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## The Racial Geography of the Federal Death Penalty

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## THE RACIAL GEOGRAPHY OF THE FEDERAL DEATH PENALTY

G. Ben Cohen\* & Robert J. Smith†

*Abstract:* Scholars have devoted substantial attention to both the overrepresentation of black defendants on federal death row and the disproportionate number of federal defendants charged capitally for the murder of white victims. This attention has not explained (much less resolved) these disquieting racial disparities. Little research has addressed the unusual geography of the federal death penalty, in which a small number of jurisdictions are responsible for the vast majority of federal death sentences. By addressing the unique geography, we identify a possible explanation for the racial distortions in the federal death penalty: that federal death sentences are sought disproportionately where the expansion of the venire from the county to the district level has a dramatic demographic impact on the racial make-up of the jury. This inquiry demonstrates that the conversation concerning who should make up the jury of twelve neighbors and peers—a discussion begun well before the founding of our Constitution—continues to have relevance today. This Article documents the historical and racial relationships between place and the ability to seat an impartial jury. We then discuss the unique impact demographic shifts in the jury pool have on death penalty decision making. Finally, we propose three possible solutions: (1) a simple, democracy-enhancing fix through a return to the historical conception of the county as the place of vicinage in federal capital trials; (2) a *Batson*-type three-step process for rooting out the influence of race on the decision to prosecute federally; and/or (3) voluntary measures by the Attorney General to mask demographic and location identifiers when deciding whether to provide federal death-authorization. We explain why a return to county-level jury pools in federal capital cases (whether through statutory construction, legislative change, or through the authority of a fair-minded Attorney General) prospectively limits the impact of race on the operation of the federal death penalty, without establishing the intractability of the federal death penalty as a whole. Finally, we observe that any effort to study the federal death penalty cannot merely address those federal cases in which the Attorney General has considered whether to approve an effort to seek the death penalty, but must also include an assessment of the cases prosecuted in state court that could be prosecuted federally and the prosecutorial decision concerning when and whether to prosecute in federal court.

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## INTRODUCTION

“I can’t help but be both personally and professionally disturbed by the numbers that we discuss today . . . [N]o one reading this [Department of Justice] report [on race and the federal death penalty] can help but be disturbed, troubled, by this [racial and ethnic] disparity.”

— [Deputy] Attorney General Eric Holder<sup>1</sup>

“The truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and *neighbours*.”

— Blackstone<sup>2</sup>

“And, behold, a certain lawyer stood up, and tempted him, saying, Master, what shall I do to inherit eternal life? He said unto him, What is written in the law? how readest thou? And he answering said, Thou shalt love . . . thy neighbour as thyself. And he said unto him, Thou hast answered right: this do, and thou shalt live. But he, willing to justify himself, said unto Jesus, *And who is my neighbour?*”

— *Luke 10:25–29*<sup>3</sup>

The United States Supreme Court’s elaborate capital punishment jurisprudence is designed to ensure that capital trials are endowed with legitimacy,<sup>4</sup> that only the most culpable murderers with the least mitigation receive a death sentence,<sup>5</sup> and that the sentence is not

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1. Marc Lacey & Raymond Bonner, *Reno Troubled by Death Penalty Statistics*, N.Y. TIMES, Sept. 12, 2000, at A17.

2. 2 WILLIAM BLACKSTONE, COMMENTARIES \*348 (describing the role of the jury).

3. *Luke 10:25–29* (King James) (emphasis added).

4. See, e.g., *Powers v. Ohio*, 499 U.S. 400, 411 (1991) (reversing death sentence and explaining that racial discrimination in the selection of jurors “casts doubt on the integrity of the judicial process and places the fairness of a criminal proceeding in doubt” (internal quotation and citation omitted)).

5. See *Kennedy v. Louisiana*, 554 U.S. \_\_\_ (June 25, 2008), 128 S. Ct. 2641, 2650 (2008) (“When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint. For these reasons we have explained that capital punishment must ‘be limited to those offenders who commit “a narrow category of the most serious crimes” and whose extreme culpability makes them ‘the most deserving of execution.’” (quoting *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)))).

bestowed upon the innocent.<sup>6</sup> But the jurisprudence—or at least its collective goal of avoiding the imposition of arbitrary death sentences—has not been altogether satisfactory.<sup>7</sup> Problems in the administration of the federal death penalty are illustrative.

