ESSAY

THE GEOGRAPHY OF THE DEATH PENALTY AND ITS RAMIFICATIONS

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INTRODUCTION

A few counties in the United States continue to sentence people to death with any regularity. The vast majority of counties do not use the death penalty at all.[1] For those interested in reducing the total number of death sentences or

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[1] This clustering is not as surprising as it seems at first blush. County size varies widely. For example, in Texas, King County has roughly three hundred residents while Harris County has roughly three million residents.

finding a practical way to gauge the level of arbitrariness that exists in the administration of a death penalty scheme, this clustering of death sentences around an isolated few counties provides the opportunity for targeted doctrinal, litigation, and advocacy strategies.

This Essay proceeds in three parts. In Part I, I detail the geography of the death penalty. Scholars traditionally gauge death penalty activity at the state level. A county-level analysis of the distribution of death sentences and executions from 2004 to 2009, however, provides a more nuanced view. Just 10% of counties nationally returned even a single death sentence during this time period.[2] Even in those states that most often impose the death penalty,[3] the majority of counties do not return any death verdicts. The geographic distribution of death sentences reveals a clustering around a narrow band of counties: roughly 1% of counties in the United States returned death sentences at a rate of one or more sentences per year from 2004 to 2009.[4] Similarly, fewer than 1% of counties in the country sentenced anyone to death (at any point since 1976) whom their respective states executed from 2004 to 2009.[5] After separately exploring the distribution of death-sentences and executions, I consider the small subset of counties that both regularly sentence people to death and are situated in states that regularly perform executions. Part I

[2] *See infra* Appendix (showing that 303 out of 3141 counties and county equivalents sentenced at least one person to death from 2004 to 2009). The Appendix is an Excel spreadsheet containing every death sentence imposed by state governments (i.e., not including death sentences returned from federal courts) from 2004 to 2009

[3] This Essay includes death sentences meted at a new penalty trial after an appellate court reversed the first death sentence. *See infra* Appendix. This number is more indicative of the current climate in a location – if the person is being sentenced again, a new decision maker decided that the person deserves a death sentence by contemporary standards. Of course, this number (for example, 121 sentences in 2009) is less favorable to those who want to deemphasize the number of new death sentences that are being imposed each year. *Compare id.* (listing 121 death sentences in 2009), *with* Press Release, Death Penalty Info. Ctr., DPIC's Year End Report: Death Sentences in U.S. Lowest Since Death Penalty Reinstated in 1976 (Dec. 18, 2009), *available at* http://www.deathpenaltyinfo.org/documents/2009YrEndReportPress.pdf (listing 112 death sentences in 2009).

[4] *See id.* (listing twenty-nine counties that sentenced at least six people to death from 2004 to 2009).

[5] *See* Frank R. Baumgartner, *The North Carolina Database of U.S. Executions*, U. N.C. CHAPEL HILL, DEPARTMENTT POL. SCI., http://www.unc.edu/~fbaum/Innocence/executions.htm (last visited Oct. 27, 2011) [hereinafter *Execution Database*]. The *Execution Database* is an Excel spreadsheet containing every execution by state and county since 1976. It was compiled by Professor Frank Baumgartner of the University of North Carolina at Chapel Hill, Political Science Department. Professor Baumgartner derived this material from the DEATH ROW U.S.A. WINTER 2010, CRIMINAL JUSTICE PROJECT – NAACP LEGAL DEF. FUND, *available at* http://naacpldf.org/files/publications/DRUSA_Winter_2010.pdf, and the Death Penalty Information Center's database of executions in the United States since 1976, *Execution Database*, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/ views-executions.

concludes by briefly considering possible explanations for why this small subset of counties produces more death sentences than any other in the United States.

This clustering of death sentences around a few counties is important. It matters because it permits a tailored and rigorous analysis for gauging the continued constitutionality of capital punishment. A county-centric approach also permits targeted litigation and advocacy strategies and suggests how scarce resources (including government dollars) can be used more efficiently in the death penalty arena.

Part II addresses these doctrinal, litigation, and advocacy ramifications. The first section discusses the doctrinal implications that result from a focus on county-level death sentencing. The section begins by discussing the Eighth Amendment's prohibition on arbitrarily imposing the death penalty. Special attention is paid to the choice between heightened procedural regulation of capital trials (the path taken by the Court) and outcome-based approaches (the path not taken). The procedural regulation approach was adopted because of the belief that such changes would result in consistently imposed punishment. Yet the Court has never tested whether its procedural regulations have reduced arbitrariness. Next, this section discusses two alternative methods for presenting constitutional challenges that seek to limit capital punishment or render its administration more equitable. It begins by explaining the categorical exclusion approach (e.g., death-ineligibility for juveniles) and its limits, and the section then proposes a data-driven approach to presenting claims of arbitrariness that focuses primarily on comparative sentencing within a single county. By facilitating a more precise way to gauge arbitrariness, the data-driven, county-level analysis improves upon Eighth Amendment jurisprudence.

The second section discusses how litigants (as well as other interested parties) might take advantage of the clustering of death sentences around a narrow band of counties. Poor trial representation – brought on by over-burdened, under-resourced, and under-trained defenders – is a hallmark of capital representation. New models of representation – including trial consulting offices and data-driven remedies, what I term the "fire hose" problem – are demonstrating the ability to reduce new death sentences drastically (even in places like Harris County, Texas). Given their limited resources, interested parties might prioritize recreating these models in the counties with the highest absolute number of death sentences, rather than spending those resources on state-based litigation campaigns.

The third section details how the geography of the death penalty might influence abolitionist advocacy strategies. Many of the counties in which the most death sentences are imposed are in locations where the state government is unlikely to repeal the death penalty. This section explores the benefits of focusing advocacy efforts on county-level actors, rather than the benefits of funneling limited resources to statewide efforts or ignoring these states altogether. County residents are the ones most affected by the decision to

sentence someone to death. In many instances these are not simply moral questions, but they also are public safety questions that impact how counties spend scarce resources to make their residents safe. Further, local residents wield more influence over local prosecutors or county-level government officials than over state-level officials. This is an especially important consideration where the local population contains a higher percentage of minority group members than the state population generally.

I. THE GEOGRAPHY OF THE DEATH PENALTY

What follows is a description of the geography of capital punishment in the United States. The first section maps the distribution of death sentences from 2004 to 2009, identifying the most active jurisdictions (in absolute numbers) at both the state and county level. The second section details the distribution of executions. It has a dual focus – first on patterns that have emerged since 1976 and second on those that developed from 2004 to 2009. The third section considers those counties, which are situated in states that regularly execute offenders, that sentence people to death in comparatively large numbers. Part I of this Essay therefore identifies those counties that mark the center of gravity for death penalty activity in the United States.

A. *Death Sentences*

Where do most new death sentences in the United States originate? Ask this question to a random person or even to a criminal defense lawyer representing a capitally-charged defendant and odds are that you will get the same response: Alabama, Florida, Georgia, Louisiana, Mississippi, South Carolina, and Texas – the so-called Death Belt.[6] Those who conceive of capital punishment as a preoccupation of Southern states might be surprised by the shifting geography of capital punishment in America. Death sentences continue to be concentrated in a handful of jurisdictions. But those jurisdictions are not uniquely concentrated in the South. In 2009, five states – Alabama, Arizona, California, Florida, and Texas – accounted for two-thirds of death sentences nationally.[7] Eight states – the five above plus Oklahoma, Missouri, and

[6] The "Death Belt [refers to] the southern states that together account for over 90% of all executions carried out since 1976." Charles J. Ogletree, *Black Man's Burden: Race and the Death Penalty in America*, 81 OR. L. REV. 15, 19 (2002). Professor Ogletree explained that the Death Belt states "overlap . . . with the southern states that had the highest incidence of extra-legal violence and killings during the Jim Crow era." *Id.* He then continued, listing "[t]he nine states that make up the Death Belt [as] Texas, Florida, Louisiana, Georgia, Virginia, Alabama, Mississippi, North Carolina, and South Carolina." *Id.* at 19 n.19.

[7] Specifically, Alabama (9), Arizona (15), California (29), Florida (15), and Texas (13). Combined, these states accounted for 67% (81 of 121) of death sentences in 2009. *See infra* Appendix. The source data was obtained from two locations. The American Judicature Society provided the source material from 2004 to 2006. *Capital Case Data Project*, AMERICAN JUDICATURE SOCIETY (Mar. 5, 2011), http://www.ajs.org/jc/death//jc_death.asp.

Pennsylvania – accounted for more than two of every three sentences returned from 2004 to 2009. Most of these eight states are not in the South.[8]

Identifying the state-level distribution of death sentences provides us with a rough idea of the areas of the country that continue to use capital punishment regularly. It would be a mistake, however, to generalize about the individual jurisdictions within the most active death-sentencing states. A significant majority of counties within the busiest death-sentencing states did not sentence anyone to death from 2004 to 2009.[9] For example, in California, 64% of counties did not sentence anyone to death, and 90% returned no more than one death sentence.[10] Just six counties returned death sentences at the rate of more than one sentence per year.[11] Three counties – Los Angeles (33), Riverside (15), and Orange (14) – collectively account for more than half of all death sentences imposed in California from 2004 to 2009.[12]

California is not the only state where this trend exists. Fewer than half of the counties in Florida, for instance, did not sentence anyone to death from 2004 to 2009.[13] Nearly three of every four Florida counties sentenced two or

From 2007 to 2009, the material is derived from capital case summaries compiled by Drake Law School Professor David McCord. David McCord, *Death Sentence Reporter*, DRAKE U. L. SCH., http://facstaff.law.drake.edu/david.mccord/titlePageMccord.html#home (last visited March 3, 2011).

[8] The eight states are Alabama (66), Arizona (50), California (110), Florida (100), Oklahoma (38), Pennsylvania (39), South Carolina (29), and Texas (97). *See infra* Appendix. The same pattern exists when looking at the imposition of death sentences from 2007 to 2009. The pattern in these years, however, may be even more pronounced. Five states – Alabama (32), Arizona (29), California (65), Florida (53) and Texas (43) – account for 60% of death sentences (222 of 372). *See infra* Appendix. In 2009, the (same) busiest five states – Alabama, Arizona, California, Florida, and Texas – accounted for two of every three sentences imposed. *See infra* Appendix.

[9] *See infra* Appendix.

[10] *See infra* Appendix (showing that, from 2004 to 2009, twenty-one California counties returned at least one death sentence, and twelve California counties returned at least two death sentences, out of a total of fifty-nine counties).

[11] Those counties were Los Angeles (33), Riverside (15), Orange (14), Contra Costa (7), San Bernardino (7), San Diego (7). *See infra* Appendix.

[12] The busiest three counties account for 56% of death sentences. *See infra* Appendix (showing the three busiest counties as accounting for 62 of 110 death sentences imposed in California from 2004 to 2009). The six counties that sentenced six or more people to death from 2004 to 2009 (a rate of one sentence per year) accounted for 75% of California death sentences over that time period. *See infra* Appendix.

[13] *See infra* Appendix. Prosecutors in Florida represent multi-county judicial circuits. Repackaging the county analysis in Florida as a circuit-by-circuit analysis also reveals the clustered nature of death sentences. For instance, five of the twenty-nine counties that returned death sentences at a rate of more than one sentence per year from 2004 to 2009 are located in Florida. Two of the six counties – Brevard (6) and Seminole (6) – are located within the same judicial circuit. *See infra* Appendix.

fewer people to death.[14] Only three counties imposed death sentences at a rate of more than one new sentence per year: Duval (13), Broward (10), and Polk (8).[15] Texas has 254 counties, of which 222 (88%) sentenced no one to death from 2004 to 2009.[16] Of the thirty-two counties that did sentence someone to death, seventeen sentenced only one person to death.[17] Just four counties imposed death sentences at a rate of more than one per year[18]: Bexar (10), Dallas (8), Harris (21), and Tarrant (10).[19]

The fact that even in the most active death-sentencing states most counties do not use the death penalty with any regularity suggests that the best way to measure death-sentencing activity is not at the state level. Instead, identifying the counties that sentence the most people to death is a better gauge of death sentencing activity for a variety of reasons. First, as the U.S. Supreme Court has repeatedly pointed out, the decision of a sentencing jury to return a death sentence (or not) is the best on-the-ground indicator of how citizens feel about the practice of capital punishment at any given time.[20] The citizens that comprise a jury are drawn from the county where the offense occurred. Thus, we can draw conclusions about the appetite for the death penalty in a particular jurisdiction based on juror imposition (or rejection) of death sentences without the need to extrapolate our findings to a different set of citizens living within other counties in the state who might be situated in very different socio-economic and political landscapes. Moreover, the determination of whether to

[14] *See infra* Appendix (showing that fifty-two of sixty-seven Florida counties returned fewer than three death sentences from 2004 to 2009).

[15] *See infra* Appendix (showing that only Duval, Broward, and Polk counties returned more than six death sentences from 2004 to 2009).

[16] *See infra* Appendix (showing that 222 of 254 counties returned zero death sentences from 2004 to 2009).

[17] *See infra* Appendix (showing that seventeen counties returned only one death sentence from 2004 to 2009).

[18] *See infra* Appendix (showing that only Bexar, Dallas, Harris, and Tarrant were the only Texas counties to return more than six death sentences from 2004 to 2009).

[19] *See infra* Appendix (listing the 2004 to 2009 total death sentence statistics for Tarrant, Bexar, Dallas, and Harris counties).

[20] *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 616 (2005) (Scalia, J., dissenting) ("[W]e have, in our determination of society's moral standards, consulted the practices of sentencing juries: Juries maintain a link between contemporary community values and the penal system that this Court cannot claim for itself." (internal quotation marks omitted)); Furman v. Georgia, 408 U.S. 238, 314 (1972) (Marshall, J., concurring) ("I add only that past and present legislative judgment with respect to the death penalty loses much of its force when viewed in light of the recurring practice of delegating sentencing authority to the jury and the fact that a jury, in its own discretion and without violating its trust or any statutory policy, may refuse to impose the death penalty no matter what the circumstances of the crime. Legislative 'policy' is thus necessarily defined not by what is legislatively authorized but by what juries and judges do in exercising the discretion so regularly conferred upon them.").

seek a death sentence or not depends in large part on the county prosecutor.[21] And, as I shall cover in detail later in this Essay, whether a death penalty case results in a capital trial (and if so, whether a death sentence results) often depends on the quality of representation provided by county-level defender organizations.[22] For these reasons, it makes sense to measure death-sentencing activity at the county level.

This focus on the county-level imposition of death sentences illuminates how pronounced the concentration of death sentences around an increasingly narrow band of counties has become. In 2009, Los Angeles County, California sentenced the same number of people to death as the State of Texas.[23] Maricopa County, Arizona sentenced more people to death than the State of Alabama.[24] This is not the exception to the rule; just 10% of counties in the United States account for all death sentences imposed from 2004 to 2009.[25] Even within that 10% of counties, the divide between the most and least active jurisdictions is stark: only 4% of counties (121) in the United States sentenced more than one person to death in that time period.[26] Those 4% of counties account for roughly 76% of the death sentences returned nationally.[27] Twenty-nine counties – fewer than 1% of counties in the country – rendered death sentences at a rate of one or more new sentences per year.[28] That 1% of counties accounts for roughly 44% of all death sentences.[29] Fourteen counties sentenced ten or more individuals to death, which represents a return of almost

[21] *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 312 (1987) (emphasizing historical prosecutorial discretion in deciding whether to "decline to charge . . . or decline to seek a death sentence" (footnote omitted)); John A. Horowitz, Note, *Prosecutorial Discretion and the Death Penalty: Creating a Committee to Decide Whether to Seek the Death Penalty*, 65 FORDHAM L. REV. 2571, 2576 (1997) ("[T]he dangers of prosecutorial discretion . . . are most problematic in the context of the death penalty, where prosecutors are likely to have the greatest influence on whether a defendant is sentenced to death.").

[22] *See infra* Part II.B.1 (discussing legal representation protocols in many of the most active death-sentencing states).

[23] *See infra* Appendix (showing that both Los Angeles County and the State of Texas sentenced thirteen people to death).

[24] *See infra* Appendix (showing that Maricopa County sentenced eleven people to death, while the State of Alabama sentenced only nine).

[25] Only about five percent of counties are responsible for the death sentences imposed from 2007 to 2009. *See infra* Appendix (listing only 188 counties as having imposed death sentences from 2007 to 2009).

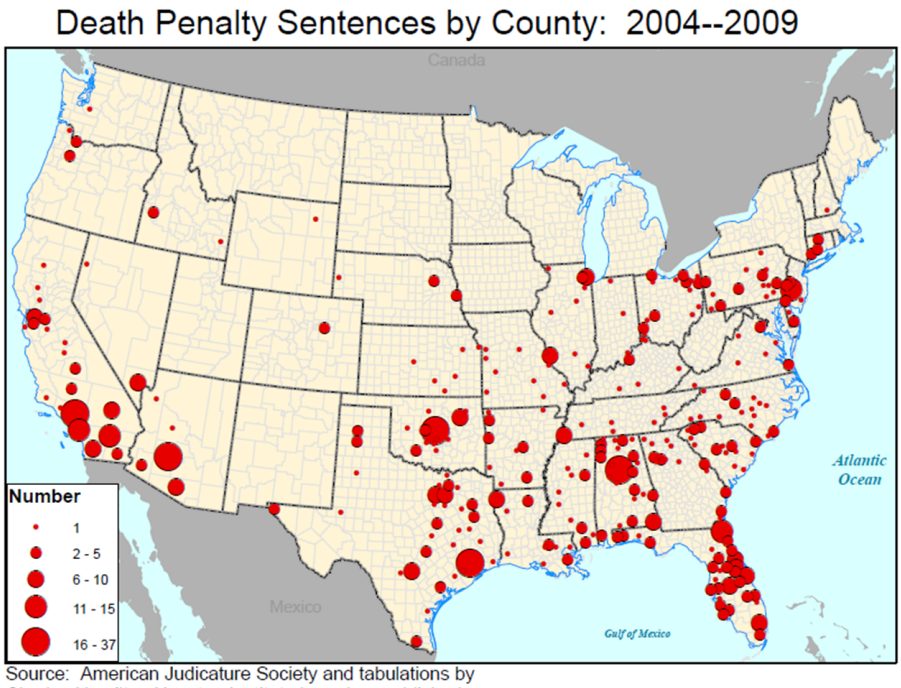
[26] *See infra* Appendix (showing that 121 counties returned at least two death sentences from 2004 to 2009).

[27] *See infra* Appendix (showing that 121 counties accounted for approximately 581 out of a total of 763 U.S. death sentences).

[28] *See infra* Appendix (showing that twenty-nine counties returned six or more death sentences from 2004 to 2009).

[29] *See infra* Appendix (showing that twenty-nine counties collectively returned approximately 334 out of a total of 763 death sentences).

two death sentences per year.[30] Those fourteen counties account for roughly one-third of death sentences nationally from 2004 to 2009.[31]

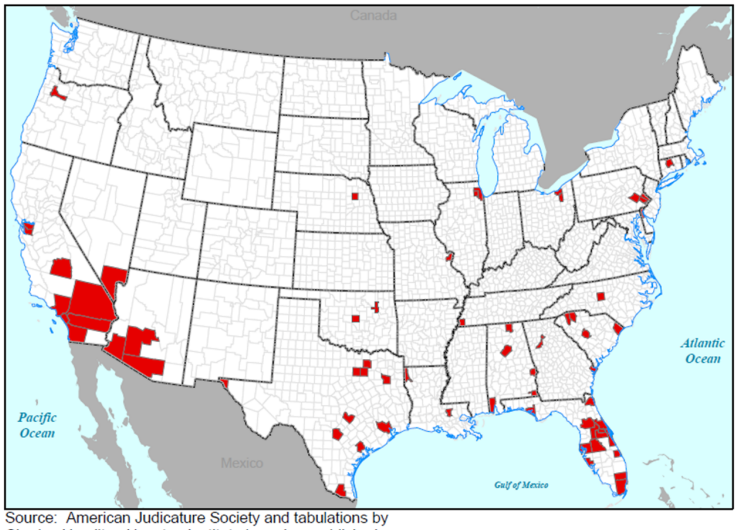


Source: American Judicature Society and tabulations by
Charles Hamilton Houston Institute based on published news sources.

