic inequalities, promote proportionality, and ensure that the death penalty is being reserved for the worst of the worst. This type of regulation would also eliminate the ethically problematic victim-value calculus that may be occurring in death penalty charging decisions.

Prior research has suggested that most capital jurors decide punishment even before the innocence/guilt phase has been concluded (Bowers 1995; Bowers & Foglia, 2002). This study found that defenders view their job as an uphill battle from the start. Except for three of them who had been extremely successful in bringing in not guilty verdicts for capital clients, defender-interviewees did not hold out hope for acquittals and were not optimistic about being able to keep clients from death row. If defense attorneys perceive their client's case as a lost cause from day one, then they may be conveying that lack of confidence to the sworn-in jury. Having a capital trial broken up into two parts makes it a challenge for defense to effectively mitigate in the second phase if they have already put forth an innocence claim in phase one (American Bar Association 2003) because the jury will likely see that mitigation evidence as self-serving and manipulative (Sundby, 1998). A bifurcated jury may resolve this dilemma for defense.

Findings further suggest death penalty insiders have reservations about super due process adherence. Expressed concerns were jurisdictional variance; quality of defense; integrity of prosecutor; death qualification of capital jury; not allowing individual *voir dire*; not sequestering the impaneled jury; and presumption of innocence. This study identified paradoxes and potential ethical dilemmas such as capital defenders on a life-saving mission who may feel forced to deliberately inject error in the record to provide appeal protection; and capital prosecutors who may be experiencing considerably less stress when involved with capital trials (as compared to noncapital murder trials) due to expanded resources, advanced scheduling, being relieved from regular caseload responsibility, and not being challenged on the issue of defendant's guilt. Findings were that capital judges felt conflict when compelled to intervene during a capital case in which they had concerns about a defendant's characteristics (e.g., low IQ, lack of social skills, legal system naiveté) or an attorney's performance.

Study limitations and suggestions

Given that this was a small sample size ($n=27$) and the research design was qualitative, the opinions expressed in this study may not be representative of other capital case practitioners, either in these

states or in other states. It is suggested that studies in other states be conducted to determine whether the same (or similar) themes would emerge from interviewing death penalty insiders.

It is suggested that elected prosecutors be interviewed to find out how and why charging decisions are made and to determine their willingness to turn over death penalty-seeking discretion to a non-partisan decision-making panel. Also, expense vouchers could be analyzed to determine if expenses in death penalty proceedings have been increasing or decreasing over time. Capital cases settled with life pleas should to be examined and compared to capital cases which went to trial in order to evaluate whether the death penalty is being reserved for the youngest, least educated, and most distrustful rather than for the worst of the worst.

Experienced capital case workers are a valuable, and largely untapped, resource for learning about the American death penalty. Society would be better served if policy makers put a system in place for periodically checking in with the front lines for feedback. Capital case practitioners are in position to pinpoint existing or emerging problems, and so it is imperative that their collective concerns be continuously heard and addressed.

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Footnotes

1. Because two interviews took place within courthouse settings, on-site court security staff would not allow the researcher entry into the courthouse with a tape recorder. On those occasions, detailed handwritten notes were taken; and, immediately after the interview concluded, those handwritten notes were typed up. [↵](#)

2. Due to the anonymous/confidential nature of this study and the fact that highly experienced death penalty judges, prosecutors, and defense attorneys are relatively rare, the IRB protocol prohibits the researcher from identifying age, gender, or race/ethnicity composition of the sample and also restricts researcher from explicitly revealing the current occupation and/or capital role when directly quoting interviewees. [↵](#)

3. In some jurisdictions, all of the felony criminal court judges are placed on random rotation to hear capital cases; in most, however, there is an assignment process, and the willingness of the judges to preside over these cases is taken into consideration. Also, attorneys do have the right to request a change of judge. The exact procedure varies across jurisdictions. [↵](#)

4. The male pronoun is being used throughout this article only because the vast majority of capital defendants are male. [↵](#)