Race-based arbitrariness threatens the fair administration of the death penalty.<sup>8</sup> Blacks and other minority group members are over-represented on death rows across the country.<sup>9</sup> Statistics suggest that defendants are more likely to be sentenced to death for killing a white victim than a black victim.<sup>10</sup> Blacks are also executed disproportionately—and have been since 1976.<sup>11</sup> Again, the federal death penalty is illustrative. Black inmates constitute twenty-eight of the fifty-seven (49%) inmates on federal death row.<sup>12</sup> As then-Assistant Attorney General Eric Holder emphasized in reaction to a September 2000 Department of Justice study of the federal death penalty, these disparities are alarming in a country where blacks constitute less than 13% of the population.<sup>13</sup> These same disparities persist even now that Eric Holder has been appointed the current Attorney General in the Obama Administration. In fact, early reports indicated that he has authorized the death penalty at the same

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6. See *In re Davis*, 557 U.S. \_\_\_ (Aug. 17, 2009), 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 ("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.") (Scalia, J., dissenting).

7. *Kennedy*, 128 S. Ct. at 2659 ("The tension between general rules and case-specific circumstances has produced results not all together satisfactory. This has led some Members of the Court to say we should cease efforts to resolve the tension and simply allow legislatures, prosecutors, courts, and juries greater latitude. For others the failure to limit these same imprecisions by stricter enforcement of narrowing rules has raised doubts concerning the constitutionality of capital punishment itself. 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." (internal quotations and citations omitted)).

8. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279 (1987).

9. As of January 2010, there are 3261 defendants on death row in the United States of America, 44% of these defendants are white. The rest are minority defendants. See CRIMINAL JUSTICE PROJECT, NAACP LEGAL DEFENSE AND EDUCATION FUND, INC., DEATH ROW U.S.A.: WINTER 2010, at 1 (2010), available at [http://www.naacpldf.org/files/publications/DRUSA\\_Winter\\_2010.pdf](http://www.naacpldf.org/files/publications/DRUSA_Winter_2010.pdf).

10. See *McCleskey*, 481 U.S. at 286.

11. To date, African-Americans and minorities make up 44% of the individuals executed since 1976. See Death Penalty Information Center, National Statistics on the Death Penalty and Race, <http://www.deathpenaltyinfo.org/race-death-row-inmates-executed-1976> (last visited June 11, 2010).

12. Death Penalty Information Center, List of Prisoners, Federal Death Row Prisoners, <http://www.deathpenaltyinfo.org/federal-death-row-prisoners> (last visited July 2, 2010).

13. See Lacey & Bonner, *supra* note 1.

rate, in the same places, and for the same race as did his predecessors in the Bush Administration.<sup>14</sup>

Geographic disparities also persist. To promote uniformity, United States Attorneys submit all death-eligible federal cases to the United States Attorney General for death-authorization.<sup>15</sup> Yet the geography of the federal death penalty is anything but uniform. Six of the ninety-four federal judicial districts account for one-third of death-authorizations.<sup>16</sup> More than half of all death-authorizations come from fourteen federal districts.<sup>17</sup> Seven federal districts are responsible for approximately 40% of the individuals on federal death row.<sup>18</sup> Two-thirds of districts have not sentenced anyone to death.<sup>19</sup> Nearly one-third of federal districts have

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14. See, e.g., Ari Shapiro, *No Decrease in Death Penalty Approval Rate*, NAT'L PUB. RADIO, Dec.10, 2009, <http://www.npr.org/templates/story/story.php?storyId=120900944> (last visited Dec. 30, 2009).

15. See, e.g., U.S. ATTORNEYS' MANUAL, TITLE 9: CRIMINAL DIVISION, at § 9-10.050 [hereinafter USAM], available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/10mcrm.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/10mcrm.htm). ("In all cases, the United States Attorney must immediately notify the Capital Case Unit when a capital offense is charged and provide the Unit with a copy of the indictment and cause number . . ."); *id.* at § 9-10.030 ("Each such decision [whether to seek the death penalty] must be based upon the facts and law applicable to the case and be set within a framework of consistent and even-handed national application of Federal capital sentencing laws. Arbitrary or impermissible factors—such as a defendant's race, ethnicity, or religion—will not inform any stage of the decision-making process."); *id.* at § 9-10.130:

National consistency requires treating similar cases similarly, when the only material difference is the location of the crime. Reviewers in each district are understandably most familiar with local norms or practice in their district and State, but reviewers must also take care to contextualize a given case within national norms or practice. For this reason, the multi-tier process used to make determinations in this Chapter is carefully designed to provide reviewers with access to the national decision-making context, and thereby, to reduce disparities across districts.