[30] Maricopa County, Arizona, had thirty-eight; Los Angeles County, California, had thirty-three; Harris County, Texas, had twenty-one; Oklahoma County, Oklahoma, had eighteen; Jefferson County, Alabama, had sixteen; Riverside County, California, had fifteen; Orange County, California, had fourteen; Duval County, Florida, had thirteen; Philadelphia County, Pennsylvania, Clark County, Nevada, and Broward County, Florida, each had eleven; Bexar, Houston, and Tarrant Counties, Texas, each had ten. *See infra* Appendix.

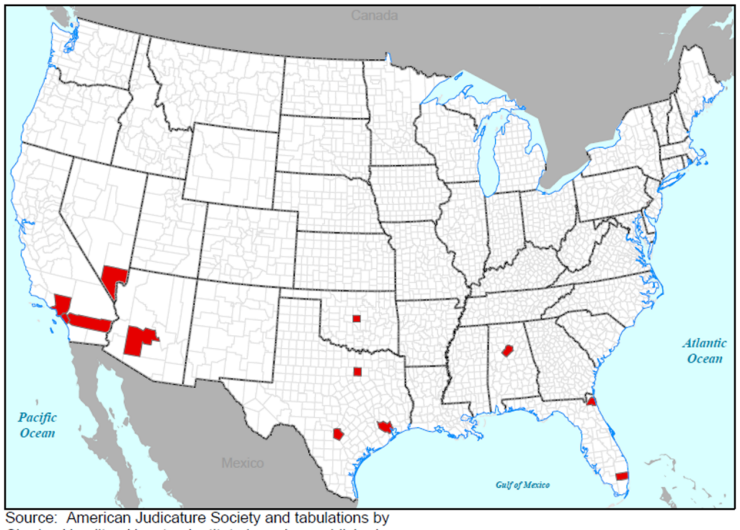
[31] *See infra* Appendix (showing that the fourteen most active counties returned 231 out of 763 total death sentences).

Counties with 3 or More Death Penalty Sentences: 2004--2009



Source: American Judicature Society and tabulations by Charles Hamilton Houston Institute based on published news sources.

Counties with 10 or More Death Penalty Sentences: 2004--2009



Source: American Judicature Society and tabulations by Charles Hamilton Houston Institute based on published news sources.

B. *Executions*

A second way to measure the activity level of a death penalty jurisdiction is to track the number of executions it has performed. The number of executions in a jurisdiction is a less-calibrated gauge for measuring death penalty activity than is the number of death sentences for two reasons. First, there is no panel of citizens to intervene after the death verdict but before the execution in the same way that the jury decides whether or not to return a death sentence

against a convicted murderer. Once a death sentence is imposed, relief can only come from the judiciary or from the executive branch.[32] Similarly, because the decision to proceed with an execution is made by state officials (who are obligated to please not just the citizens from the county in which the offense was tried, but citizens from the whole state), and because executions are performed at the state penitentiary (often many miles from where the crime was committed), it is easier for citizens to misplace dissatisfaction with the execution on the state generally, and not on the county government. The fact that the political decision to perform an execution is one step removed from the citizens in the county who imposed the sentence means that it is possible for a backlog of executions to remain even though local taste for capital punishment has subsided.

Nonetheless, execution rates are helpful for three reasons. First, from an Eighth Amendment standpoint, death sentences without executions threaten to strip the retributive legitimacy of the death penalty, which in turn threatens to undermine the constitutionality of such sentences.[33] From a litigation or advocacy perspective, knowing where executions are most likely to occur allows scarce resources to be diverted from those states whose death sentences are symbolic (or mostly symbolic) and instead spent in those states that both sentence and execute offenders. Finally, from a public policy standpoint, it might not be optimal to allocate scarce public safety dollars to a government program that has only symbolic effects.[34]

There have been 1231 executions since the dawn of the modern era of capital punishment in 1976.[35] Like the distribution of death sentences, the distribution of executions reveals a skewed geography. Professor Frank Baumgartner, a political science professor at the University of North Carolina

[32] Of course, in rare situations a last minute temporary stay may be issued by a state or federal court. In extraordinary situations state or federal courts might grant relief. *See, e.g.*, *In re* Davis, 130 S. Ct. 1, 1 (2009) (transferring the petitioner's writ of habeas corpus to a federal district court with orders to "receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes petitioner's innocence"); *id*. at 2 (Scalia, J., dissenting) ("Today this Court takes the extraordinary step – one not taken in nearly 50 years – of instructing a district court to adjudicate a state prisoner's petition for an original writ of habeas corpus.").

[33] *See, e.g.*, Sara Colón, Comment, *Capital Crime: How California's Administration of the Death Penalty Violates the Eighth Amendment*, 97 CALIF. L. REV. 1377, 1405 (2009) (arguing that California's failure to carry out executions of its death row convicts "sets the level of punishment needed for retribution and then fails to live up to it"). It is possible, of course, to argue that the retributive effect is still sufficient because society has been able to express its highest condemnation of the prisoner simply by issuing the sentence and signaling the belief that the person is no longer fit to live among us.

[34] *See* DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 416 (1990) (hypothesizing that if capital sentencing serves neither deterrent nor retributive purposes, "its only remaining function must be symbolic").

[35] *See Execution Database*, *supra* note 5.

at Chapel Hill, has compiled a database of every execution in the United States since 1976.[36] Sixteen states (some of which opt out of capital punishment altogether) plus the District of Columbia have not sentenced anyone to death since 1976.[37] Thirty-three states (plus the federal government and the District of Columbia, and including the sixteen aforementioned states) executed fewer than ten people.[38] Ten states executed death-sentenced inmates at a rate of one or more per year.[39] Three states performed executions at a rate significantly in excess of two per year.[40] Of these, Texas is responsible for more than one-third of all executions.[41] Virginia executed 108 people (roughly 3.3 per year).[42] Oklahoma executed 91 people (roughly 2.8 people per year).

Tracking executions at the county level is also important. The strongest remaining rationale for the continued Eighth Amendment validity of capital punishment is its retributive effects;[43] if, however, counties sentence people to death whom the states do not execute then the retributive function of the death penalty is diminished because the act of execution is not realized.[44] Professor Baumgartner's research demonstrates that even among the handful of active death-sentencing counties in the United States, few have actually sentenced anyone to death whom the respective state subsequently executed. Indeed, since 1976, only 15% of the counties in the United States have sentenced anyone to death who subsequently has been executed.[45] Only fifty counties (1.6%) have sentenced five or more people to death whom their respective state ultimately executed.[46] This translates to one execution every seven years.[47]

Three hundred three executions occurred in the six-year period from 2004 to 2009.[48] Twenty-seven states (plus the federal government and the District of

[36] *See id.* (describing Professor Baumgartner's methodology and source material used to compile the database).

[37] *See id.*

[38] *See id.*

[39] Those ten states are Texas (463), Virginia (108), Oklahoma (91), Florida (69), Missouri (67), Alabama (48), Georgia (48), North Carolina (43), Ohio (41), and South Carolina (41). *See id.*

[40] South Carolina, Ohio, North Carolina, Georgia, and Alabama executed death-sentenced inmates at a rate of less than 1.5 executions per year. *See id.* Florida (69) and Missouri (67) performed executions at a rate slightly higher than two per year. *See id.*

[41] *See id.* (38% (463 of 1231)).

[42] *See id.*

[43] *See, e.g.*, Mary Sigler, *Mercy, Clemency, and the Case of Karla Faye Tucker*, 4 OHIO ST. J. CRIM. L. 455, 477 (2007) (categorizing retribution as the "justification for punishment that provides the primary rationale for the death penalty").

[44] *See supra* note 33 and accompanying text.

[45] *See Execution Database*, *supra* note 5.

[46] *See id.*

[47] *See id.*

[48] *See id.*

Columbia) did not perform a single execution over that time period.[49] Sixteen states executed more than one person.[50] Only ten states performed executions at a rate of more than one execution per year.[51] All but seven states averaged two or fewer executions per year.[52] All but three states averaged three or fewer executions per year[53]: Texas (134), which is responsible for approximately 45% of all executions from 2004 to 2009;[54] Ohio, which executed 25 people (8% of total executions);[55] and Oklahoma, which performed 22 executions (6%).[56] From 2004 to 2009, the overwhelming majority of counties (99.5%) did not sentence anyone to death who was ultimately executed.[57] Only four counties in the United States saw returns on their death sentences at the rate of more than one execution per year.[58] All four are in Texas: Harris (42), Dallas (13), Bexar (12) and Tarrant (11).[59]

C. *Targeting the Most Active Death-Penalty Counties*

Four of the thirteen counties that sentenced more than ten people to death from 2004 to 2009 are also responsible (in the sense that they sentenced the person to death) for a disproportionate number of the 1231 executions that have occurred since 1976.[60] Three of these counties – Harris (115), Bexar (34) and Tarrant (31) – are in Texas.[61] The other is Oklahoma County, Oklahoma, with thirty-six executions.[62] The remaining eight counties that sentenced more than ten people to death from 2004 to 2009 have had the following number of

[49] *See id.* The following lists the states that performed executions from 2004 to 2009 and the respective number of executions occurring in each such state. Texas (134), Ohio (25), Oklahoma (22), Alabama (16), Virginia (16), South Carolina (14), North Carolina (13), Georgia (12), Florida (11), Indiana (9), Missouri (6), Tennessee (5), Mississippi (4), California (3), Nevada (3), Arkansas (2), Arizona (1), Connecticut (1), Delaware (1), Kentucky (1), Maryland (2), Montana (1), South Dakota (1).

[50] *See id.*

[51] *See id.*

[52] *See id.*

[53] *See id.*

[54] *See id.* (44.4% (134 of 303)).

[55] *See id.*

[56] *See id.*

[57] One hundred sixty-six counties sentenced one person or more to death who were executed from 2004 to 2009. *See id.*

[58] *See id.*

[59] *See id.*

[60] This information is current as of October 28, 2010.

[61] Four of the top five busiest execution counties in the country are in Texas. Harris, Bexar, and Tarrant counties are discussed in-text. *See infra* notes 64-69 and accompanying text. The other is Dallas County (44). Harris County (Houston) has sentenced more people to die that subsequently were executed (115) than any *state* except (obviously) Texas. *See Execution Database*, *supra* note 5.

[62] *See id.*

death-sentenced inmates from their county executed since 1976: Jefferson County, Alabama (10); Clark County, Nevada (7); Duval County, Florida (7); Maricopa County, Arizona (6); Los Angeles County, California (2); Orange County, California (2); Broward County, Florida (1); Philadelphia County, Pennsylvania (1); Riverside County, California (0).[63]

The following statistics examine these same jurisdictions but consider executions that occurred from 2004 to 2009:

- Harris County, Texas, sentenced twenty-one people to death from 2004 to 2009.[64] Texas executed over that same time period forty-two people who were sentenced to death in Harris County.[65]

- Bexar County, Texas, sentenced ten people to death from 2004 to 2009.[66] Texas executed over that same time period twelve people who were sentenced to death in Bexar County.[67]

- Tarrant County, Texas, sentenced ten people to death from 2004 to 2009.[68] Texas executed over that same time period eleven people who were sentenced to death in Tarrant County.[69]

- Oklahoma County, Oklahoma, sentenced eighteen people to death from 2004 to 2009,[70] but Oklahoma only executed over that same time period six people who were sentenced to death in Oklahoma County.[71]

- Jefferson County, Alabama, sentenced sixteen people to death from 2004 to 2009,[72] but Alabama only executed over that same time period two people who were sentenced to death in Jefferson County.[73]

- Maricopa County, Arizona, sentenced thirty-eight people to death from 2004 to 2009,[74] but Arizona only executed over that same time

[63] *See id.*
[64] *See infra* Appendix.
[65] *See Execution Database*, *supra* note 5.
[66] *See infra* Appendix.
[67] *See Execution Database*, *supra* note 5.
[68] *See infra* Appendix.
[69] *See Execution Database*, *supra* note 5.
[70] *See infra* Appendix.
[71] *See Execution Database*, *supra* note 5.
[72] *See infra* Appendix.
[73] *See Execution Database*, *supra* note 5.
[74] *See infra* Appendix.

period one person who was sentenced to death in Maricopa County.[75]

- Los Angeles County, California, sentenced thirty-three people to death from 2004 to 2009,[76] but California only executed over that same time period one person who was sentenced to death in Los Angeles County.[77]

- Broward County, Florida, sentenced eleven people to death from 2004 to 2009,[78] but Florida only executed over that same time period one person who was sentenced to death in Broward County.[79]

- Duval County, Florida, sentenced thirteen people to death from 2004 to 2009,[80] but Florida did not execute over that same time period any person who was sentenced to death in Duval County.[81]

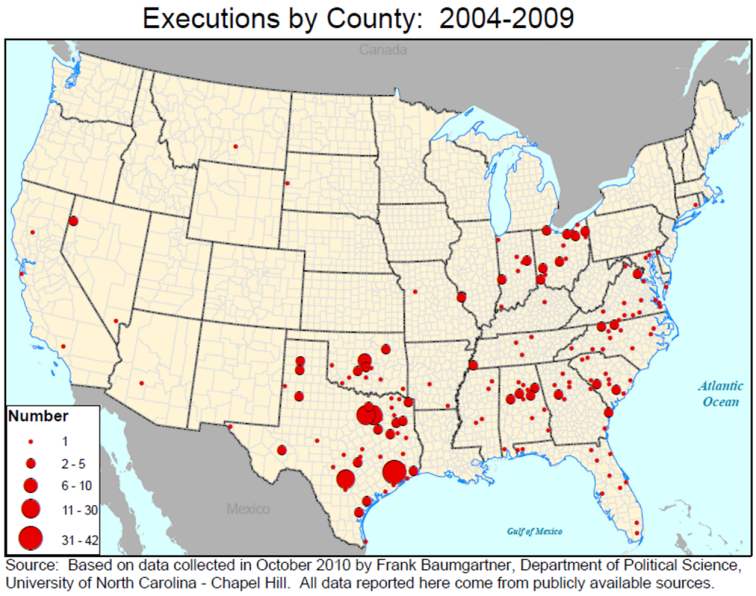
- Philadelphia County, Pennsylvania, sentenced eleven people to death from 2004 to 2009,[82] but Pennsylvania did not execute over that same time period any person who was sentenced to death in Philadelphia County.[83]

- Clark County, Nevada, sentenced eleven people to death from 2004 to 2009,[84] but Nevada did not execute over that same time period any person who was sentenced to death in Clark County.[85]

- Orange County, California, sentenced fourteen people to death from 2004 to 2009,[86] but California did not execute over that same time period any person who was sentenced to death in Orange County.[87]

[75] *See Execution Database*, *supra* note 5.
[76] *See infra* Appendix.
[77] *See Execution Database*, *supra* note 5.
[78] *See infra* Appendix.
[79] *See Execution Database*, *supra* note 5.
[80] *See infra* Appendix.
[81] *See Execution Database*, *supra* note 5.
[82] *See infra* Appendix.
[83] *See Execution Database*, *supra* note 5.
[84] *See infra* Appendix.
[85] *See Execution Database*, *supra* note 5.
[86] *See infra* Appendix.
[87] *See Execution Database*, *supra* note 5.

- Riverside County, California, sentenced fifteen people to death from 2004 to 2009,[88] but California did not execute over that same time period any person who was sentenced to death in Riverside County.[89]



Source: Based on data collected in October 2010 by Frank Baumgartner, Department of Political Science, University of North Carolina - Chapel Hill. All data reported here come from publicly available sources.

So far, this Essay has detailed the distribution of death sentences and executions in the United States. Part II of this Essay will describe the doctrinal, litigation, and advocacy opportunities that present themselves if we focus on those counties that return the most (in an absolute sense) death sentences. Before discussing these opportunities, however, the remainder of this section provides a few observations that help clarify why a narrow band of counties remain the most active death penalty jurisdictions in the country. The following analysis is not meant to provide any definitive answers. As I explain below, *why* these jurisdictions remain highly active is nowhere near as important as the fact that they *do* account for a large percentage of the death sentences returned nationally.

The most obvious characteristic that these counties share, which may contribute to their high number of death sentences relative to other counties in their respective states and the rest of the country, is size. A significant number of counties on this list are among the most populated counties in the United States.[90] Los Angeles has a population of approximately ten million people.[91]

[88] *See infra* Appendix.

[89] *See Execution Database*, *supra* note 5.

[90] *See* U.S. CENSUS BUREAU, RESIDENT POPULATION ESTIMATES FOR THE 100 LARGEST

Harris and Maricopa have approximate populations of four million apiece.[92] Seventeen of the twenty-eight counties on the list have populations over one million. But size alone does not tell the whole story. Los Angeles County is only twice the size of Cook County, but Los Angeles County sentenced nearly five times as many people to death from 2004 to 2009.[93] Harris County has roughly one million fewer people than Cook County, but Harris County sentenced almost three times as many people to death.[94] Maricopa County is roughly the same size as Harris County, but Maricopa County sentenced thirty-eight people to death while Harris County rendered twenty-one death sentences.[95] Miami-Dade County, which has a population of approximately 2.5 million, only sentenced four people to death, whereas Oklahoma County, which has a population of approximately 750,000, sentenced eighteen people to death.[96]

U.S. COUNTIES BASED ON JULY 1, 2009 POPULATION (2009), *available at* http://www.census.gov/popest/counties/CO-EST2009-07.html (listing the nation's 100 most populous counties as of 2009).

[91] *Los Angeles County, California QuickFacts*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/06/06037.html (last visited March 3, 2011) (showing that the population of Los Angeles County as of 2010 was 9,818,605).

[92] *Harris County, Texas QuickFacts*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/48/48201.html (last visited March 3, 2011) (showing that the population of Harris County as of 2010 was 4,092,459); *Maricopa County, Arizona QuickFacts*, U.S. CENSUS BUREAU, http://quickfacts.census .gov/qfd/states/04/04013.html (last visited March 3, 2011) (showing that the population of Maricopa County as of 2010 was 3,817,117).

[93] Los Angeles County has approximately 10 million residents, *see supra* note 91, and it sentenced thirty-three people to death from 2004 to 2009. *See infra* Appendix. Cook County, Illinois, sentenced seven people to death over the same time period, *see infra* Appendix, and it has a population of roughly five million. *Cook County, Illinois QuickFacts*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/17/17031.html (last visited March 3, 2011). Los Angeles County also had *fewer* than twice as many homicides from 2004 to 2009 (5529 versus 3347), meaning that Cook County suffered more homicides per capita than Los Angeles. *See Crime and Crime Rates by Category and Crime: Los Angeles County*, CAL. ST. DEPARTMENT JUST., http://stats.doj.ca.gov/cjsc_stats/prof09/19/1.htm (last visited October 21, 2011).

[94] *See infra* Appendix (listing total death sentences for Cook County (7) and Harris County (21)). *Compare Harris County Quickfacts*, *supra* note 92 (showing the population of Harris county), *with Cook County Quickfacts*, *supra* note 93 (showing the population of Cook County). Cook County suffered roughly 25% more homicides than Harris County from 2004 to 2009 (3347 versus 2446).