16. See Appendix 1: Death Authorizations and Sentences by Federal District [hereinafter Appendix 1], available at <http://www.law.washington.edu/wlr/issues/v085/docs/> (calculating authorizations from the Western District of Missouri (20), Eastern District of Virginia (39), District of Puerto Rico (22), District of Maryland (26), Central District of California (27), and Eastern District of New York (21) out of 461 total authorizations). The districts without any death-authorizations are not listed.

17. See *id.* (calculating authorizations of districts listed in the parenthetical to note 16 *supra* in addition to the District Court for the District of Columbia (17), Eastern District of Michigan (16), Western District of Virginia (13), Southern District of New York, Eastern District of Texas (12), Eastern District of Louisiana (10), Western District of Tennessee (9), and Southern District of Florida (9)).

18. See *id.* (calculating death row inmates convicted in the Western District of Missouri (5), Eastern District of Virginia (4), Western District of Texas (3), Eastern District of Missouri (3), Northern District of Texas (3), Eastern District of Louisiana (3), and Eastern District of Texas (3) out of fifty-seven total inmates).

19. *Id.*

not sought a death sentence.<sup>20</sup> Fewer than 20% of federal districts have sentenced more than one person to death.<sup>21</sup>

In 1994, Congress authorized the federal death penalty for a wide range of offenses, allowing it for every murder perpetrated with a firearm and that occurs during a crime of violence.<sup>22</sup> Over ten thousand murders with a firearm occur in the United States each year.<sup>23</sup> Yet, the government has charged only 2847 defendants with death-eligible federal crimes since 1988.<sup>24</sup> United States Attorneys General have reviewed 2219 of these cases and have authorized death prosecutions against 460 defendants.<sup>25</sup> Two-hundred two cases proceeded to a capital trial.<sup>26</sup> Juries have returned death sentences against sixty-seven

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20. *Id.* The districts that have not sought a death sentence to date are not listed.

21. *See id.*

22. 18 U.S.C. § 924(i) (1994) (current version at 18 U.S.C. § 924(j) (2006)) provided the death penalty for murder committed by the use of a firearm during a crime of violence or a drug-trafficking crime. *See also* Rory K. Little, *What Federal Prosecutors Really Think: The Puzzle of Statistical Race Disparity Versus Specific Guilt, and the Specter of Timothy McVeigh*, 53 DEPAUL L. REV. 1591, 1593 n.9 (2004) (“[T]he [death] penalty is now available for virtually any federal offense that includes a nonnegligent homicide.”). Though Congress resurrected the federal death penalty in 1988, see 21 U.S.C. § 848(e)(1)(A)–(B) (1988), use of capital punishment at the federal level traditionally was reserved for offenses that occur on federal lands (or on the high seas), murders of a federal official, and killings involving espionage, hijacking, or kidnapping across state-lines. *See* Rory Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice’s Role*, 26 FORDHAM URB. L.J. 347 (1999).

23. *See* JAMES ALAN FOX & MARIANNE W. ZAWITZ, U.S. DEP’T. OF JUSTICE, HOMICIDE TRENDS IN THE UNITED STATES 137 (2008), available at <http://bjsdata.ojp.usdoj.gov/content/pub/pdf/htius.pdf>.

24. Declaration of Kevin McNally Regarding the Frequency of Federal Capital Prosecutions and the Race or Ethnic Background of Defendants, ¶ 6 (June 6, 2009) [hereinafter McNally Decl.], available at [http://www.capdefnet.org/pdf\\_library/Frequency%20and%20Race-Ethnic%20Background%206-8-09.pdf](http://www.capdefnet.org/pdf_library/Frequency%20and%20Race-Ethnic%20Background%206-8-09.pdf). A version of this Declaration has been introduced in a series of cases. *See, e.g.*, *United States v. Rodriguez*, 581 F.3d 775, 815 n.17 (8th Cir. 2009); *United States v. Taylor*, 583 F. Supp. 2d 923, 928 (E.D. Tenn. 2008) (“[McNally’s] knowledge appears to be obtained from reviewing documents or talking to individuals who may have been directly involved in the attorneys general decisions or the trials. For purposes of this Memorandum, the Court assumes this lack of direct or first hand knowledge would not serve as an impediment to the admissibility of his testimony if it was otherwise relevant or useful to the jury.”); *United States v. Sablan*, 2006 U.S. Dist. LEXIS 96150 (D. Colo. Apr. 18, 2006) (“According to the McNally Declaration, of the 2,227 capital defendants eligible to receive the death penalty, only 18% of those, or 359 cases, have been selected for prosecution under the FDP. Of those 359 cases, 47 defendants are currently serving death sentences, and three defendants have been executed. The relative infrequency with which the federal death penalty is imposed does not necessarily equate with arbitrariness.”). Those who believed that President Obama’s Justice Department would seek fewer death sentences have reason to expect to be disappointed. *See* Shapiro, *supra* note 14.