[95] *See infra* Appendix (listing total death sentences for Maricopa County (38) and Harris County (21)); *supra* note 92 (listing the population of both Harris and Maricopa Counties). Harris County also suffered roughly 29% more homicides than Maricopa from 2004 to 2009 (2446 versus 1732).

[96] Miami-Dade County sentenced four people to death from 2004 to 2009, *see infra* Appendix (showing that Miami-Dade sentenced four people during the relevant time

Alabama and Florida account for a combined 166 death sentences imposed nationally from 2004 to 2009.[97] Two Alabama counties and six Florida counties are among the twenty-nine counties that imposed the most death sentences.[98] Only one of those seven counties has a population that exceeds one million people, however, while the other six are among the least populous of the twenty-nine counties that sentenced people to death at the rate of one or more people per year.[99] Two potential explanations for the increased death penalty activity in these locations are that neither Alabama nor Florida require jury sentencing on the ultimate death determination and both Florida and Alabama allow non-unanimous jury death recommendations.

Duval County, Florida, and Jefferson County, Alabama, are responsible for a combined twenty-nine death sentences, only one of which was authorized by a unanimous jury.[100] This practice runs counter to nearly every death penalty

period), and has approximately 2.5 million residents. *Miami-Dade County, Florida QuickFacts*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/12/12086.html (last visited March 3, 2011). Oklahoma County, Oklahoma, sentenced eighteen people to death, *see infra* Appendix, and has a population of roughly three-quarters of a million people. *Oklahoma County, Oklahoma QuickFacts*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/40/40109.html (last visited March 3, 2011). Miami-Dade County suffered 1300 homicides from 2004 to 2009, while Oklahoma County suffered 378. *See infra* Appendix.

[97] *See infra* Appendix.

[98] *See infra* Appendix.

[99] That county is Broward County, Florida. *See Broward County, Florida QuickFacts*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/12/12011.html (last visited October 20, 2011) (showing the population of Broward County as of 2010 was 1,748,066).

[100] *Capital Case Data Project*, *supra* note 7 (listing jury verdicts, including county of offense and vote totals). Duval County has other problems. The County elected a new public defender, Matt Shirk, in 2008. Shirk abruptly "fired 10 of the most experienced attorneys in this office without taking a single personnel file or interviewing them," including veteran criminal defense lawyers Pat McGuiness and Ann Finnell, who had been the subjects of an award-winning documentary for their representation of a fifteen-year-old client charged with murder whose confession had been coerced by Jacksonville Police. Debra Cassens Weiss, *Prosecutors and PDs Fired in Fla. Consider Lawsuits*, ABA JOURNAL (Dec. 8, 2008, 8:10 AM), http://www.abajournal.com/news/article/prosecutors_and_pds_fired_en_masse_in_fla._consider_lawsuits/. McGuiness alleges that Shirk "was supported by the Fraternal Order of Police and made certain representations to them, as I understand, that there would not be questions raised about integrity of policemen." *New Public Defender Fires 10 Lawyers*, NEWS4JAX.COM (Oct. 14, 2011, 2:09 PM), http://www.news4jax.com/news/18036655/detail.html. During his campaign, Shirk made a promise to voters "not to oppose funding cuts to the office he was running for, and a promise to squeeze as much money as possible out of indigent defendants, including a proposal for the postponed billing of acquitted defendants who might later be able to find some employment." Radley Balko, *Here's a Bad Idea . . .* , THE AGITATOR (Nov. 25, 2008, 1:43 PM), http://www.theagitator.com/2008/11/25/heres-a-bad-idea/.

jurisdiction in the country.[101] In Alabama, the jury is said to recommend death when at least ten jurors vote to impose the sentence.[102] Florida only requires that a majority of jurors vote to impose a death sentence. For example, in 2008, a Duval County judge formally sentenced Galante Phillips to death in accordance with the jury recommendation, even though five of the twelve jurors voted to spare Phillips.[103] Non-unanimous, penalty-phase juries impose indirect costs on capital determinations. More than four decades of social science research indicates that unanimous juries deliberate longer, discuss and debate the evidence more thoroughly, and are more tolerant and respectful of dissenting voices.[104] Non-unanimous decision rules also tend to promote perilous racial dynamics. As Justice Stewart explained, "[Ten] jurors [operating under a non-unanimous decision rule] can simply ignore the views of their fellow panel members of a different race or class."[105] These factors,

[101] Florida is the only jurisdiction that does not require the jury's finding of an aggravating factor to be unanimous. *See, e.g.*, Jones v. State, 569 So. 2d 1234, 1238 (Fla. 1990) (stating that capital jurors are not "require[d] . . . to unanimously agree upon the existence of the specific aggravating factors applicable in each case"). The Florida Supreme Court refused to revise *Jones* despite the Court's decision in *Ring v. Arizona*, 536 U.S. 583, 585 (2001). *See* Bottoson v. Moore, 833 So. 2d 693, 695 (Fla. 2002) (finding that the defendant's execution, stayed by the Court pending the *Ring* decision, need not be reconsidered in light of *Ring*).

[102] Harris v. Alabama, 513 U.S. 504, 506 (1995) ("The jury may recommend death only if 10 jurors so agree, while a verdict of life imprisonment requires a simple majority.").

[103] Phillips v. State, 39 So. 3d 296, 301 (Fla. 2010) ("On April 9, 2008, the jury rendered its verdict finding Phillips guilty of first-degree premeditated murder during the commission of a robbery, and armed robbery. After a penalty phase on April 22 and 23, 2008, the jury recommended, by a vote of seven to five, that Phillips be sentenced to death.").

[104] *See* REID HASTIE, STEVEN D. PENROD & NANCY PENNINGTON, INSIDE THE JURY 85 (1983); Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622, 669 (2001).

[105] Johnson v. Louisiana, 406 U.S. 356, 396 (1972) (Stewart, J., dissenting); *see also* Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1277-79 (2000) (explaining that recent research indicates that even when voir dire empanels racial minorities as jurors, their views may be excluded from serious consideration when "outnumbered and outvote[d] by an otherwise homogenous jury panel"). The fact that someone has a darker complexion obviously does not mean that she will be more inclined to vote for a life sentence. *See* Tania Tetlow, *How Batson Spawned Shaw – Requiring the Government to Treat Citizens as Individuals When It Cannot*, 49 LOY. L. REV. 133, 152 (2003) ("[A] state may recognize that racial communities have some common thread of relevant interests, but the state may not make the racist assumption that such interests exist. It remains unclear what level of proof is necessary to show that racial communities have common interests and voting behavior." (footnotes omitted) (internal quotation marks omitted)); *see also* Batson v. Kentucky, 476 U.S. 79, 138-39 (1986) (Rehnquist, J., dissenting) ("The use of group affiliations, such as age, race, or occupation, as a 'proxy' for potential juror partiality, based on the assumption or belief that members of one group are more likely to favor defendants who belong to the same group, has long been accepted as a

combined with the basic point that it is easier to reach a determination when all members need not agree, suggest that the non-unanimous decision rule plays a role in the number of death sentences returned in Florida and Alabama and thus in the most active death-sentencing counties within those states.

Alabama and Florida also permit the trial judge to override the decision of the jury.[106] Florida judges rarely override jury recommendations.[107] Alabama judges do so more frequently.[108] From 2004 to 2009, Jefferson County judicial overrides accounted for six of sixteen death sentences.[109] In 2008, for example, a Jefferson County jury voted ten-to-two that Montez Spradley should receive a life sentence.[110] The trial court overrode the jury recommendation and sentenced Spradley to death.[111] Judicial override also

legitimate basis for the State's exercise of peremptory challenges . . . . Indeed, given the need for reasonable limitations on the time devoted to *voir dire*, the use of such 'proxies' by both the State and the defendant may be extremely useful in eliminating from the jury persons who might be biased in one way or another."). The point is that race has usually served as a proxy for class – and in some parts of the country still does. In turn, class serves as a proxy for life experience. A person who lives in an impoverished, crime-ridden neighborhood might understand the situational factors that influence crime production in a way that a person who lives in a relatively wealthy, crime-free neighborhood cannot. Class might be the most salient factor in larger cities where members of racial minority groups are represented more broadly in the community. In these cases, *Batson* violations might not be as much of a concern as the failure to pay jurors a living wage for the day(s) she misses work. As jurors are excluded more often because they cannot afford to serve on a jury or cannot afford to get to jury duty, we lose the perspective of the members of society for whom we already have to strain to hear their stories.

[106] *Harris*, 513 U.S. at 504 (holding that Alabama's judicial override procedure does not violate the Eighth Amendment); Spaziano v. Florida, 468 U.S. 447, 448 (1984) (affirming the constitutionality of Florida's judicial override procedure).

[107] *See* Michael Mello, *The Jurisdiction to Do Justice: Florida's Jury Override and the State Constitution*, 18 FLA. ST. U. L. REV. 923, 937-38 (1991) (explaining that from 1986 to 1990, the Florida Supreme Court affirmed only two out of thirty-two judicial overrides imposing the death sentence over the jury's life sentence recommendation).

[108] *See* Adam Liptak, *Overriding the Jury in Capital Cases*, N.Y. TIMES, Jul. 11, 2011, http://www.nytimes.com/2011/07/12/us/12bar.html?partner=rss&emc=rss. Liptak explains that "Alabama judges have rejected sentencing recommendations from capital juries 107 times [since 1976], [and] [i]n 98 of those cases, or 92 percent of them, judges imposed the death penalty after juries had called for a life sentence." *Id.* He goes on to write that, while "Florida and Delaware also allow overrides . . . [, n]o one has been sentenced to death in Florida as a result of a judicial override since 1999, and there is no one on death row in Delaware as a consequence of an override." *Id.*

[109] *See Capital Case Data Project*, *supra* note 7; *infra* Appendix.

[110] *Capital Case Data Project*, *supra* note 7 (reporting the execution of Montez Spradley in 2008 against jury recommendation); s*ee also* Eric Velasco, *Judge Overrides Jury, Imposes Death Penalty*, BIRMINGHAM NEWS, Apr. 22, 2008, at 1B (relating judge's override of jury's ten-to-two decision to give Spradley a life sentence).

[111] *Capital Case Data Project*, *supra* note 7. A review of the *Capital Case Data Project*

imposes indirect costs on capital determinations. One such cost occurs because trial judges are elected in Alabama and Florida.[112] For example, twelve jurors tasked with carefully listening to evidence of a defendant's severe mental illness might decide to spare his life despite what might appear to be a calculated and grisly murder. Unlike the subtleties of mental illness, an incumbent judge's soft-line approach to crime is easily conveyed to and appreciated by the public in a thirty-second news spot. No capital defendant would prefer to face a judge who, handicapped by public sentiment, must choose the death sentence over a life sentence in accordance with mitigating evidence in order to avoid being perceived as "soft on crime."[113] Thus, the capital-sentencing practices in Jefferson County, Alabama, suggest that Alabama's high death-sentencing rate may also stem from the absence of a decision-rule requiring jury (not judge) verdicts at the sentencing stage.

For the purposes of this Essay, however, the important point is not *why* death sentences are concentrated around relatively few jurisdictions. The point is that the existence of a narrow band of death-sentencing jurisdictions provides unique doctrinal, litigation, and advocacy opportunities. Such opportunities may prove valuable for those interested in measuring the level of arbitrariness that exists in a given state capital-sentencing scheme as applied to death sentences in a particular county-level jurisdiction or for those who are interested in reducing the overall number of death sentences returned each year.

provides several other instances where an Alabama judge overrode non-death sentence jury verdicts, instead imposing the death penalty. *See id.* In one such 2006 case, a jury (not in Jefferson County) voted twelve-to-zero to impose a life sentence on Oscar Doster. The judge overrode the unanimous jury recommendation and sentenced Doster to death. Doster v. State, CR-06-0323, 2010 WL 2983206, at *1 (Ala. Crim. App. July 30, 2010) (explaining that the trial court judge imposed a death sentence on the defendant when the jury voted unanimously for life imprisonment).

[112] *See* Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 777 n.85 (1995).

[113] *See, e.g.*, *id.* at 787 ("A Florida Supreme Court justice recalled that when he was responsible for assignments as a trial court judge, judges facing reelection asked him for assignments to criminal cases because it would help get their names in the press."); Christopher Slobogin, *The Death Penalty in Florida*, 1 ELON L. REV. 17, 44 (2009) ("Probably the best-known judicial campaign in Florida occurred in connection with the merit-retention election of Florida Supreme Court Justice Rosemary Barkett in 1992. In advertisements sponsored by the National Rifle Association, law enforcement groups, and related organizations, Barkett was repeatedly criticized for her opinions in capital cases, despite the fact that she voted with the Court's majority in those cases 91% of the time."); *see also* Ring v. Arizona, 546 U.S. 584, 614 (2002) (Breyer, J., concurring) (stating that "the Eighth Amendment requires States to apply special procedural safeguards when they seek the death penalty," and " therefore conclud[ing] that the Eighth Amendment requires that a jury, not a judge, make the decision to sentence a defendant to death").

II. DOCTRINAL, LITIGATION, AND POLICY RAMIFICATIONS

The first Part of this Essay examined the distribution of death sentences and executions across the United States. Part II builds on that research and explores various approaches that litigants may develop in light of the emerging geography of the death penalty. It begins with a short discussion of the U.S. Supreme Court's efforts to ensure that capital punishment is not imposed arbitrarily. It then suggests that litigants in counties which return the most death sentences might collect county-level case data that can be used to develop hard claims about the arbitrariness of the death penalty. Finally, this Part also explores possible litigation and advocacy strategies that could maximize the opportunity to decrease new death sentences.

A. *Constitutional Ramifications*

This section addresses the doctrinal ramifications that flow from the geography of the death penalty. It begins by detailing the Court's attempt to ensure that capital punishment is not imposed arbitrarily, even within the limited class of offenders eligible for a potential death sentence. It then discusses how litigants might frame future constitutional challenges to capital sentencing schemes – first by considering the limits of the categorical exclusion approach, then by articulating a new county-focused, data-driven approach.

1. The Quest for a Rational and Consistently Imposed Death Penalty

In 1972, the Supreme Court struck down the death penalty in *Furman v. Georgia* because no principled basis existed to distinguish the few people sentenced to death from thousands of others who committed crimes as bad or worse but were not sentenced to death.[114] In his concurring opinion in the case, Justice Potter Stewart wrote,

> These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.[115]

Justices Marshall, Brennan, Douglas, and White also agreed to vacate the death sentences at issue in *Furman* due (at least in significant part) to the risk of arbitrary imposition. Justice Marshall observed, "[C]onvicted murderers are rarely executed, but are usually sentenced to a term in prison."[116] He explained

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[114] *See* Furman v. Georgia, 408 U.S. 238, 310 (1972) (Stewart, J., concurring) ("I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.").

[115] *Id.* at 309-10.

[116] *Id.* at 362-63 (Marshall, J., concurring).

that death sentences appear to be reserved for "the poor, the ignorant, and the underprivileged members of society," and especially for members of racial minority groups.[117] Marshall believed that these characteristics were not valid criteria to determine who received a death sentence.

Justice Brennan wrote that capital punishment "smacks of little more than a lottery system."[118] Replying to the State's argument that the infrequency with which Georgia imposed capital punishment resulted from "informed selectivity," meaning that only the worst crimes resulted in death sentences, Justice Brennan responded,

> When the rate of infliction is at this low level, it is highly implausible that only the worst criminals or the criminals who commit the worst crimes are selected for this punishment. No one has yet suggested a rational basis that could differentiate in those terms the few who die from the many who go to prison. Crimes and criminals simply do not admit of a distinction that can be drawn so finely as to explain, on that ground, the execution of such a tiny sample of those eligible.[119]

Justice Douglas similarly focused on the risk of arbitrary imposition. Quoting an article by Justice Goldberg and Alan Dershowitz, Justice Douglas wrote, "The extreme rarity with which applicable death penalty provisions are put to use raises a strong inference of arbitrariness."[120] He then underscored that "evidence that the provision of the English Bill of Rights of 1689, from which the language of the Eighth Amendment was taken, was concerned primarily with selective or irregular application of harsh penalties, and that its aim was to forbid arbitrary and discriminatory penalties of a severe nature."[121]

Justice White took the rarity argument beyond arbitrariness generally, explaining that the freak nature of the death penalty undermined its deterrence and retribution rationales. "I begin with what I consider a near truism," wrote Justice White, "that the death penalty could so seldom be imposed that it would cease to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system."[122] He ultimately concluded that, "as the statutes before us are now administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice."[123]

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[117] *Id.* at 365-66.

[118] *Id.* at 293 (Brennan, J., concurring).

[119] *Id.* at 294.

[120] *Id.* at 249 (Douglas, J., concurring) (footnote omitted) (quoting Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1783 (1970)).

[121] *Id.* at 242 (footnote omitted).

[122] *Id.* at 311 (White, J., concurring).

[123] *Id.* at 313.

Four years after *Furman*, the Court decided *North Carolina v. Woodson*.[124] North Carolina responded to *Furman*'s command to eliminate arbitrariness and discrimination by mandating the imposition of a death sentence upon conviction of a legislatively defined capital crime.[125] In a five-to-four decision, the Court held that mandatory death sentences violate the Constitution because the punishment does not consider the characteristics of the person who committed the crime.[126] In other words, the death penalty must be reserved for those who commit the worst of the worst offenses, but even among that limited group of offenders, the death penalty is only permissible for the most culpable offenders.[127]

In *Gregg v. Georgia*,[128] decided on the same day as *Woodson*, the Court held that state sentencing schemes that adequately narrow the class of offenders eligible for a possible death sentence and cabin the discretion of a jury to sentence a person to life or death are constitutionally permissible.[129] The *Gregg* Court recognized that the "basic concern of *Furman* centered on those defendants who were being condemned to death capriciously and arbitrarily."[130] Explicit in *Gregg*, however, was the belief that the legislative fixes that the states enacted since *Furman* would result in greater consistency in the administration of the death penalty.[131] One might have expected the Court to police that boundary. It could have done so by periodically granting review in a series of cases and summarily remanding any cases demonstrating that a state statute could not separate the worst murderers who commit the worst murders from those people who commit a murder eligible for a death sentence but nonetheless receive a lesser sentence.

[124] 428 U.S. 280 (1976).

[125] *Id*. at 285-86 ("After the *Furman* decision . . . [t]he North Carolina General Assembly in 1974 followed the court's lead and enacted a new statute that was essentially unchanged from the old one except that it made the death penalty mandatory."); *see also* N.C. GEN. STAT. § 14-17 (1975).

[126] *Woodson*, 428 U.S. at 304-05.

[127] *Id.* at 304 ("A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind.").

[128] 428 U.S. 153 (1976).

[129] *Id.* at 155.

[130] *Id.* at 206.

[131] *Id.* at 195 ("[T]he concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance."); *see also* Baze v. Rees, 553 U.S. 35, 84 (2008) (Stevens, J., concurring) ("Our decisions in 1976 upholding the constitutionality of the death penalty relied heavily on our belief that adequate procedures were in place that would avoid the danger of discriminatory application identified by Justice Douglas' opinion in Furman.").

That never happened. The Court set boundaries governing whether state statutes sufficiently narrow the class of death-eligible offenses, managed the capital trial process itself, and categorically excluded types of crimes and classes of offenders from capital punishment. But the Court has never tested the *Gregg* Court's assumption that regulating capital sentencing schemes would result in rational and consistently imposed death sentences. There are plenty of doubters.

Justice Blackmun, who dissented in both *Furman* and *Woodson*, wrote in a 1994 dissent from the denial of certiorari that he "no longer shall tinker with the machinery of death."[132] As to the *Gregg* Court's belief that carefully constricting the death-eligibility would eliminate arbitrariness, Justice Blackmun wrote, "Over time, I have come to conclude that even this approach is unacceptable: it simply reduces, rather than eliminates, the number of people subject to arbitrary sentencing. It is the decision to sentence a defendant to death – not merely the decision to make a defendant eligible for death – that may not be arbitrary."[133] He concluded,

> Twenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all, see Furman v. Georgia, 408 U.S. 238 (1972), and, despite the effort of the States and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake.[134]

Justice Kennedy, writing for the majority in *Kennedy v. Louisiana*, stated, "The tension between general rules and case-specific circumstances has produced results not all together satisfactory . . . . Our response to this case law, which is still in search of a unifying principle, has been to insist upon confining the instances in which capital punishment may be imposed."[135] Concurring in *Walton v. Arizona*, Justice Scalia wrote, "[O]ur [capital punishment] jurisprudence and logic have long since parted ways."[136] He continued,

> To acknowledge that "there perhaps is an inherent tension" between this line of cases and the line stemming from Furman, is rather like saying

[132] Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

[133] *Id.* at 1152-53 (footnote omitted); *see also* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 359 (1995) ("The body of doctrine produced by the Court is enormously complex and its applicability to specific cases difficult to discern; yet, it remains unresponsive to the central animating concerns that inspired the Court to embark on its regulatory regime in the first place. Indeed, most surprisingly, the overall effect of twenty-odd years of doctrinal head-banging has been to substantially reproduce the pre-Furman world of capital sentencing.").

[134] *Callins*, 510 U.S. at 1143-44.

[135] Kennedy v. Louisiana, 554 U.S. 407, 436-37 (2008) (citations omitted).

[136] Walton v. Arizona, 497 U.S. 639, 656 (1990) (Scalia, J., dissenting).

> that there was perhaps an inherent tension between the Allies and the Axis Powers in World War II. And to refer to the two lines as pursuing "twin objectives," is rather like referring to the twin objectives of good and evil. They cannot be reconciled.[137]

Justice Stevens joined the majority in *Gregg* to allow capital punishment to resume.[138] In a 2008 concurring opinion in *Baze v. Rees*,[139] Justice Stevens explained that the "decisions in 1976 upholding the constitutionality of the death penalty relied heavily on our belief that adequate procedures were in place that would avoid the danger of discriminatory application . . . arbitrary application . . . and . . . excessiveness."[140] However, "more recent cases have endorsed procedures that provide less protections to capital defendants than to ordinary offenders."[141] Quoting Justice White in *Furman*, Justice Stevens wrote that the death penalty represents "the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes."[142] Again quoting Justice White in Furman, he concluded, "A penalty with such negligible returns to the State [is] patently excessive and cruel and unusual punishment violative of the Eighth Amendment."[143]

The *Gregg* Court supported its contention that legislative drafting could solve capital sentencing arbitrariness by pointing to the American Law Institute's (ALI's) model capital punishment statute,[144] which suggested, among other things, a weighing of aggravating and mitigating circumstances.[145] In 2010, the ALI withdrew its support for the model statute it had drafted, citing "intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment."[146]

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[137] *Id.* at 663-64.

[138] Gregg v. Georgia, 428 U.S. 153, 154 (1976).

[139] Baze v. Rees, 553 U.S. 35 (2008).

[140] *Id.* at 84 (Stevens, J., concurring).

[141] *Id.* at 86.

[142] *Id*. (quoting Furman v. Georgia, 408 U.S. 238, 312 (1972) (White, J., concurring)).

[143] *Id*.

[144] *See* MODEL PENAL CODE § 4.02 (2001) (explaining that evidence of a mental disease or defect which impairs a defendant's capacity to appreciate the wrongfulness of his actions "is admissible in favor of a sentence of imprisonment rather than death").

[145] Gregg v. Georgia, 428 U.S. 153, 193 (1976) ("While some have suggested that standards to guide a capital jury's sentencing deliberations are impossible to formulate, the fact is that such standards have been developed. When the drafters of the Model Penal Code faced this problem, they concluded that it is within the realm of possibility to point to the main circumstances of aggravation and of mitigation that should be weighed *and weighed against each other* when they are presented in a concrete case." (footnote omitted) (internal quotation marks omitted)).

[146] Carol S. Streiker & Jordan M. Streiker, *Report to the ALI Concerning Capital Punishment*, *in* REPORT OF THE COUNCIL TO THE MEMBERSHIP OF THE AMERICAN LAW INSTITUTE ON THE MATTER OF THE DEATH PENALTY, Annex B at 1 (2009), *available at*

2. Potential Doctrinal Modifications That Allow for Measuring Arbitrariness

This subsection explores how constitutional challenges to the arbitrary administration of the death penalty might proceed incrementally until a time when judicial reconsideration of the practice is more plausible – or, perhaps, not necessary.

a. *Limits of the Categorical Exclusion Approach*

The Court's Eighth Amendment jurisprudence is centered on the belief that the Cruel and Unusual Punishment Clause contains a proportionality component.[147] To determine whether a punishment is disproportionate the Court looks to the "evolving standards of decency that mark the progress of a maturing society," as measured by, *inter alia*, legislative approval and jury verdicts.[148] The Court has used this analysis to exclude certain classes of offenders from death penalty eligibility. In *Atkins v. Virginia*,[149] the Court excluded mentally retarded individuals from capital punishment, finding that as a class mentally retarded citizens have "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand others' reactions."[150] The Court in *Atkins* also emphasized the "abundant evidence that [mentally retarded citizens] often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders."[151] In *Roper v. Simmons*,[152] the Court held that those under the age of eighteen at the time the crime is committed uniformly are less culpable than adult offenders who commit murder and thus cannot be subjected to capital punishment.[153] *Roper* explained that juvenile offenders as a class are less likely to engage in "the kind of cost-benefit analysis that attaches any weight to the possibility of execution," more likely to possess "[a] lack of maturity and an underdeveloped sense of responsibility . . . qualities [that] often result in impetuous and ill-considered actions and decisions," and

http://www.ali.org/doc/Capital%20Punishment_web.pdf.

147 Harmelin v. Michigan, 501 U.S. 957, 996 (1991) (Kennedy, J., concurring) ("[S]tare decisis counsels our adherence to the narrow proportionality principle that has existed in our Eighth Amendment jurisprudence for 80 years.").

148 Trop v. Dulles, 356 U.S. 86, 101 (1958); *see also* Roper v. Simmons, 543 U.S. 551, 616 (2005) (Scalia, J., dissenting) ("[W]e have, in our determination of society's moral standards, consulted the practices of sentencing juries: Juries maintain a link between contemporary community values and the penal system that this Court cannot claim for itself." (internal quotation marks omitted)).

149 536 U.S. 304 (2002).

150 *Id.* at 318.

151 *Id.*

152 543 U.S. 551 (2005).

153 *Id.* at 552.

"more vulnerable or susceptible to negative influences and outside pressures, including peer pressure."[154]

Though these developments hold promise, they apply to a relatively small number of people who would have received a death sentence. Even for those individuals who do fall within the bounds of these categorical exclusions, proving so has become messier than we might have desired. The largest benefit to abolitionists of these wholesale bans is in the increased risk-to-reward cost that the county (and sometimes, indirectly, the state) must absorb to prosecute a case capitally.[155] For example, a majority of states require the determination of whether a person is mentally retarded to be made by the jury at the penalty phase of the trial. So the prosecution must decide to prosecute the case capitally. Then the county must provide the additional resources (money and time) requisite to the prosecution of a murder case capitally. *Then* the prosecution will find out whether the person is eligible for a possible death sentence, sometimes pretrial (but still long after the decision to proceed capitally is made) but often not until the penalty phase verdict is returned. As an abolition strategy, these benefits do not go far enough. For instance, if the Supreme Court hands down a decision tomorrow banning the imposition of the death penalty for the severely mentally ill, the categorical exclusion approach will have run its course (at least mostly).[156] The difficulties in administering the exclusion against mentally-retarded offenders, however, will apply with the same (and likely greater) force to severely mentally-ill offenders, meaning that we should not expect drastic reductions in new death sentences even if severely mentally-ill defendants are categorically excluded.

The Court also has held the death penalty to be a categorically disproportionate punishment for the commission of certain crimes.[157] In *Coker v. Georgia*, the Court found the death penalty to be a disproportionate punishment for the rape of an adult woman.[158] The Court extended *Coker* in *Kennedy v. Louisiana*,[159] striking down a Louisiana statute that punished the rape of a child with the death penalty.[160] Writing for the Court in *Graham v.*

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[154] *Id.* at 569.

[155] *See id.* at 495 n.242 (noting that investigations by several states revealed that states spent millions of dollars more per year on capital cases than on noncapital cases).

[156] *See* Joe Trigilio, *Executing Those Who Do Not Kill: A Categorical Approach to Proportional Sentencing*, 48 AM. CRIM. L. REV. 1371 (2011) (arguing for a categorical exclusion for those offenders who do not personally kill the victim).

[157] *See* Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1155-56 (2009) (listing crimes for which the Supreme Court has found the death penalty to be disproportionate and explaining that the Court "would not allow the death penalty for crimes against individuals that do not involve death . . . [and] has created limits even when crimes do involve death").

[158] Coker v. Georgia, 433 U.S. 584 (1977).

[159] Kennedy v. Louisiana, 554 U.S. 407 (2008).

[160] *Id.* at 413.

Florida,[161] a non-capital case, Justice Kennedy characterized the holding in *Kennedy* broadly: "[C]apital punishment is impermissible for nonhomicide crimes against individuals."[162] As with categorical exclusions based on classes of offenders, the gains to be had for offense-based exclusions are limited because death sentences for crimes against the government (for instance, treason) or for targeting citizens *en masse* (for instance, the federal death penalty statute that applies both to drug kingpins and to those who engage in aircraft piracy) are infrequent. These decisions do have an impact on outlier jurisdictions, and they also protect against backslide that could occur due to reactionary prosecutions or short bursts of political energy towards re-capitalizing particular non-homicide crimes. But this path, too, has mostly run its course.[163]

b. *The Case for a Data-Driven Arbitrariness Review*

The next step is to turn back to *Furman*. Defendants could argue that imposing the death penalty in a particular case reflects an intolerably high level of arbitrariness.[164] To make this argument, the defendant would need to prove that no legitimate basis exists for why he received a death sentence when other

[161] Graham v. Florida, 130 S. Ct. 2011 (2010).

[162] *Id.* at 2015.

[163] *But see* Steven F. Shatz, *The Eighth Amendment, the Death Penalty, and Ordinary Robbery-Burglary Murderers: A California Case Study*, 59 FLA. L. REV. 719, 770 (2007) (arguing for a categorical exclusion for "ordinary robbery-murderers" because "[t]hey are, in every respect, the average murderers whose culpability "is insufficient to justify the most extreme sanction available to the State." (internal citation omitted)). The difference between the approach Professor Shatz took in his article (especially as it relates to his data on Alameda county specifically) might be different from the approach I detail in the next section more in its packaging than in its substance.

[164] Litigating race as a basis for reversing death sentences has been unfruitful (outside of the *Batson* context). Nonetheless, the arbitrary influence of race continues to influence capital punishment. *See, e.g.*, Melynda J. Price, *Performing Discretion or Performing Discrimination: Race, Ritual, and Peremptory Challenges in Capital Jury Selection*, 15 MICH. J. RACE & L. 57, 57 (2009) ("Research shows the mere presence of Blacks on capital juries – on the rare occasions they are seated – can mean the difference between life and death. Peremptory challenges are the primary method to remove these pivotal participants. Batson v. Kentucky developed hearings as an immediate remedy for the unconstitutional removal of jurors through racially motivated peremptory challenges. These proceedings have become rituals that sanction continued bias in the jury selection process and ultimately affect the outcome of capital trials."). Trial offices that track the racial breakdown of capital jurors and the race of the victim/race of the offender outcomes of capital trials might be able to make more of an impact by litigating pretrial in counties where these problems persist. *See id.* at 105 ("The very state that gave rise to *Batson v. Kentucky* still found it necessary to single out peremptory challenges in a new study of the same county where the case arose some twenty years later. The Kentucky Supreme Court, as part of a larger initiative to assess racial fairness in the state court system, convened an interdisciplinary panel of judges, lawyers and civic leaders to report on a series of topics including the jury process.").

similarly-situated defendants did not. Arbitrariness is a legal question. Thus far, Eighth Amendment jurisprudence has not focused on hard data. The key concurring opinions in *Furman* focused on the wide net of people eligible for a death sentence and the comparatively tiny number of people sentenced to death. From this comparison, it then deduced that imposing the death sentence must be arbitrary. In *Atkins* and *Roper*, the Court looked to the sentencing practices of juries but did so based on anecdotal data. Anecdotal evidence should not suffice for future arbitrariness challenges.

The clustering of death sentences in a limited number of counties provides the opportunity to obtain hard data on the level of arbitrariness at which a statute operates. Further, this data occurs in a sample size large enough to be statistically significant and would only require the coordination of a handful of organizations to compile. Defender offices in active death penalty counties (ideally in partnership with social scientists) can track information about each homicide offense charged: offender and victim demographics, type of homicide, aggravating evidence charged (if the case proceeds capitally), and basic mitigating evidence (again, if the case proceeds capitally).[165] That aggregated information will serve as the basis for arbitrariness challenges, which themselves can proceed in several ways.

Suppose an individual is charged with first-degree murder for killing a convenience store operator. The prosecutor indicates her intent to proceed capitally. The county of offense is in a state that has a "in the course of a felony" aggravating factor. The defense lawyer looks to the homicide database to determine:

- How many homicides resulted from a felony murder where the underlying felony is a robbery?
- How many people were charged for such homicides over the past N years?
- How many cases proceeded to disposition (including pleas)?

[165] The following is a list of factors to be tracked:

- Basic Case Information: county of offense; number and listing of homicide counts charged; number and listing of aggravating factors alleged
- List of Players: name of prosecutor(s); name of defense lawyer(s); name of judge
- Suspect Demographics: first and last name and middle initial; age at time of offense; race; gender; IQ score(s) (list dates IQ tests were obtained); diagnosed medical illnesses
- Victim Demographics: Race; Gender; Age; Number of Victims
- Co-Defendant Demographics: name of any co-defendants; is the defendant the triggerman; is there evidence that the defendant was either the leader or the follower?
- Disposition: plea, and if so, to what; guilty or not guilty; if guilty, then guilty of what offense?

- How many cases proceeded to a capital trial? Of those, how many resulted in death?

This basic information provides a rough sense of the level of arbitrariness that exists within the county where the offense occurred. A more detailed picture would isolate all relevant cases that proceed capitally and then include a breakdown of the aggravating factors alleged against each. For those that proceeded to a penalty-phase verdict, it would also include the aggravators found by the jury. A still more sophisticated analysis might include basic mitigating factors that either were found by the jury or uncontroverted (for example, an IQ-score range or a diagnosed mental illness).

Although less sophisticated, the basic analysis model can paint the picture adequately in many instances. This approach would be appropriate in an instance where there are twenty cases that proceeded capitally and in which the jury found the underlying aggravator, but the jury returned a life sentence nineteen times. The benefit of this simplified approach is that it maximizes the opportunity to obtain a statistically significant sample size (especially if the analysis covers only a few years). The benefits of using the more sophisticated approaches, which include aggravating and mitigating factors, could redound to either the prosecution or the defense. Consider, for example, a scenario where juries in the county generally do not return death sentences for felony-murder cases if the underlying felony is robbery but do so in the small number of cases where the victim is over the age of sixty-five. The benefit to the prosecution is clear if the defendant is over the age of sixty-five (assuming age of the victim is an aggravating factor in the jurisdiction).

These arbitrariness challenges might be brought pretrial, where the defense requests hearings in which the data can be introduced into the record. It might also be helpful to introduce detailed information about other similar cases that did not result in death sentences. Similarly, defendants should be able to request information from the district attorney's office about how decisions to proceed capitally are made, especially in a circumstance where a small number of homicides proceed capitally compared to the number of similarly situated offenses, or where a number of similarly situated cases are charged capitally but few proceed to trial. The defense might also request to argue arbitrariness to the jury by informing jurors of the sentencing patterns in the county.

These challenges should also be raised in the state appellate courts. If other counties in the state keep a similar database of homicides (something that statewide defender offices, state supreme courts, or university projects could accomplish) then the challenges might grow to include (1) the intra-county arbitrariness discussed above; (2) statewide arbitrariness (e.g., juries across the state do not return death sentences in similarly situated cases); or (3) intra-state geographic arbitrariness.[166] As challenges proceed to the U.S. Supreme Court,

[166] Inter-county arbitrariness is trickier than intra-county arbitrariness. The argument that sentences across a state should not reflect inter-county arbitrariness is based on the ideas that the state is the sovereign, it is a state death penalty statute, and it is the state that

defendants might be able to show county-to-county arbitrariness across states. They would not make this showing to support the proposition that counties must sentence in the same proportions, but instead to show that arbitrariness for the type of crime exists in multiple jurisdictions (especially those with large enough sample sizes to obtain statistically significant results). Likewise, if multiple statewide databases were available, litigants would be able to show arbitrariness at a level of sophistication that exceeds anything offered in the Court's cases to date.

The backlash from *Furman* was immense.[167] The Court could take a more granular approach in the future.[168] For instance, if the Court took a case out of Maricopa County, Arizona where the evidence demonstrates there is no basis for distinguishing those who get a death sentence for committing a homicide with a particular aggravating factor from those who obtain a sentence less than death for the offense, it should simply vacate the death sentence and remand to the Arizona Supreme Court. In other words, the Court should simply police the arbitrariness boundary. If the jurisdiction (or the entire state, depending on the challenge presented) is able to sort offenders rationally in the future, then the Court will not intervene. If not, the Court simply vacates each sentence where the litigants establish an unacceptable risk of arbitrariness.[169]

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carries out executions. On the other hand, some of the arbitrariness might also reflect the will of the county residents sitting on juries and expressing the values of the locality. It also could reflect permissible local variations in the belief that the death penalty is (or is not) a good use of scarce public safety resources (including the increased time burden on prosecutors). I tend to believe that both intra-county arbitrariness and extreme isolation of death-penalty usage within a county, state, or nation are more objectionable.

[167] For the view that the Court is neither inclined to produce nor capable of producing countermajoritarian change, see Corinna Barrett Lain, Furman *Fundamentals*, 82 WASH. L. REV. 1, 8 (2007) ("If the past truly is a prologue, *Furman* portends that the Court will be an unlikely source of protection when capital defendants need it most. We ought to recognize that fact and rethink our reliance on the Court to protect these and other unpopular minorities from the tyrannical potential of majority rule."). The boundary-policing function suggested above protects against some of the backlash concerns. I do agree, however, that the best opportunity to eliminate death sentencing in the United States is not through the Court, but instead through adequate representation from the earliest moments following arrest.

[168] Recent summary reversals in the post-conviction ineffective assistance of counsel context provide a good example. *See infra* note 169.