25. McNally Decl., *supra* note 24, at ¶ 7.

26. *See* Appendix 2: Defendant Profile and Status of Case by District at 2E–462E [hereinafter Appendix 2], available at <http://www.law.washington.edu/wlr/issues/v085/docs/>.

defendants.<sup>27</sup> Fifty-seven defendants remain on federal death row.<sup>28</sup> The infrequency of the federal death penalty—with 67 federal death sentences in the face of over 150,000 murders—makes death by lightning-strike look positively routine.<sup>29</sup> Indeed, a federal death sentence is akin to winning (or in this instance losing) the lottery.

While there is no shortage of death-eligible murders in the United States each year, the number of murders in a particular location bears little relationship to the number of defendants from that jurisdiction who are sentenced to death federally. New York City had 596 homicides in 2003.<sup>30</sup> Chicago had 599.<sup>31</sup> Los Angeles had just under 500.<sup>32</sup> Philadelphia had 348.<sup>33</sup> The federal districts that encompass these four cities have sent a combined total of six defendants to federal death row since 1988.<sup>34</sup> By contrast, the federal district that encompasses St. Louis (seventy-four murders in 2003<sup>35</sup>) has sent three individuals to federal death row over that same time period.<sup>36</sup> The Eastern District of

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27. Thirteen defendants were acquitted. Two defendants received life sentences from a federal judge. One hundred twenty (120) defendants received life sentences from federal juries. *See id.*; McNally Decl., *supra* note 24, at ¶7.

28. *See* Appendix 1, *supra* note 16, at 69D. Three defendants were executed. Two death sentences were reversed on appeal. Two death sentences were reversed by a trial judge. Two defendants are pending re-trial. One defendant received clemency. McNally Decl., *supra* note 24, at ¶7.

29. There were 424 deaths by lightning in the years 1999–2008. NAT'L OCEANIC & ATMOSPHERIC ADMIN., NUMBER OF LIGHTNING DEATHS BY STATE FROM 1999 TO 2008, at 4 (2009), available at [http://www.lightningsafety.noaa.gov/stats/99-08\\_deaths\\_by\\_state.pdf](http://www.lightningsafety.noaa.gov/stats/99-08_deaths_by_state.pdf). *See* *Furman v. Georgia*, 408 U.S. 238, 309–10 (1972) (Stewart, J., concurring) (“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.”) (footnotes omitted); *see also id.*, at 310 (“My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race.”).

30. *See Chicago Topped Homicide Rates in 2003*, USA TODAY, Jan. 1, 2004, [http://www.usatoday.com/news/nation/2004-01-02-city-murders\\_x.htm](http://www.usatoday.com/news/nation/2004-01-02-city-murders_x.htm) (last visited July 2, 2010).

31. *Id.*

32. *Id.*

33. *See* FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 2003, at 116 (2004), available at [http://www.fbi.gov/ucr/cius\\_03/pdf/03sec2.pdf](http://www.fbi.gov/ucr/cius_03/pdf/03sec2.pdf).

34. Death Penalty Information Center, List of Prisoners, Federal Death Row Prisoners, <http://www.deathpenaltyinfo.org/federal-death-row-prisoners> (last visited June 28, 2010).

35. Cheryl Wittenauer & Andale Gross, *2008 Deadly Year for St. Louis, Kansas City*, MISSOURIAN, Jan. 2, 2009, <http://www.columbiainmissourian.com/stories/2009/01/02/2008-deadly-year-st-louis-kansas-city/> (last visited July 2, 2010).

36. *See* Appendix 1, *supra* note 16. For state prosecutions these geographic disparities are noteworthy, but perhaps not constitutionally relevant. However, the federal death penalty is pursued by a single sovereign and is unconstitutional as arbitrary if it depends more on where in the country



Louisiana, which encompasses New Orleans (275 murders in 2003<sup>37</sup>), has also sent three individuals to federal death row.<sup>38</sup> If the quantity of death-eligible federal crime does not explain the number of death sentences sought in a jurisdiction, then we must wonder what *does* explain the seemingly random distribution of federal death penalty prosecutions and sentences.