[169] The *Gregg* Court (discussed in Part II.A.1, *supra*) relied, in part, on the Georgia Supreme Court's promise to do just this kind of arbitrariness review. *See* Gregg v. Georgia, 428 U.S. 153, 204-05 (1976) ("In performing its sentence-review function, the Georgia court has held that 'if the death penalty is only rarely imposed for an act or it is substantially out of line with sentences imposed for other acts it will be set aside as excessive.' *Coley v. State*, 231 Ga., at 834, 204 S. E. 2d, at 616. The court on another occasion stated that 'we view it to be our duty under the similarity standard to assure that no death sentence is affirmed unless in similar cases throughout the state the death penalty has been imposed generally . . . .' *Moore v. State*, 233 Ga. 861, 864, 213 S. E. 2d 829, 832 (1975)"). In *Pulley*

B. *Litigation*

This section focuses on how the geography of the death penalty might inform the litigation strategies used to reduce the total number of death sentences nationally. It begins by addressing the role of poor representation in securing death sentences, and it then describes how successful models of representation that have been employed in several jurisdictions could be introduced into the counties with the highest number of death sentences.

1. Poor Representation

More than fifteen years ago Stephen Bright penned an article in the *Yale Law Journal* titled *Counsel for the Poor: The Death Penalty Not for the Worst Crime but for the Worst Lawyer*.[170] Professor Bright relayed story after story of abysmal lawyering. One Alabama lawyer was so drunk at the capital trial of a chronically abused spouse charged with murdering her husband that the lawyer was held in contempt and the trial was delayed.[171] A Harris County, Texas lawyer slept through significant parts of his client's capital trial, and he later explained to reporters that the trial was "boring."[172] One lawyer referred to his client as "nigger," and another called his client a "wet back" in front of an all white jury.[173] Others lawyers failed to present any mitigating evidence, including evidence of significant mental retardation.[174] Professor Bright wrote that these stories demonstrate why "[t]he process of sorting out who is most deserving of society's ultimate punishment does not work when the most fundamental component of the adversary system, competent representation by counsel, is missing."[175]

Competent representation is still a problem in the counties that amass the most death sentences today. If one is concerned about how to reduce the

v. Harris, the Court held that the Constitution does not require states to perform inter-case proportionality review. 465 U.S. 37, 50-51 (1983). In 2009, Justice Stevens penned a statement concerning the denial of certiorari in *Walker v. Georgia*, 129 S. Ct. 453 (2008), in which he stated that the petitioner did not preserve the issue; but Justice Stevens stated that the "likely result" of an inadequate proportionality review would be "the arbitrary or discriminatory imposition of death sentences in contravention of the Eighth Amendment." *Id.* at 457. The arbitrariness review proposed here is somewhat less searching than the proportionality review requested in *Pulley*, but it does approximate the "juries generally throughout the [county or] state [or country]" standard noted in *Gregg*. I do not argue, however, that the Court should require the states to conduct such a review, but instead that the Court should do so itself in appropriate boundary drawing cases.

[170] Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1993).

[171] *Id.* at 1835.

[172] *Id.* at 1843 n.52.

[173] *Id.* at 1843 n.51.

[174] *See id.* at 1865.

[175] *Id*. at 1837.

overall number of death sentences and is willing to acknowledge that adequate funding, training, recruiting, and retention of capital defense lawyers across-the-board is not a likely scenario, then one strategy is to focus on the locations where the most death sentences are returned and then figure out what representation strategies are most likely to succeed in reducing sentences in that jurisdiction. One difference between the capital defense landscape that Professor Bright described and the one that exists today is that we now have counter-examples of successful trial representation models. Even within some of the counties that sentence the most people to death, offices that represent some capitally-charged individuals are very effective despite severely limited resources.

Capital cases today are more complex, time-consuming, and specialized than non-capital street crime cases. They more closely resemble white collar cases requiring hundreds of thousands of documents than they do second-degree murder cases. Lawyers are expected to "leave no stone unturned" as they search for the documents and witnesses who can construct a narrative of the client's life from birth through the present.[176] Is the client mentally retarded? The answer to that question alone – a foundational question, as the answer may exclude the individual from death penalty eligibility – requires the lawyer to spend enough time with the client to develop a sense that diminished intellectual capacity could be an issue.[177] The lawyer must find and hire an expert psychologist who administers intellectual functioning tests. The lawyer must search school records to see if the client took an IQ test, if he was placed in special education classes, and how he performed in school, among other things. The lawyer must search jail and other institutional records (hospitals, rehabilitation centers, etc.) that could reflect that the client was given an IQ test. The lawyer must interview teachers, family members, and friends to determine what type of work the client performed and how capable he was at handling different types of tasks that might suggest adaptive functioning difficulties. Such investigations are not exhaustive to determine a client's mental capabilities. There are scores of areas to be researched, conclusions to be drawn, and themes to be developed and readied for presentation, just to prepare for the possibility that the case reaches the penalty phase. The point is that a minimum level of representation in a capital trial requires far more – more experience, more time, more people, more money – than non-capital criminal trials.

[176] Sean D. O'Brien, *When Life Depends on It: Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 693, 732 (2008) ("A successful capital defense investigation, therefore, is one that leaves no stone unturned in examining a wide range of evidence from a broad set of sources to discover and communicate the humanizing events and conditions that exist in the life of every capital client.").

[177] *See* Atkins v. Virginia, 536 U.S. 304, 307 (2002) (holding under the Eighth Amendment that mentally retarded citizens are not eligible for the death penalty).

The second factor that makes capital defense different from non-capital criminal defense is that the goal is different in most cases. If your client is charged with second-degree murder that carries a mandatory life sentence, often your goal is to get an acquittal or a verdict on a lesser included offense. The goal in most capital cases is to save the client's life. Many – though certainly not all – of the capital cases that proceed to trial are not difficult cases for jurors to resolve at the guilt phase. Thus, capital lawyers often spend time building the mitigation case from day one. Often early preparation of the mitigation evidence is conducted with an eye towards a pretrial disposition that saves the client's life. This makes thorough and early preparation absolutely crucial, but it also requires the lawyer to spend substantial face-to-face time with the client. Getting the client to accept a plea that requires him to remain incarcerated for the rest of his life requires a tremendous amount of trust. Obtaining that trust, however, is extraordinarily difficult. Many capital clients are poor, abused, and mentally impaired,[178] and they live in areas with high levels of poverty, violence, and dysfunction. Many have learned not to trust anyone, especially someone who is perceived to be part of "the system."

Having briefly sketched the standard of practice required to perform at a minimally proficient level and having explained the "save a life" goal of most capital cases, I now consider the problems that exist with the quality of representation in several of the counties with the highest numbers of death sentences.

a. *Philadelphia*

In a 2010 Philadelphia case, a person who had spent two years as a capitally charged individual was two weeks away from trial when his lawyer finally discovered that as a juvenile the client could not be subjected to capital punishment.[179] Philadelphia has a reputation as having one of the best public defender offices but worst private bars in the country. The public defender office is not responsible for a single death sentence from 2004 to 2009 despite handling 20% of the capital cases in the city.[180] This is no accident. The

[178] *See* Halbert v. Michigan, 545 U.S. 605, 620-21 (2005) (explaining that most indigent defendants "fall in the lowest two out of five levels of literacy – marked by an inability to do such basic tasks as write a brief letter to explain an error on a credit card bill, use a bus schedule, or state in writing an argument made in a lengthy newspaper article" (quoting Kowalski v. Tesmer, 543 U.S. 125, 140 (2004) (Ginsburg, J., dissenting))).

[179] Interview with Marc Bookman, Dir., Atl. Representation Ctr. (Feb. 2011) (on file with author). Unless otherwise referenced, the information about the capital defense landscape was obtained from this interview. Prior to joining the Atlantic Representation Center, Mr. Bookman served as a deputy public defender in the Defender Association of Philadelphia.

[180] The no-death streak amassed by the Defender Association of Philadelphia predates the 2004 to 2009 time period. *See* David P. Caruso, *Lawyers: Money Matters in Death Penalty Defense*, INTELLIGENCER J., Apr. 7, 2004, § D, at 12 ("In the 11 years since the Defender Association of Philadelphia began handling capital cases, not one client has been

defender office assigns cases to experienced capital trial lawyers who begin mitigation investigation from the earliest possible moments, engage in aggressive pretrial litigation (filing motions that challenge the validity of the prosecution, seeking to exclude illegally obtained evidence, etc.), and are willing to spend the hours necessary to build the trust needed for a client to take a plea to a sentence less than death (often life without parole). When cases go to trial – something that is rare among the public defender office cases – the lawyers conduct comprehensive voir dire to ensure that people who could not genuinely consider a sentence less than death are excluded while those citizens who would consider both punishments are not excluded. They build a narrative for why the client should receive life, and they integrate lay and expert witnesses to help the jury understand that story. In short, they provide solid representation.

Then there is the private bar.[181] The first problem is structural. Private lawyers receive a maximum of $2000 to prepare for a capital trial *and then $400 for each day of trial*.[182] The incentives are terribly wrong. Good capital trial lawyers avoid death sentences by avoiding trial as often as possible. Doing so requires resources to be concentrated at the front-end of the case rather than at trial. For example, Lynne Abraham,[183] the notorious former Philadelphia District Attorney, charged almost everyone who fit under the capital statute with capital murder. Yet, she also had a practice of accepting life pleas. Building the relationship necessary to talk meaningfully about accepting a plea deal requires a substantial amount of in-person, face-to-face time. For salaried public defenders, despite the fact that they, too, are severely overworked and under-resourced, the incentive is to spend the hours at the start of the case and avoid trial. For most private lawyers who are capped at $2000

sentenced to death.").

[181] *Id*. ("All 61 people condemned to death in Philadelphia since the Defender Association began handling capital cases in 1993 were represented by private attorneys."). As of January 1, 2010, the private bar was responsible for all seventy-two death sentences meted out in Philadelphia since 1993. *See* Interview with Marc Bookman, *supra* note 179.

[182] Caruso, *supra* note 180, § D, at 12. ("By comparison, the court-appointed private lawyers who still handle four out of every 5 murder cases in Philadelphia sometimes get as little as $2,000 to defray expenses, plus $400 in fees for each day of trial."). These figures have not been altered since the article was written in 2004. *See* Interview with Marc Bookman, *supra* note 179.

[183] *See generally* Tina Rosenberg, *The Deadliest D.A.*, N.Y. TIMES, July 16, 1995, § 6, at 22, *available at* http://www.nytimes.com/1995/07/16/magazine/the-deadliest-da.html ("If Walker had been charged in Pittsburgh or many other American cities, the District Attorney would most likely have asked for life imprisonment instead of death; Walker's mental anguish and lack of a violent history would have taken the crime out of the small group of homicides thought to warrant execution. But Abraham's office seeks death virtually as often as the law will allow. As a result, Philadelphia County's death-row population of 105 is the third largest of any county's in the nation, close behind Houston's Harris County and Los Angeles County – counties far more populous and murderous than Philadelphia.").

unless they get to trial, it is not difficult to imagine how few hours they spend visiting the client pretrial.

b. *Los Angeles*

The same basic story emerges in Los Angeles County. The Los Angeles County Public Defender's Office handles 50% (roughly sixty capital cases at any given time) of the trial stage death penalty cases in the county.[184] The Alternate Public Defender and members of the private bar handle the rest of the cases.[185] The Public Defender's Office has only gone to trial in a capital case one time in six years.[186] The client did not receive a death sentence.[187] Yet, from 2004 to 2009, Los Angeles County juries sentenced thirty-three people to death.[188] These disparities are not the result of happenstance. The Public Defender's Office succeeds despite heavy volume by categorizing cases that come into their office by likelihood that the case will go to trial, and if it does go to trial, by the likelihood it will result in a death sentence. To find the answers to these questions, the office looks to its institutional memory – as recorded in a case database. For instance, if the office believes that dead child, dead police officer, and multiple body cases are the three types most likely to result in a death sentence, those types of cases receive priority. Almost immediately after arrest, the Public Defender's Office assigns the case and requires the lawyers to visit the client at least once per week. A thorough fact and mitigation investigation is launched from the onset.

In Los Angeles County, the district attorney has a capital case committee that decides whether to seek death or not. The memorandum relied on by the committee is sent (upon request) to defense counsel, and then defense counsel is given an opportunity to respond before a final death decision is made. During this opportunity to respond, the Public Defender's Office lawyers frontload their mitigation findings and try to get the district attorney to accept a

[184] CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, REPORT AND RECOMMENDATIONS ON THE ADMINISTRATION OF THE DEATH PENALTY IN CALIFORNIA, 28-29 (2008), *available at* http://www.ccfaj.org/documents/reports/dp/official/FINAL%20REPORT%20DEATH%20PENALTY.pdf (testifying that in Los Angeles County, approximately half of the ongoing death penalty cases are handled by the Public Defender and half are handled by the Alternate Public Defender or appointed counsel); *id.* at 35 n.47 (citing Testimony of Greg Fisher, Deputy Public Defender; Special Circumstance Case Coordinator, Los Angeles County Public Defender's Office, Feb. 20, 2008) ("The Los Angeles County Public Defender's Office reports that they normally have 60 cases at a time in their office that are death-eligible, but only 10-12 of those cases will typically go to trial as death cases.").

[185] *Id.*

[186] Interview with Jennifer Friedman, Deputy Pub. Defender, L.A. Cnty. Pub. Defender's Office (Feb. 2011) (on file with author). Unless otherwise referenced, all information pertaining to the practice of the Los Angeles County Public Defender's Office stems from this interview.

[187] *Id.*

[188] *See infra* Appendix.

plea. As discussed, to be in a position to discuss a potential plea, lawyers must spend – and Los Angeles public defenders do spend – countless hours building trust with the client. The ability to sort through eligible capital cases, assign the high risk cases to an experienced set of litigators, begin to develop mitigation evidence from the start, and develop a trusting relationship with the client are reasons why the Los Angeles County Public Defender's Office is so successful.[189]

Los Angeles County contract lawyers are not as successful for at least two reasons. First, these lawyers generally are not in a good position to obtain a plea to a sentence less than death. The district attorney has ninety days from arrest to decide whether to prosecute a case capitally. Many times two contract lawyers do not get assigned to the client until a significant part of the ninety days has elapsed.[190] Often a contract lawyer does not know that she possesses the right to see the capital case committee memorandum and to respond to the district attorney *before* the decision to seek death has been made.[191] Other lawyers do not feel comfortable sharing any information with the district attorney (beyond what is required under mandatory discovery laws) out of fear that the state will use the defense-offered preview to frustrate the defense case at the penalty phase. The contract lawyers also do not spend enough time with their clients in part because it is difficult for solo practitioners (which many contract attorneys are in Los Angeles) to juggle the inordinate amount of time that a capital case requires in terms of upfront investment with competing deadlines from other appointed and paying clients.[192] Before judging the lack

[189] *See* Interview with Jennifer Friedman, *supra* note 186.

[190] CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, *supra* note 184, at 29 ("Many county public defender offices assign two counsel to every death eligible case when the appointment is initially accepted. Where private counsel is appointed, however, only one lawyer is ordinarily appointed until the decision is made to file the case as a death case, which will not occur until after the preliminary hearing, as much as one year later. This may delay the mitigation investigation to the prejudice of the defendant. The results of mitigation investigations are frequently employed to persuade the district attorney not to seek the death penalty. If the investigation is delayed until second counsel is appointed, the decision to seek the death penalty has already been made.").

[191] I interchange "he" and "she" to refer to capital defense lawyers. I use "he" to refer to death row inmates. Women comprise less than 2% of death-sentenced inmates nationally. *See* Victor Straub, *Death Penalty for Female Offenders, January 1973 Through October 31, 2010*, DEATH PENALTY INFO. CENTER (Nov. 3, 2010), http://www.deathpenaltyinfo.org/documents/femaledeathrow.pdf; *see also* Furman v. Georgia, 408 U.S. 238, 365 (1972) (Marshall, J., concurring) ("There is also overwhelming evidence that the death penalty is employed against men and not women. . . . It is difficult to understand why women have received such favored treatment since the purposes allegedly served by capital punishment seemingly are equally applicable to both sexes.").

[192] CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, *supra* note 184, at 43 ("The Guidelines should be met in every potential capital case from the outset. Thus, two qualified counsel as well as an investigator and mitigation specialist should be appointed for as many as 200 cases each year, even though only 20 of them may end in a judgment of

of commitment displayed by contract attorneys, remember that with a workload similar to a massive white-collar case but without the staff or funding, the task is onerous to say the least.

c. *Alabama and Texas*

Los Angeles County and Philadelphia County both have public defender offices that know how to handle capital cases. The biggest representation problem in those counties is that the existing offices do not handle a high enough percentage of capitally-charged cases. In Jefferson County, Alabama, and Bexar, Harris, and Tarrant counties in Texas there is no public defender system.[193]

Lawyers are appointed to capital trial cases in Alabama by trial judges from a list of lawyers that meet the very low threshold requirements for handling capital cases in the state.[194] Appointed lawyers receive $40 per billable hour. Alabama does not require capital trial lawyers to receive any specialized training on how to represent a capital client. Noting many of these problems, the American Bar Association report on capital punishment in Alabama concluded that Alabama's "failure to adopt a statewide public defender office, a series of local public defenders, or to implement close oversight of indigent legal services at the circuit level has resulted in the State being incapable of delivering quality counsel in all capital cases."[195]

Bexar, Harris, and Tarrant Counties have a combined population of nearly 7.5 million. Each of these counties relies on private, appointed counsel to represent capitally charged clients. In Harris County, for example, the county pays a flat fee for the case, regardless of how much time or effort the lawyer exerts.[196] In cases resolved pretrial with a plea, the trial court has the option to

death.").

[193] Harris County opened a public defender office in February 2011 as a pilot project. Chris Moran, *Harris County Taps Experienced Hand for Public Defender*, HOUSTON CHRONICLE (Nov. 9, 2010, 6:30 AM), http://www.chron.com/disp/story.mpl/metropolitan/7287211.html. That office is not currently slated to handle capital cases.

[194] Telephone Interview with J. Derek Drennan, Partner, Jaffe & Drennan, P.C. (Feb. 25, 2011) (on file with author); Telephone Interview with Randy Susskind, Senior Staff Attorney, Equal Justice Institute (Feb. 25, 2011) (on file with author). Information about the capital case landscape in Jefferson County, Alabama stems from these two interviews. In addition to his position with the Equal Justice Institute, Mr. Susskind is also an Adjunct Professor in Clinical Law. Mr. Drennan is an experienced capital litigator in the renowned firm of Jaffe & Drennan in Birmingham, Alabama. Unless otherwise referenced, all information that pertains to Alabama capital defense is derived from these interviews.

[195] AMERICAN BAR ASS'N, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE ALABAMA DEATH PENALTY ASSESSMENT REPORT, at xiv (2006), *available at* http://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/alabama/report.authcheckdam.pdf.

[196] Interview with Kathryn Kase & John Niland, Senior Attorneys, Trial Project of the Texas Defender Serv. (Feb. 2011) (on file with author). Mr. Niland is the Director of the

reduce the flat fee, which creates incentives for lawyers to spend as little time as possible trying to obtain a plea or preparing for trial. Worse, appointed counsel must request additional sums for things like secretarial expenses and expert witnesses, and these requests are commonly denied.[197]

The problems with appointed private counsel versus institutional counsel are varied. First, the appointment process itself is a problem in counties like Harris and Jefferson where the trial judge appoints the lawyer to try the case in his court.[198] Judges might appoint friends or campaign donors or even lawyers with a track record of not causing too many headaches for the judge.[199] Similarly, lawyers who represent clients through a defender office need not worry about where the next meal is coming from. These lawyers can aggressively litigate pretrial motions or request as much funding as needed (even if the requests are not granted) without worrying about whether the judge will become so frustrated that she will not appoint the lawyer to future cases. Institutional offices also are able to operate more like law firms than solo practitioner offices. Defender offices can decide which attorneys to put on a case, they have internal support staff, they are able to share resources (like motions or case law files), and they often have staff investigators and social workers. Finally, defender offices can benefit from institutional case tracking, which allows the offices to allocate resources more efficiently.

2. Successful Litigation Models

As the wheels of the modern death penalty machine began to spin following *Gregg*, organizations like the NAACP set out to provide "last aid" to death-

Trial Project. Ms. Kase is the Managing Director of the Texas Defender Service's Houston office. Unless otherwise referenced, information that relates to trial level defense of the death penalty in Texas is derived from this interview.

[197] Scott Phillips, *Hire a Lawyer, Escape the Death Penalty?*, ACS ISSUE BRIEF (Feb. 2010), *available at* http://www.acslaw.org/files/Phillips%20issue%20brief%20final%20(3-1-10).pdf.

[198] The ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases recommends an appointment mechanism free of judicial control. *See* ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES: BLACK LETTER LAW ONLY § 3.1(B) (rev. ed. 2003) [hereinafter ABA GUIDELINES] ("The responsible agency should be independent of the judiciary and it, not the judiciary or elected officials, should select lawyers for specific cases."); *id.* § 3.1(C) ("[T]he Responsible Agency must be either a defender organization or an independent authority run by defense attorneys with demonstrated knowledge and expertise in capital representation.").

[199] Adam Gershowitz, *Statewide Capital Punishment: The Case for Eliminating Counties' Role in the Death Penalty*, 63 VAND. L. REV. 307, 324 (2010) ("[I]n Harris County, Texas, the so-called capital of capital punishment . . . [,] courthouse appointment lists were often an informal string of each judge's friends and campaign contributors." (internal quotation marks omitted)).

sentenced inmates in the South.[200] Southern states such as Georgia, Alabama, South Carolina, Mississippi, and Louisiana sentenced people to death and executed them at alarming rates, inspiring a new name for the region: the Death Belt.[201] Inside the Death Belt, defendants did not receive adequate trial representation, black defendants received death sentences at disproportionate rates, and litigators worried that state supreme courts paid little attention to the federal constitutional rights of the accused. Lawyers brought these inmates into federal court for post-conviction review, and federal courts responded more favorably than their state counterparts. Another major reason for the post-conviction focus stemmed from the fact that states had to provide a public defender at trial but they were not obligated to provide (and usually did not provide) state-funded habeas representation. The idea was to represent death-row inmates so that they would not be sent to the gallows without a federal court reviewing the substance of their claims.[202]

Law schools established clinics to allow students to work with faculty members to provide habeas representation. Non-profit organizations like the Southern Center for Human Rights and the Equal Justice Institute sprang up.[203] These organizations amassed incredible success litigating post-conviction cases and obtaining relief in state and federal courts.[204] Yet death row populations repopulated as states continued to sentence people to death. Lawyers representing capitally charged defendants remained incompetent. More resources were needed to increase the post-conviction services because not only did the new inmates arrive at death row, but they also remained on death row for longer periods between sentence and execution.

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[200] Even before *Furman* the NAACP mounted its attack on the death penalty from the back-end, distributing "last aid" kits to lawyers nationwide with the goal of stopping impending executions. *See* Lain, *supra* note 167, at 20 n.93 ("The NAACP achieved its moratorium by distributing 'Last Aid Kits' – packets of virtually every motion, pleading, or other document a lawyer might need to postpone an execution – to hundreds of capital defense attorneys nationwide.").

[201] *See supra* note 6 and accompanying text.

[202] This is not to say that trial representation did not occur. For example, Stephen Bright had tremendous success representing individuals at the trial level in Georgia. On the whole, however, the focus was on providing post-trial representation.

[203] Stephen Bright started the Southern Center for Human Rights in 1976. Bryan Stevenson, the founder of the Equal Justice Initiative, worked for Bright first as an intern and then as a staff attorney. He started the EJI in 1989. *See generally* Paul M. Barrett, *Bryan Stevenson's Death-Defying Acts*, N.Y.U. L. SCH. MAG., 2010, http://www.law.nyu.edu/ecm_dlv1/groups/public/@nyu_law_website__publications__law_school_magazine/documents/documents/ecm_dlv_008766.pdf (last visited March 10, 2011); *History*, L. OFF. S. CENTER HUM. RTS., http://www.schr.org/about/history (last visited Mar. 10, 2011).

[204] See James S. Liebman, Jeffrey Fagan & Valerie West, *A Broken System: Error Rates in Capital Cases, 1973-1995*, 30-32 (June 12, 2000), *available at* http://www2.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf, for information that 4500 death sentences (roughly 68%) were reversed from 1973 to 1995 by state and federal courts.

The federal courts-as-savior notion ended in 1996 when President Clinton signed into law the Antiterrorism and Effective Death Penalty Act (AEDPA), which prohibits federal courts from overturning state court judgments unless the decision was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding."[205] The U.S. Supreme Court has vacated federal appellate court habeas grants at least ten times over the last two terms.[206] Most recently, in *Harrington v. Richter*, the Court held that *even if a state court summarily rejects a claim*, federal courts still must give deference to the state court adjudication.[207] This is all particularly devastating in the ineffective assistance of counsel context – the bread and butter of capital habeas cases – because federal courts must give "double deference" to state court decisions: the first layer of deference as required under the *Strickland* standard and the second layer as required by AEDPA.[208]

The decreased chances of success on habeas corpus review combined with the increased concentration of capital sentencing around a handful of counties suggest a new priority for defender offices, law school clinics, law firms providing pro bono representation, and outside funders: Focus on first-aid, not last-aid.[209] The distribution of death sentences even in the busiest death penalty states suggests a focus on the counties with the highest absolute number of sentences. It is true that counties such as Los Angeles sentence fewer people to death per capita than other smaller counties, but this is not the important point.[210] Litigating within a single county, or in as few counties as

[205] 28 U.S.C. § 2254(d) (2006); Knowles v. Mirzayance, 129 S. Ct. 1411, 1414 (2009) ("A federal court may grant a habeas corpus application arising from a state-court adjudication on the merits if the state court's decision was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." (internal quotation marks omitted)).

[206] *See, e.g.*, Swarthout v. Cooke, 131 S. Ct. 859, 861 (2011); Premo v. Moore, 131 S. Ct. 733 (2011); Harrington v. Richter, 131 S. Ct. 770 (2011) ("[The Ninth Circuit's] analysis illustrates a lack of deference to the state court's determination and an improper intervention in state criminal processes, contrary to the purpose and mandate of AEDPA and to the now well-settled meaning and function of habeas corpus in the federal system.").

[207] *Harrington*, 131 S. Ct. at 777, 784 ("Section 2254(d) [of AEDPA] applies to [the] Petition even though the state court's order was unaccompanied by an opinion explaining the court's reasoning.").

[208] *Id*. at 788 ("The standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so." (citations omitted) (internal quotation marks omitted)).

[209] *See* Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 1 UTAH L. REV. 1, 10 (2004) ("We may have no choice but to fix the front end of the system, as back-end review simply does not work.").

[210] *See infra* Appendix.

necessary, minimizes logistical hurdles and allows for cumulative benefits, such as gaining a reputation of aggressive pretrial litigation, to accrue.

a. *Trial Consulting Projects*

One strategy that might improve the ability to drive down death sentences across a state is to focus on the representation models in counties where the most death sentences are imposed. As discussed above, the cumulative effects of litigating in one jurisdiction (including economy of scale savings) suggest that outfits with a limited amount of time to provide services might wish to adopt this micro-level focus. These offices might be able to work to impose minimum representation standards and to monitor those standards through case assessments. For example, private bar lawyers might need to "check off" the following tasks: retaining the necessary members of the defense team (mitigation specialists, fact investigators, etc.), spending a minimum number of hours visiting clients, and taking concrete steps to begin the mitigation investigation. These types of compliance checklists could be helpful to the private bar – both in terms of guidance and also in avoidance of future ineffectiveness claims. The checklists may also help consulting lawyers, who are able to monitor performance on particular cases, establish a baseline for recommendations for future appointment to cases, and evaluate the attempts at trial-level culture change over time. More generally, a concentrated burst of resources within the jurisdictions most likely to return death sentences – even if that burst of resources is simply added consulting and training services rather than increased direct representation – is a reasonable way to maximize the reduction of total death sentences.

Several offices across the country are deploying the type of aggressive pretrial strategies necessary to represent effectively capital clients with scarce resources.[211] A high-quality institutional defender office would be of incomparable assistance in places like Jefferson County, Alabama.[212] In places like Los Angeles County and Philadelphia County, where institutional offices effectively represent capital clients, one would hope that the percentage of

[211] *See, e.g.*, *Capital Trial Project*, TEXAS DEFENDER SERVICE, http://www.texasdefender.org/programs (last visited Oct. 17, 2011).

[212] Judicial override could seriously hamper the efficacy of a strong pretrial office in Alabama. The fact that judges can override juries gives prosecutors more of an incentive to take cases to trial. Once at trial, very effective representation could have a perverse impact: judges might believe that the high quality of the representation led an otherwise deserving offender to be spared the death penalty, and thus there might be a tendency to ratchet-up sentences. On the other hand, strong pretrial representation would still perform the role of presenting strong mitigation packages early (the de facto sorting function), would help to raise the resources burden (including time) to prosecutors of pursuing these cases, could increase the number of life sentences by juries (thus putting pressure on the anti-democratic override function itself), and could still have the cultural transformation impact among the defense bar. My point here is only that the cost-benefit calculation to the pretrial consulting office strategy is different and more complex in Alabama.

cases that filter to the institutional office(s) increase substantially. At least until those changes occur, the creation of trial consulting offices is indispensable. These offices work with the private bar attorneys on pretrial litigation, client outreach, mitigation investigation, and expert referrals, and they administer training programs to help transform the knowledge base and culture in a jurisdiction.

The trial project at the Texas Defender Service (TDS) is one excellent example. Texas had eight new death sentences in 2009, fewer than one-fourth the total from a decade ago.[213] Harris County sentenced zero people to death in 2009.[214] Some of the credit belongs to a change in state law that allows prosecutors to obtain life without the possibility of parole sentences without proceeding to a capital trial.[215] This change provides an alternative to the death penalty for those citizens (and prosecutors) concerned with permanent incapacitation but not keen on capital punishment for policy or moral reasons. A lot of the credit also belongs to TDS.[216]

With the goal to "improve the quality of representation afforded to those facing a death sentence and to expose and eradicate the systemic flaws plaguing the Texas death penalty," TDS opened its doors in 1995.[217] The trial project began in 2000. It provides case consultations to trial lawyers with pending capital cases. As discussed at length earlier in this Essay, capital trial work is different in kind from other criminal defense representation. TDS helps lawyers through the process – it helps trial teams think through mitigation strategies, find expert witnesses, break down barriers to establishing relationships with clients, and even talk with clients about the desirability of taking a plea to avoid a death sentence. In conjunction with the Texas Criminal Defense Lawyers Association, TDS also provides free training to

[213] *See infra* Appendix (providing the number of death sentences in Texas in 2009); David McCord, *What's Messing with Texas Death Sentences?*, 43 TEX. TECH L. REV. 601, 602 (2011) (finding thirty-seven death sentences in Texas in 1999).

[214] *See infra* Appendix.

[215] *See* McCord, *supra* note 213, at 603 n.9 (explaining that prior to 2005, if a defendant was charged with capital murder, the only "alternative sentence to death was life with possibility of parole in 40 years").

[216] The Gulf Region Advocacy Center (GRACE), founded by Danalynn Recer, similarly deserves credit. According to its website, "The Gulf Region Advocacy Center, or GRACE, is organized for the purpose of supporting and providing quality representation to indigent persons charged with capital crimes in the state courts of Texas and Louisiana." *About Us*, GRACE, http://www.gracelaw.org/AboutUs.html (last visited Oct. 29, 2011). In a fitting example of fixing the problem at the front-end, GRACE provided "life-saving representation of Calvin Burdine, who had been returned to Harris County for retrial because his original attorney slept during his first trial." *Id*. GRACE is modeled after the Louisiana Crises Assistance Center (now Louisiana Capital Assistance Center), a New Orleans based trial office founded by Clive Stafford Smith.

[217] *About*, TEXAS DEFENDER SERVICE, http://www.texasdefender.org/about (last visited Oct. 17, 2011).

capital trial teams, including "bring your own case training," which allows defenders to receive general training and obtain assistance on active cases at the same time. One of the main functions that TDS serves is to educate the capital defense bar. The first objective is to get lawyers in the mindset that the goal is *life*, and often times the best road to *life* is a pretrial disposition. This is a difficult concept to convey successfully; many appointed lawyers believe that capital cases *must* be tried. They believe that the goal is to win outright, because life imprisonment is not a successful outcome. Changing the rubric to *life is winning* – for even a single capital defense lawyer – is an enormous success. The second goal that TDS pursues is process-based. It teaches the importance and availability of resources, as well as the necessity of starting fact and mitigation investigation from the earliest moments of representation.

TDS also helps to change the culture of capital defense practice in Texas. Because Bexar, Harris, and Tarrant Counties use appointed attorneys, the private bar has an active interest in not presenting a particularly rigorous pretrial practice (lest the trial judge get angry). TDS teaches lawyers that the only way to prepare a case – including preparation for a pretrial disposition – is to pursue actively the funding required to present a thorough mitigation defense and to engage in a tailored and sustained motions practice. It is plausible that capital cases tried in Texas and many locations throughout the country result in death sentences, not because the client deserves death or even because the district attorney wants death particularly badly in a case but because capital defense lawyers do not send any signals that the prosecution will need to fight to win its case. TDS is changing that culture in Texas.

Another example of a trial consulting project is the Arizona Capital Representation Project, which began as a post-conviction office with a mission to "improve the quality of representation afforded to capital defendants in Arizona."[218] Working on cases from the back-end and seeing the resources missing from the front-end, the Project decided to seek funding for trial-level consultation to try to prevent the errors and omissions from occurring in the first place.[219] As is common throughout the country, lawyers assigned to

[218] *Who We Are*, ARIZONA CAPITAL REPRESENTATION PROJECT, http://azcapitalproject.org/about/ (last visited Oct. 17, 2011). Two new trial consulting projects commenced in 2010. The first is the Arizona Capital Representation Project. The second is the Atlantic Center for Capital Representation, based in Philadelphia, which focuses on assisting trial counsel in capital cases in Pennsylvania and Delaware. ATLANTIC CENTER FOR CAPITAL REPRESENTATION, http://www.atlanticcenter.org/ (last visited Oct. 17, 2011). The outfit consists of one trial lawyer and one mitigation specialist, and according to its director, Marc Bookman, in the first twelve months of operation the center has had more requests for help than it can accommodate. The center provides pretrial consulting, expert referrals, motions practice, and voir dire assistance. *Id.*

[219] The Project tracks homicide cases starting from the arrest and contacts trial counsel when the Project thinks it might be able to assist counsel on particular issues. It also has advertised, using listservs and training seminars, to encourage lawyers to contact the office for assistance. *See, e.g.*, *Training Announcement*, ARIZONA CAPITAL REPRESENTATION

capital cases in the county usually do not begin investigating mitigation at a time before the district attorney decides whether to move forward with capital charges.[220] Missing this window deprives the defense of the opportunity to show why the client deserves to live *before* the district attorney's office has spent a significant amount of time preparing to prosecute the guilt phase and defend against a potential mitigation phase, publicly announced its decision to seek a death sentence, told the victims' family members that the death penalty would be sought, or firmly established their position. Not only does the mitigation investigation not start early enough, but many lawyers also still engage in repudiated practices for obtaining and presenting mitigating evidence. For example, lawyers often send out "questionnaires" about potentially mitigating evidence to potential defense witnesses, rather than meeting with each witness in person. A smaller group of lawyers takes the time to call mitigation witnesses on the phone. A still smaller group might conduct a single in-person interview with a critical mitigation witness. More generally, lawyers conduct incomplete record collection and even send records to experts before a thorough social history investigation is completed. Some lawyers in Maricopa County still refuse to use a mitigation specialist to aid the defense as it investigates and prepares the penalty phase. To help change this culture, the Arizona Project, like TDS, administers "bring your own case" trainings. These trainings focus on the need to shift the focus of preparation from the trial itself to the earliest moments of representation – i.e., "how to forge a strong bond with the client and conduct a scorched earth mitigation investigation," in order to "pursue pre-notice settlement negotiations."[221] The trainings also focus on the important role of pretrial motions practice, something that is not part of the culture in many death penalty jurisdictions.[222]

But the real questions are why these projects do not exist in every active death penalty jurisdiction and why the ones that exist are not better funded.[223] The most baffling funding-related issue is why private organizations that donate hundreds of thousands of dollars each year to increase the quality of representation in capital cases or to abolish the death penalty outright do not fund the creation of more trial consulting offices. Donors would need to

PROJECT, http://azcapitalproject.org/2011/09/29/training-announcment/ (Sept. 29, 2011).

[220] Interview with Amy Armstrong & Natman Shaye, Dir. & Res. Counsel, Ariz. Capital Representation Project (Feb. 2011) (on file with author). As resource counsel, Mr. Shave also leads the trial consulting project. Unless otherwise referenced, all information pertaining to capital defense in Arizona stems from this interview.

[221] *See, e.g.*, *Training Announcement*, ARIZONA CAPITAL REPRESENTATION PROJECT (Sept. 29, 2011), http://azcapitalproject.org/2011/09/29/training-announcement/.

[222] *Id.*

[223] GRACE, for example, had the following plea on its website in March 2011: "To continue our current level of pro-bono work, expand our resentencing project by adding two attorneys and a mitigator, and finish Phases III and IV of the building project, we must raise $520,000.00 through private sources over the next ten months." *Donate*, GULF REGION ADVOCACY CENTER, http://www.gracelaw.org/donate.html (last visited March 20, 2011).

commit less money per case for a trial consulting office than to fund new habeas projects. Donors could measure the results in terms of the total decrease in the number of new capital sentences, decrease in the number of capital prosecutions, and increase in the percentage of cases resolved by pretrial disposition.

County officials in counties that fund death penalty prosecutions (and defenses) might wish to create these offices to check local prosecutorial practices and reduce back-end spending. Officials may opt to do so because, years of post-conviction litigation aside, proceeding to trial just to find out that the mitigation case is too strong to get a death sentence is a gigantic waste of time and money. Funding a trial consulting office, one that is merely providing the basic Sixth Amendment function (or assisting other lawyers in fulfilling that mission), might be a more politically sellable way to reduce capital punishment costs than arguing to eliminate the death penalty or reduce the number of death prosecutions. In places like Alabama, where the state funds the county-level capital prosecutions, a strong pretrial capital office serves as a check to prosecutorial overreaching at the county level (which, in turn, acts as a de facto cost-saving device when cases need not proceed to trial, post-conviction, and possible retrial).

Local prosecution offices, especially in areas where the leadership is lukewarm on the death penalty but still uses it regularly out of perception of public desire, might benefit from strong pretrial consultation offices. Prosecutors are not in a good position to assemble quickly mitigation evidence that might inform the prosecution whether a capital case should proceed to trial. In areas where strong defender offices prepare mitigation packages early, the prosecution is able to use the better structural position of the defense – access to the client, his family, his records, etc. – as a sort of second layer screening device that helps the office decide which cases should be pursued capitally on the front-end, rather than proceeding based on the facts of the crime alone only to find out the death is not tenable or desirable *after* the wheels have been put in motion.

The federal government should also be interested in funding trial-level resource centers.[224] Where federal defender offices are used to represent death row inmates in expensive and lengthy federal habeas proceedings, it is the federal government that foots the bill. In a 2009 speech on indigent defense reform, Attorney General Eric Holder alluded to this need to invest pretrial to prevent ineffective assistance of counsel: "The integrity of our criminal justice

[224] *See* Nancy King & Joseph Hoffman, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 824 (2009) ("Over the past two decades, several proposals have been made to link reductions in the scope and availability of federal habeas review to various reforms of state indigent defense services. . . . We agree that what is sorely needed is a radical rethinking of the criminal justice system that recognizes the close relationship between the deficiencies of defense representation at the beginning of the criminal justice process and the failure of postconviction litigation at the end of the process." (citations omitted)).

system aside, the crisis in indigent defense is also about dollars and cents."[225] Holder cited a study finding that a "state's failure to invest resources at the trial court level has contributed to the costly imprisonment of defendants whose convictions were later reversed," and, "[e]ven assuming these defendants were guilty of the crimes for which they were originally convicted, the public still must bear the cost of appeals and retrials because the system didn't get it right the first time."[226] The Attorney General emphasized, "In order to fulfill the promises of *Gideon* and *Gault*, we need the engagement of partners at the federal, state, and local levels, both within and outside of government."[227] He promised,

> [I've] convened an internal working group to help me identify ways we can do our part in this effort. I've instructed them to leave no stone unturned in identifying potential funding sources, legislative initiatives, and other ways we can work with our state and local partners to establish effective public defense systems."[228]

Most law school death penalty clinics focus on post-conviction representation.[229] There are at least two notable exceptions. Andrea Lyon directs the Center for Justice in Capital Cases at DePaul Law School, which provides direct trial representation, consulting, and training. Students participate in cases by doing such things as "locating and interviewing witnesses, uncovering legal records, writing motions, and handling other critical components of these cases."[230] At Washington and Lee Law School, David Bruck and his students assist Virginia capital defense trial teams by providing a comprehensive online resource center, assisting in the drafting of pretrial motions, and providing general pretrial and trial consulting.[231] Law

[225] Eric Holder, U.S. Att'y General, Commentary on Indigent Defense Reform at the Brennan Legacy Awards Dinner (Nov. 17, 2009), *available at* http://www.brennancenter.org/content/resource/attorney_general_eric_holder_on_indigent_defense_reform/.

[226] *Id.*

[227] *Id.*

[228] *Id.*

[229] *See, e.g.*, *About the Clinic*, U. CAL. BERKELEY SCHOOL L. DEATH PENALTY CLINIC, http://www.law.berkeley.edu/6107.htm (last visited Oct. 18, 2011) ("[T]he focus of the clinic's work is representing men and women on direct appeal and in capital post-conviction proceedings in several states.").

[230] *About Us*, DEPAUL U. COLLEGE L. CENTER FOR JUST. CAPITAL CASES, http://www.law.depaul.edu/centers_institutes/cjcc/default.asp (last visited Feb. 18, 2011).

[231] The *About* section of the Washington and Lee Virginia Capital Clearinghouse describes the clinic as follows:

> The Clearinghouse is comprised of ten third-year Washington & Lee law students. Admission to VC3 is competitive. Once accepted, each student remains in the Clinic for the entire third year of law school. Whenever an attorney contacts VC3 to request assistance in a capital case, the case is assigned to a team of two students who will maintain primary responsibility for handling matters relating to the case. Although VC3 focuses on pre-trial and trial stages of the capital case, attorneys may contact the

schools considering death penalty clinics should think about replicating the trial clinics at DePaul and Washington and Lee. Habeas cases are vastly more expensive than trial consulting.[232] Often students are unable to see a case resolved within a single year in habeas work, but they can often see the fruits of a single pretrial case (including discrete motions) ripen. Finally, trial assistance (including motion research and writing, thinking through investigative strategies, etc.) is more relevant for the vast majority of law students, as those who practice criminal law often become line defenders or prosecutors.

b. *The Fire Hose Problem*

Once we narrow our focus from statewide prosecutions to county-level prosecutions, public defender offices (or trial consulting offices) still must maximize the use of limited resources in the face of an unwieldy number of murder cases that prosecutors charge capitally. Maricopa County has had upwards of one hundred pending capital cases. Los Angeles County often has more than one hundred at a time. Riverside County, California, which is one-fifth the size of Los Angeles County, had nearly the same number of pending capital cases at the start of 2010.[233]

Ideally, an equal amount of time could be spent on each case, beginning with a vigorous investigation practice from the start of the case. Unfortunately, with dozens of cases within a county and limited defense resources, circumstances often are not ideal. One could ignore the problem, sticking with the mantra that everyone deserves – and therefore will get – the same vigorous defense. Under this scenario, either representation quality is dropped across the board, or representation is inadvertently lowered for some clients and not others. This strategy makes little sense in capital cases, both because of the goal change (life) and the nature of the work (early mitigation and client relationship building to prepare for possible pretrial disposition). There is an alternative.

Public defender offices can develop internal ranking systems of potential capital cases. By looking at verdict outcomes in prior capital cases, offices can estimate the cases most likely to proceed capitally. For instance, in many counties, those cases are murders involving police officers, children, or multiple victims. The same case-tracking model discussed above in

clinic concerning issues or problems at any stage of the death penalty legal process. *About the Virginia Capital Case Clearinghouse*, VC3.ORG, http://vc3.org/about/ (last visited Oct. 17, 2011).

[232] *See* DEATH PENALTY INFO. CTR., SMART ON CRIME: RECONSIDERING THE DEATH PENALTY IN A TIME OF ECONOMIC CRISIS 14 (2009) (surveying the relative costs involved in death penalty cases in different states).

[233] Interview with R. Addison Steele, II, Deputy Pub. Defender, Riverside Cnty. Pub. Defender's Office (Feb. 2011) (on file with author); *see also* Interview with Armstrong & Shaye, *supra* note 220; Interview with Friedman, *supra* note 186.

relationship to staging arbitrariness claims could be used to predict the cases most likely to proceed to trial, those most likely to plea out with a strong mitigation package, those unlikely to proceed to a capital trial, and those that could proceed to a capital trial but where juries in the county are reluctant to impose death for that type of crime.[234] Defender offices may not be comfortable allocating resources for capital trials based on the predicted likelihood of a future death sentence. The offices, however, might be more apt to use the model to assign "extra" team members, such as junior attorneys tasked with visiting the client on a regular basis for regular intervals of time or mitigation investigators if two new cases emerge simultaneously and mitigation must begin immediately.

C. *Advocacy*

Despite reinvigorated debate over the wisdom of the death penalty as a policy choice,[235] short-term prospects of legislative abolition in the five most active death-sentencing states – Alabama, Arizona, California, Florida, and Texas – are not optimistic. The clustered distribution of death sentences in each of these states, however, provides significant incentive to focus advocacy efforts on county-level reform. Whether prosecutors should pursue capital trials rather than allocate scarce resources to other county-funded projects or to other uses within the district attorney's office is a public safety trade-off most often made at the county level. Moreover, community groups often wield considerably more power with the local government than with the state legislature. These groups can have an impact on whether county officials

[234] *See supra* note 165 and accompanying text (listing factors that public defender offices in high death penalty counties should track).

[235] In his concurring opinion in *Baze v. Rees*, Justice Stevens wrote, "The time for a dispassionate, impartial comparison of the enormous costs that death penalty litigation imposes on society with the benefits that it produces has surely arrived." 553 U.S. 35, 81 (2008) (Stevens, J., concurring). Politicians and law enforcement officials of all stripes have taken the invitation. *See* DEATH PENALTY INFO. CTR., *supra* note 232, at 6 (summarizing a survey in which police chiefs were critical of the death penalty). New Jersey, New Mexico, and Illinois legislatively abolished the death penalty. *Id.* Connecticut, Colorado, Montana, and Maryland came close. *Id.* The Death Penalty Information Center commissioned a nationwide survey of police chiefs in 2009 that explored how law enforcement leaders view the death penalty. *Id.* The results: Police chiefs across the country consider the death penalty to be last among competing tools to reduce violent crime rates in their jurisdictions. *Id.* at 9. Even considered as a stand-alone public safety tool, 57% of police chiefs surveyed agreed that "[t]he death penalty does little to prevent violent crimes because perpetrators rarely consider the consequences when engaged in violence." *Id.* at 10. Less than one in four police chiefs believe that those individuals who commit murder think through the range of possible punishments before acting. *Id.* at 11. Seattle Police Chief Norm Stamper answered Justice Stevens's cost to benefit question in a way that aptly summarized the collective responses of police chiefs surveyed: "the death penalty is inefficient and extravagantly expensive." *Id.* at 13.

should pursue and fund capital prosecutions, as well as on removing obstructions to minority group participation in jury service. Focusing advocacy efforts in counties where the most death sentences are returned is a solid strategy for changing the climate and assisting the effort to drive down the number of new death sentences nationally.

Counties pay for capital prosecutions in many states, including the cost of defense services through at least the end of the trial.[236] There is strong evidence that death penalty cases cost significantly more money than non-capital trials.[237] In one state where a cost study of the death penalty was published in a peer-reviewed journal, capital cases resolved by a guilty plea cost more money than non-capital murder trials that proceed to jury verdicts.[238] The question is not whether local prosecutors (and citizens) favor the use of capital punishment in isolation but whether the goal of keeping citizens safe is better served by spending an additional public safety dollar on a capital prosecution or on other services or programs.

The public safety tradeoffs are not borne equally. Expensive capital prosecutions in many counties stem from cases where the victim is not from the neighborhoods where most violent crimes occur. Quite frequently the victims in capital cases are white, even though nearly half of murder victims nationally are African American.[239] The *Los Angeles Times* archives every homicide in Los Angeles County. Roughly four of five homicide victims in

[236] Gershowitz, *supra* note 199, at 353 ("Under the current system, most funding for capital trials is provided by counties. In some states, however, the counties receive supplemental assistance from the state treasury.").

[237] *See generally* Philip J. Cook, *Potential Savings from Abolition of the Death Penalty in North Carolina*, 11 AM. L. & ECON. REV. 498 (2009) (finding that North Carolina taxpayers would save nearly $11 million per year if the State abolished the death penalty).

[238] *Id*. at 516-18 (finding that capital cases without trials averaged $43,200 in defense fees and noncapital cases with trials averaged $18,600 in fees).

[239] *See* JOHANNA WALD & ROBERT J. SMITH, CHARLES HAMILTON HOUSTON INST. RACE & JUSTICE, ELEVEN MILLION POINTS OF LIGHT 8 (2010) ("Nearly half (48%) of all murder victims in North Carolina over the past decade have been African American, though they only constitute 22% of the State's population. White residents represent nearly three-fourths (74%) of the State's population, but only 46% of murder victims during this period. However, like many other states, North Carolina's death penalty appears to be mostly reserved for cases where the victim is white. For example, in Wake County (Raleigh), both defendants placed on death row since 2000 were convicted of murdering white victims. In Mecklenburg County (Charlotte), the first person to be put on death row from Charlotte in more than a decade was convicted of killing a white victim. This means that despite the disproportionate number of African American murder victims in Raleigh, Durham, and Charlotte, and despite expending $11 million per year more than the state would pay if the maximum penalty was life without the possibility of parole, not a single person has been placed on death row from Raleigh, Durham or Charlotte since 2000 for the murder of an African American." (citations omitted)).

the county are African American or Hispanic.[240] In 2009 alone, 739 people died by homicide.

The Los Angeles County District Attorney's office secured thirteen death sentences in 2009.[241] The cost to Los Angeles County for a single capital case (initiation through penalty phase verdict) is approximately $1 million dollars.[242] Only counting the thirteen cases that resulted in a death sentence in 2009, the State could have secured life sentences against each of the fifteen defendants and saved the county $13 million. In other words, Los Angeles County spent $13 million *above* the amount that would have been spent had the cases proceeded non-capitally and resulted in a life sentence. Meanwhile, California executed no one in 2009, two people from 2004 to 2009, and thirteen total people since 1976.[243] Only two people sentenced to death in Los Angeles County have been executed by California in the last thirty-five years.[244] The county is not seeing a good return on its investment, in terms of public safety or executions.

What else could the county spend public safety dollars on *before* spending another dollar on capital prosecutions? In 2009, the Charles Hamilton Houston Institute for Race and Justice, which was created by Harvard Law School Professor Charles Ogletree, produced a "Fact Sheet" about the opportunity costs of the death penalty in Los Angeles County.[245] The Institute noted that the county could tie defunding of capital prosecutions to immediate processing of the backlog of rape kits in Los Angeles. At the time the fact sheet was produced, 12,669 rape kits were untested; some sat for decades.[246] Each test

[240] From January 1, 2007 to February 28, 2011, 3510 people died by homicide. Of these, 2744 were African American or Hispanic. *The Homicide Report*, L.A. TIMES, http://projects.latimes.com/homicide/map/?year=2009 (last visited Oct. 17, 2011).

[241] *See infra* Appendix.

[242] Counties should be reimbursed under state law, but the State has never complied. *See* CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, *supra* note 184 (suggesting that California should reimburse Los Angeles County an additional $13.5 million per year).

[243] *See Execution Database*, *supra* note 5.

[244] *Id.*

[245] The following suggestions were first made in a Charles Hamilton Houston Institute for Race and Justice "Fact Sheet" on the costs of the death penalty in Los Angeles. CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE & JUSTICE, SOMETHING DOESN'T ADD UP: COSTS AND TRADE-OFFS OF MAINTAINING THE DEATH PENALTY IN CALIFORNIA (2009), *available at* http://www.charleshamiltonhouston.org/assets/documents/news/May%2029%20Final%20Fact%20Sheet%20California.pdf. The Los Angeles County Fact Sheet and the North Carolina Report, ELEVEN MILLION POINTS OF LIGHT, *supra* note 239, were sponsored by an Atlantic Philanthropies research grant.

[246] HUMAN RIGHTS WATCH, TESTING JUSTICE: THE RAPE KIT BACKLOG IN LOS ANGELES CITY AND COUNTY 1 (2009), *available at* http://www.hrw.org/sites/default/files/reports/rapekit0309web.pdf ("Los Angeles County has the largest known rape kit backlog in the United States.").

costs $1500.[247] Thus, Los Angeles County could have used the $1 million it would have saved by foregoing even one of the death sentences it secured from 2004 to 2009 to test 666 rape kits. In February 2011, the Los Angeles Police Department announced that it had cleared its "historic backlog" of rape kits and that *three hundred* suspects had been arrested as a result.[248] How counties invest limited public safety dollars matters.

The main point is that if community members do not agree that more capital prosecutions are the best way to use the limited public safety dollars available, these community members' complaints can be funneled to the county prosecutor and the county government rather than to the state legislature. Elected district attorneys often justify seeking capital punishment, despite personal preference against its use, because their county constituents prefer the death penalty. Death penalty abolitionists send the message that they do not want the death penalty, but this message leaves out the wider swath of citizens that might choose capital punishment in isolation but do not favor the punishment over other uses of county resources.

Voicing public safety preferences is not the only role that county-level advocacy could fulfill. The voices of racial and ethnic minority group communities within the larger community are not always heard. One route to silencing the voices of minority group members is to peremptorily strike from juries those individuals for whom the prosecution believes race serves as a proxy for attitudes towards the death penalty and a host of other political inclinations. In some active death penalty jurisdictions – Caddo Parish, Louisiana, for example – increasing the diversity of capital juries might be one of the most effective abolitionist tools available.[249] Organized actions by community leaders, such as clergy members, might impact the decision-making of prosecutors (both line and elected) even if it would not make a dent

[247] Katherine L. Prevost, *Eliminating the Rape-Kit Backlog: Bringing Necessary Changes to the Criminal Justice System*, 72 U.M.K.C. L. REV. 193, 199 (2003) (finding that rape kits can cost police departments anywhere from $500 to $1500).

[248] Joel Rubin, *LAPD Clears Decades-Old Backlog of Untested DNA Evidence*, L.A. TIMES, Feb. 2, 2011, http://articles.latimes.com/2011/feb/02/local/la-me-lapd-dna-tests-20110202 ("LAPD officials have spent the last two years scraping together federal grants, public funds and private donations to outsource the testing to private labs.").

[249] Though race and class demographics are changing rapidly in some areas, there is reason to believe that more representative juries would be less likely to return death sentences. Professor William Bowers studied seventy-four capital jury trials with a black defendant and a white victim, and he found that juries with four or more white jurors have a much higher death-sentencing rate than juries with two or more black jurors. *See* William J. Bowers et al., *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing When the Defendant Is Black and the Victim Is White*, 53 DEPAUL L. REV. 1497, 1501 (2004). The addition of a single black male onto the jury significantly altered deliberation outcomes. According to Professor Bowers's study, juries with no black males imposed the death sentence in 71.9% of cases. *Id*. When, however, at least one black male served on the jury, that number plummeted to 42.9%. *Id*.

at the state level. For example, in counties where problems with discriminatory jury selection exist, organized court watching during voir dire in capital trials would put increased pressure on district attorneys not to eliminate minority group members from the jury. If media attention (opinion pieces in local papers, blog pieces, or even community or church events) followed court watching, then the point that this practice will not be tolerated would be communicated more effectively than through similar efforts at statewide jury selection reform.

CONCLUSION

This Essay has demonstrated that the geography of the death penalty reflects a concentration of death sentences around a limited number of counties. Though this geography does not mean that we must abandon existing strategies for defeating arbitrariness or eliminating the death penalty altogether, it does suggest the need to complement existing strategies with newer, more targeted local strategies. In other words, this clustered distribution provides the opportunity for layered county-level approaches to reducing death sentences – through case tracking, doctrinal evolution, and targeted litigation and advocacy techniques.

To gauge which counties should receive the most litigation and advocacy attention, it makes sense to rank death-penalty activity by the number of new death sentences and then modify those rankings based on actual threat of execution. By these measurements, Harris County, Texas, is by far the worst death penalty jurisdiction in the country. Harris County sentenced twenty-one people to death from 2004 to 2009, executed forty-two people over the same time period, and executed 115 people since 1976.[250] Categorization becomes trickier moving down the spectrum. For example, there is room for debate over whether resources should be devoted first to Clark County, Nevada (eleven sentences from 2004 to 2009 and zero executions), or Tulsa County, Oklahoma (eight death sentences from 2004 to 2009 and four executions).

Of course, other secondary considerations come into play in close cases. For instance, from a litigation strategy standpoint, all else being equal, it would make sense to invest more resources in a county where the district attorney routinely authorizes plea-bargains in capital cases. In such a county, increasing the quality of trial level defender services would likely increase the ability to avoid capital trials more so than a similar investment in a county where the district attorney's office routinely refuses to accept life-saving plea bargains. From an advocacy standpoint, between two counties where capital cases routinely go to trial, all else being equal, it makes sense to invest more heavily in a county where there is a large minority population that is routinely

[250] *See Execution Database*, *supra* note 5; *infra* Appendix. The trend in Harris County is changing. Death sentences in that county dropped significantly from 2004 to 2009. *See infra* Appendix. In fact, Harris County had no death sentences in 2008 and one death sentence in 2009. *Id.*

excluded from juries in capital trials because there is a large upside to increasing diversity on capital juries, and this is an effort where local level advocacy can be effective. It also makes sense to consider the local political environment – for example, is this a county where the district attorney routinely refuses plea offers but where there is a possibility of voting in a different district attorney? Finally, in some states, there might be the possibility of economy of scale savings by instituting trial-level consulting offices or advocacy teams that can target the multiple high-sentence counties within a relatively small geographic space.

There are no easy answers. But this is precisely the strategic debate in which we should be engaging. Regardless of how those tough decisions are made, we should be worried about the relatively few active death penalty counties and not focus our attention at the state level. By employing these strategies at the county level, and thereby maximizing the odds of reducing the number of future death sentences, the case for the judicial abolition of the death penalty will be ready when the time is right.

APPENDIX: DEATH SENTENCES IMPOSED BY STATE AND COUNTY GOVERNMENTS FROM 2004 TO 2009

STATE	**COUNTY**	**2004**	**2005**	**2006**	**2007**	**2008**	**2009**	**07-09 Total**	**04-09 Total**
Arizona	Maricopa	7	4	3	8	5	11	24	38
California	Los Angeles	4	6	0	4	6	13	23	33
Texas	Harris	10	2	2	5	0	2	7	21
Oklahoma	Oklahoma	4	5	1	3	5	0	8	18
Alabama	Jefferson	1	4	3	4	3	1	8	16
California	Riverside	2	1	3	1	4	4	9	15
California	Orange	1	2	0	0	4	7	11	14
Florida	Duval	0	2	2	3	4	2	9	13
Florida	Broward	1	1	3	5	0	1	6	11
Nevada	Clark	1	2	2	1	3	2	6	11
Pennsylvania	Philadelphia	2	4	2	2	0	1	3	11
Alabama	Houston	3	1	3	2	1	0	3	10
Texas	Bexar	1	3	3	2	0	1	3	10
Texas	Tarrant	1	2	4	0	2	1	3	10
Texas	Dallas	1	0	1	1	3	2	6	8
Oklahoma	Tulsa	1	1	2	0	3	1	4	8
Florida	Polk	0	5	0	1	1	1	3	8
Tennessee	Shelby	4	1	0	0	1	2	3	8
California	Contra Costa	0	2	1	2	0	2	4	7
Arizona	Pima	0	3	1	0	0	3	3	7
California	San Bernardino	0	0	4	1	2	0	3	7
California	San Diego	2	3	0	0	1	1	2	7
Illinois	Cook	2	2	2	1	0	0	1	7
California	Alameda	0	2	0	2	2	0	4	6
Alabama	Mobile	0	2	1	0	1	2	3	6
Florida	Seminole	2	0	1	0	1	2	3	6
Missouri	St. Louis	0	2	1	0	2	1	3	6
Florida	Brevard	2	0	2	1	0	1	2	6
Louisiana	Caddo	2	1	1	1	0	1	2	6
Pennsylvania	Bucks	0	0	1	1	1	2	4	5
South Carolina	Lexington	0	0	1	3	0	1	4	5
Delaware	New Castle	1	0	2	1	1	0	2	5
Florida	St. Lucie	1	2	0	1	0	1	2	5
South Carolina	Spartanburg	2	1	0	1	1	0	2	5

Florida	Volusia	1	1	2	1	0	0	1	5
Florida	Orange	0	1	0	1	2	0	3	4
Florida	Miami-Dade	0	1	0	2	1	0	3	4
Georgia	Fulton	0	1	0	0	1	2	3	4
California	Tulare	1	0	1	1	0	1	2	4
Louisiana	East Baton Rouge	1	0	1	0	2	0	2	4
Ohio	Summit	1	0	1	0	1	1	2	4
Oregon	Marion	1	0	1	2	0	0	2	4
Pennsylvania	Berks	1	1	0	1	1	0	2	4
South Carolina	Horry	1	1	0	0	1	1	2	4
Texas	Collin	0	1	1	1	0	1	2	4
Texas	Smith	1	0	1	1	0	1	2	4
Alabama	Madison	1	1	1	0	1	0	1	4
South Carolina	Greenville	1	1	1	1	0	0	1	4
Texas	Hidalgo	1	2	0	1	0	0	1	4
North Carolina	Randolph	2	1	1	0	0	0	0	4
Florida	Marion	0	0	0	0	2	1	3	3
Illinois	DuPage	0	0	0	1	1	1	3	3
Alabama	Russell	0	1	0	1	0	1	2	3
Connecticut	Hartford	0	1	0	1	1	0	2	3
Florida	Bay	0	1	0	1	0	1	2	3
Florida	Hillsborough	1	0	0	1	1	0	2	3
Texas	El Paso	0	1	0	0	1	1	2	3
Texas	Travis	1	0	0	1	0	1	2	3
Texas	Victoria	1	0	0	1	1	0	2	3
Florida	Lake	1	0	1	0	0	1	1	3
Florida	Pinellas	1	0	1	0	0	1	1	3
Florida	Sarasota	1	0	1	0	0	1	1	3
Georgia	Chatham	1	1	0	1	0	0	1	3
Nebraska	Madison	1	1	0	1	0	0	1	3
Ohio	Cuyahoga	0	2	0	1	0	0	1	3
Alabama	Etowah	0	0	0	1	0	1	2	2
Alabama	Franklin	0	0	0	1	0	1	2	2
Alabama	Colbert	0	0	0	2	0	0	2	2
Arkansas	Washington	0	0	0	0	2	0	2	2
Arkansas	Bradley	0	0	0	2	0	0	2	2
Florida	St. Johns	0	0	0	1	1	0	2	2
Georgia	Glynn	0	0	0	1	0	1	2	2
Pennsylvania	Lawrence	0	0	0	0	1	1	2	2
Texas	Randall	0	0	0	0	1	1	2	2

Texas	Cameron	0	0	0	0	2	0	2	2
Alabama	Elmore	1	0	0	0	0	1	1	2
Alabama	Talladega	1	0	0	0	1	0	1	2
Alabama	Covington	0	0	1	1	0	0	1	2
Alabama	Marion	0	0	1	1	0	0	1	2
Arizona	Mohave	1	0	0	0	0	1	1	2
Arizona	Yuma	0	0	1	0	1	0	1	2
Arkansas	Sebastian	0	1	0	0	1	0	1	2
Arkansas	Pulaski	1	0	0	1	0	0	1	2
California	San Joaquin	0	0	1	0	1	0	1	2
California	Sacramento	0	0	1	1	0	0	1	2
California	Imperial	1	0	0	1	0	0	1	2
California	Kern	1	0	0	1	0	0	1	2
Delaware	Sussex	1	0	0	1	0	0	1	2
Florida	Osceola	0	0	1	0	1	0	1	2
Georgia	Paulding	0	1	0	0	0	1	1	2
Louisiana	Ouachita	0	0	1	0	0	1	1	2
Mississippi	Oktibbeha	0	0	1	0	0	1	1	2
Mississippi	Harrison	1	0	0	0	0	1	1	2
Mississippi	Forrest	0	0	1	1	0	0	1	2
Missouri	Cape Girardeau	1	0	0	0	0	1	1	2
Nebraska	Douglas	1	0	0	0	0	1	1	2
North Carolina	Forsyth	0	0	1	0	1	0	1	2
Ohio	Butler	1	0	0	0	0	1	1	2
Ohio	Lucas	0	1	0	1	0	0	1	2
Ohio	Mahoning	1	0	0	0	1	0	1	2
Pennsylvania	Montgomery	0	1	0	0	0	1	1	2
Pennsylvania	Northumber-land	0	1	0	1	0	0	1	2
Pennsylvania	Fayette	1	0	0	1	0	0	1	2
South Carolina	Sumter	0	1	0	0	1	0	1	2
Texas	McLennan	1	0	0	0	1	0	1	2
Virginia	Prince William	1	0	0	0	0	1	1	2
Virginia	Norfolk	0	1	0	1	0	0	1	2
Connecticut	New Haven	1	1	0	0	0	0	0	2
Florida	Charlotte	0	0	2	0	0	0	0	2
Florida	Okeechobee	1	0	1	0	0	0	0	2
Georgia	Richmond	2	0	0	0	0	0	0	2
Idaho	Ada	0	2	0	0	0	0	0	2
Kentucky	Jefferson	0	1	1	0	0	0	0	2

Louisiana	Jefferson	2	0	0	0	0	0	0	2
North Carolina	New Hanover	2	0	0	0	0	0	0	2
Ohio	Clark	0	1	1	0	0	0	0	2
Oklahoma	Canadian	1	1	0	0	0	0	0	2
Oklahoma	Comanche	1	1	0	0	0	0	0	2
Pennsylvania	Blair	0	0	2	0	0	0	0	2
Texas	Potter	0	2	0	0	0	0	0	2
Texas	Cherokee	2	0	0	0	0	0	0	2
Alabama	Montgomery	0	0	0	0	0	1	1	1
Alabama	Tuscaloosa	0	0	0	0	0	1	1	1
Alabama	Limestone	0	0	0	0	1	0	1	1
Alabama	Escambia	0	0	0	1	0	0	1	1
Alabama	Lauderdale	0	0	0	1	0	0	1	1
Arkansas	Benton	0	0	0	0	0	1	1	1
Arkansas	Saline	0	0	0	0	0	1	1	1
California	Madera	0	0	0	0	0	1	1	1
California	Yolo	0	0	0	0	1	0	1	1
California	Colusa	0	0	0	1	0	0	1	1
Colorado	Arapahoe	0	0	0	0	1	0	1	1
Connecticut	Fairfield	0	0	0	1	0	0	1	1
Florida	Flagler	0	0	0	0	0	1	1	1
Florida	Escambia	0	0	0	0	0	1	1	1
Florida	Clay	0	0	0	0	1	0	1	1
Florida	Pasco	0	0	0	0	1	0	1	1
Florida	Citrus	0	0	0	1	0	0	1	1
Florida	Lee	0	0	0	1	0	0	1	1
Florida	Santa Rosa	0	0	0	1	0	0	1	1
Florida	Manatee	0	0	0	1	0	0	1	1
Georgia	Cobb	0	0	0	0	1	0	1	1
Georgia	DeKalb	0	0	0	0	1	0	1	1
Georgia	Gordon	0	0	0	0	1	0	1	1
Georgia	Burke	0	0	0	1	0	0	1	1
Georgia	Douglas	0	0	0	1	0	0	1	1
Georgia	Lumpkin	0	0	0	1	0	0	1	1
Georgia	Morgan	0	0	0	1	0	0	1	1
Illinois	Jo Daviess	0	0	0	0	1	0	1	1
Illinois	White	0	0	0	0	1	0	1	1
Illinois	Fulton	0	0	0	1	0	0	1	1
Illinois	Will	0	0	0	1	0	0	1	1
Indiana	Clark	0	0	0	0	1	0	1	1
Kansas	Cowley	0	0	0	0	0	1	1	1
Kansas	Greenwood	0	0	0	0	1	0	1	1

Kansas	Wyandotte	0	0	0	0	1	0	1	1
Louisiana	Red River	0	0	0	0	0	1	1	1
Louisiana	West Baton Rouge	0	0	0	0	1	0	1	1
Mississippi	Lee	0	0	0	1	0	0	1	1
Missouri	Carter	0	0	0	0	0	1	1	1
Missouri	Howell	0	0	0	0	0	1	1	1
Missouri	Jackson	0	0	0	0	1	0	1	1
Missouri	Jefferson	0	0	0	0	1	0	1	1
Missouri	St. Charles	0	0	0	1	0	0	1	1
Nevada	Washoe	0	0	0	0	1	0	1	1
New Hampshire	Hillsborough	0	0	0	0	1	0	1	1
North Carolina	Johnston	0	0	0	0	0	1	1	1
North Carolina	Mecklenbu-rg	0	0	0	0	0	1	1	1
North Carolina	Cumberland	0	0	0	1	0	0	1	1
North Carolina	Moore	0	0	0	1	0	0	1	1
North Carolina	Wake	0	0	0	1	0	0	1	1
Ohio	Wood	0	0	0	0	1	0	1	1
Ohio	Hamilton	0	0	0	1	0	0	1	1
Ohio	Stark	0	0	0	1	0	0	1	1
Ohio	Trumbull	0	0	0	1	0	0	1	1
Oklahoma	Grady	0	0	0	0	0	1	1	1
Oklahoma	Garfield	0	0	0	0	1	0	1	1
Oklahoma	Garvin	0	0	0	0	1	0	1	1
Oklahoma	McClain	0	0	0	0	1	0	1	1
Oklahoma	Custer	0	0	0	1	0	0	1	1
Pennsylvania	York	0	0	0	0	0	1	1	1
Pennsylvania	Allegheny	0	0	0	0	1	0	1	1
Pennsylvania	Greene	0	0	0	0	1	0	1	1
Pennsylvania	Lebanon	0	0	0	0	1	0	1	1
Pennsylvania	Columbia	0	0	0	1	0	0	1	1
Pennsylvania	Delaware	0	0	0	1	0	0	1	1
South Carolina	Charleston	0	0	0	0	0	1	1	1
South Carolina	Pickens	0	0	0	0	0	1	1	1
South Carolina	Dorchester	0	0	0	0	1	0	1	1

South Carolina	Abbeville	0	0	0	1	0	0	1	1
Tennessee	Knox	0	0	0	0	0	1	1	1
Tennessee	Sullivan	0	0	0	1	0	0	1	1
Texas	Brazos	0	0	0	0	0	1	1	1
Texas	Leon	0	0	0	0	0	1	1	1
Texas	Henderson	0	0	0	0	1	0	1	1
Texas	Nueces	0	0	0	0	1	0	1	1
Texas	Wharton	0	0	0	0	1	0	1	1
Texas	Bell	0	0	0	1	0	0	1	1
Texas	Fort Bend	0	0	0	1	0	0	1	1
Texas	Hunt	0	0	0	1	0	0	1	1
Virginia	Fairfax	0	0	0	0	1	0	1	1
Virginia	Washington	0	0	0	0	1	0	1	1
Washington	Pierce	0	0	0	1	0	0	1	1
Alabama	Fayette	0	1	0	0	0	0	0	1
Alabama	Walker	0	1	0	0	0	0	0	1
Alabama	Bibb	0	0	1	0	0	0	0	1
Alabama	Calhoun	0	0	1	0	0	0	0	1
Alabama	Macon	0	0	1	0	0	0	0	1
Alabama	Morgan	0	0	1	0	0	0	0	1
Alabama	Dale	1	0	0	0	0	0	0	1
Alabama	Jackson	1	0	0	0	0	0	0	1
Arizona	Yavapai	0	0	1	0	0	0	0	1
Arkansas	Lafayette	0	1	0	0	0	0	0	1
Arkansas	Sevier	0	1	0	0	0	0	0	1
Arkansas	Randolph	1	0	0	0	0	0	0	1
California	Fresno	0	1	0	0	0	0	0	1
California	San Mateo	0	1	0	0	0	0	0	1
California	Tehama	0	1	0	0	0	0	0	1
California	Ventura	0	1	0	0	0	0	0	1
California	Santa Barbara	0	0	1	0	0	0	0	1
California	Stanislaus	0	0	1	0	0	0	0	1
Delaware	Kent	0	0	1	0	0	0	0	1
Florida	Sumter	0	1	0	0	0	0	0	1
Florida	Walton	0	1	0	0	0	0	0	1
Florida	Alachua	0	0	1	0	0	0	0	1
Florida	Martin	0	0	1	0	0	0	0	1
Georgia	Camden	0	1	0	0	0	0	0	1
Georgia	Hall	0	1	0	0	0	0	0	1
Georgia	Walker	1	0	0	0	0	0	0	1
Idaho	Caribou	0	0	1	0	0	0	0	1

Illinois	Livingston	1	0	0	0	0	0	0	1
Illinois	Marion	1	0	0	0	0	0	0	1
Indiana	Madison	0	1	0	0	0	0	0	1
Indiana	St. Joseph	0	1	0	0	0	0	0	1
Kansas	Shawnee	0	1	0	0	0	0	0	1
Kansas	Barton	0	0	1	0	0	0	0	1
Kansas	Sedgwick	1	0	0	0	0	0	0	1
Kentucky	Adair	0	0	1	0	0	0	0	1
Kentucky	Floyd	0	0	1	0	0	0	0	1
Kentucky	Warren	0	0	1	0	0	0	0	1
Kentucky	Boone	1	0	0	0	0	0	0	1
Kentucky	Kenyon	1	0	0	0	0	0	0	1
Louisiana	St. Tammany	0	1	0	0	0	0	0	1
Louisiana	Livingston	0	0	1	0	0	0	0	1
Louisiana	Calcasieu	1	0	0	0	0	0	0	1
Louisiana	St. Mary	1	0	0	0	0	0	0	1
Mississippi	George	0	1	0	0	0	0	0	1
Mississippi	Yazoo	0	1	0	0	0	0	0	1
Mississippi	Grenada	0	0	1	0	0	0	0	1
Mississippi	Hinds	0	0	1	0	0	0	0	1
Mississippi	Jefferson Davis	1	0	0	0	0	0	0	1
Mississippi	Montgomery	1	0	0	0	0	0	0	1
Missouri	Boone	0	0	1	0	0	0	0	1
Missouri	Cass	0	0	1	0	0	0	0	1
Missouri	Jasper	0	0	1	0	0	0	0	1
Missouri	Dent	1	0	0	0	0	0	0	1
Missouri	St. Clair	1	0	0	0	0	0	0	1
Nebraska	Scotts Bluff	0	1	0	0	0	0	0	1
New Jersey	Atlantic	1	0	0	0	0	0	0	1
North Carolina	Ashe	0	1	0	0	0	0	0	1
North Carolina	Harnett	0	1	0	0	0	0	0	1
North Carolina	Henderson	0	1	0	0	0	0	0	1
North Carolina	Robeson	0	1	0	0	0	0	0	1
North Carolina	Wayne	0	1	0	0	0	0	0	1
North Carolina	Brunswick	0	0	1	0	0	0	0	1
North	Rutherford	0	0	1	0	0	0	0	1

Carolina									
Ohio	Lorain	0	1	0	0	0	0	0	1
Ohio	Portage	0	1	0	0	0	0	0	1
Ohio	Montgomery	0	0	1	0	0	0	0	1
Ohio	Belmont	1	0	0	0	0	0	0	1
Ohio	Noble	1	0	0	0	0	0	0	1
Oklahoma	Seminole	0	1	0	0	0	0	0	1
Oklahoma	Cleveland	0	0	1	0	0	0	0	1
Oklahoma	Rogers	1	0	0	0	0	0	0	1
Oregon	Multnomah	0	1	0	0	0	0	0	1
Oregon	Clackamas	0	0	1	0	0	0	0	1
Oregon	Columbia	1	0	0	0	0	0	0	1
Pennsylvania	Clinton	0	1	0	0	0	0	0	1
Pennsylvania	Bradford	0	0	1	0	0	0	0	1
Pennsylvania	Dauphin	1	0	0	0	0	0	0	1
South Carolina	Richland	0	1	0	0	0	0	0	1
South Carolina	Calhoun	0	0	1	0	0	0	0	1
South Carolina	Clarendon	0	0	1	0	0	0	0	1
South Carolina	Georgetown	0	0	1	0	0	0	0	1
South Carolina	Anderson	1	0	0	0	0	0	0	1
Tennessee	McMinn	0	1	0	0	0	0	0	1
Tennessee	Madison	0	0	1	0	0	0	0	1
Tennessee	Giles	1	0	0	0	0	0	0	1
Tennessee	Murray	1	0	0	0	0	0	0	1
Texas	Denton	0	1	0	0	0	0	0	1
Texas	Grayson	0	1	0	0	0	0	0	1
Texas	Johnson	0	0	1	0	0	0	0	1
Texas	Lubbock	0	0	1	0	0	0	0	1
Texas	Medina	0	0	1	0	0	0	0	1
Texas	Ellis	1	0	0	0	0	0	0	1
Texas	Houston	1	0	0	0	0	0	0	1
Texas	Jefferson	1	0	0	0	0	0	0	1
Texas	Polk	1	0	0	0	0	0	0	1
Virginia	Richmond	0	0	1	0	0	0	0	1
Virginia	Richmond (Independent City)	0	0	1	0	0	0	0	1
Virginia	Rockingham	0	0	1	0	0	0	0	1
Virginia	Lynchburg	1	0	0	0	0	0	0	1

Wyoming	Natrona	1	0	0	0	0	0	0	1