Rather than chart these race and location disparities independently, this Article investigates the relationship between the two. Commentators pay ample attention to the roles played by the victim, the defendant, the judge, and the prosecutor in maintaining a racially and geographically skewed capital punishment.<sup>39</sup> But we question here whether the federal death penalty “lottery” depends most on the racial make-up of the county where one “buys” their “ticket.” In other words, the physical space within which federal capital juries are constructed (either the county of offense in state cases or the federal district in federal cases) aggravates both the geographic and race disparities that plague the federal death penalty. Examining the districts with multiple federal death sentences against black defendants, we document a disquieting relationship between the racial geography of a county where an offense occurs, the demographics of the relevant federal district, and the likelihood that a federal capital defendant will receive a death sentence.

Questions of vicinage—determining the geographic area from which a court draws twelve jurors—have been with us for over two hundred years.<sup>40</sup> Our framing constitutional principle provides that the ultimate punishment should be judged by a narrow band of the defendant’s “equals and neighbors,”<sup>41</sup> but the lawyer’s question to Jesus in Chapter 10 of the Book of Luke remains—“who is my neighbor?”<sup>42</sup>

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the offense occurred than on the type of crime the defendant committed or the kind of person the defendant is.

37. Tara Young, *How New Orleans Became the Nation’s Murder Capital: Cycle of Death, Hot Zone*, NOLA.COM, Feb. 9, 2009, <http://www.nola.com/speced/cycleofdeath/index.ssf?/speced/cycleofdeath/hotzone.html> (last visited July 2, 2010).

38. See Appendix 1, *supra* note 16.

39. See generally Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433 (1995); 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 (1995).

40. See *infra* Part V.

41. *Duncan v. Louisiana*, 391 U.S. 145, 151–52 (1968) (“But the founders of the English law have, with excellent forecast, contrived that . . . the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his *equals and neighbours*, indifferently chosen and superior to all suspicion.”) (emphasis added) (internal quotations omitted); see also *United States v. Booker*,

Part I begins with an overview of race issues in the administration of the federal death penalty. Part II explains the concept of vicinage and examines the historical and racial relationships between place and the ability to seat an impartial jury. In Part III, we focus on the demography of the small band of jurisdictions that have returned the vast majority of federal death sentences. This examination reveals that a disproportionate number of federal death sentences are located in districts where the decision to prosecute federally transformed the jury pool from predominantly black to predominantly white. In Part IV, we explain that juror race *does* matter and impacts verdict outcomes. Part V examines race as a proxy for other shared community values that shift as the jury pool crosses county lines. We conclude, in Part VI, by proposing three possible solutions: (1) a simple, democracy-enhancing fix through a return to the historical conception of the county as the place of vicinage in federal capital trials; (2) a *Batson*-type three-step process for rooting out the influence of race on the decision to prosecute federally; and (3) a voluntary measure by the Attorney General to mask demographic and location identifiers when deciding whether to provide federal death-authorization.

I. BLACKS ARE DISPROPORTIONATELY IMPACTED BY  
FEDERAL DEATH PENALTY PROSECUTION, ESPECIALLY  
IN COUNTIES DEMOGRAPHICALLY DIFFERENT FROM  
THE SURROUNDING FEDERAL DISTRICT

“He uses statistics as a drunken man uses lamp posts—for support rather than for illumination.”

—Andrew Lang<sup>43</sup>

A decade ago the United States Department of Justice issued a report analyzing the government’s use of the federal death penalty from Congress’ enactment of the death penalty statute in 1988 until 2000.<sup>44</sup> The study revealed at least three racial and ethnic disparities stark

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543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004); *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

42. *Luke* 10:25–29.

43. Andrew Lang *quoted in* ALAN L. MACKAY, *SCIENTIFIC QUOTATIONS: THE HARVEST OF A QUIET EYE* 91 (Maurice Ebison ed., 1977).

44. U.S. DEP’T OF JUSTICE, *THE FEDERAL DEATH PENALTY SYSTEM: A STATISTICAL SURVEY* (1988–2000) (Sept. 12, 2000), *available at* <http://www.justice.gov/dag/pubdoc/dpsurvey.html>.

enough to leave now-Attorney General Eric Holder “disturbed” and “troubled.” First, 80% of all cases in which a United States Attorney requested permission to seek the death penalty involved a minority group defendant. Second, 72% of the cases where the Attorney General authorized a capital prosecution involved minority group defendants. Third, United States Attorneys sought death-authorization twice as often in cases involving black defendants and non-black victims as in cases involving black defendants and black victims.<sup>45</sup> President Clinton called these disparities “astonishing.”<sup>46</sup> The disparities also “sorely troubled” Attorney General Janet Reno, who, along with then-Deputy Attorney General Eric Holder, promised to compile data, find explanations, and root out bias.<sup>47</sup>

President Bush took office in January 2001. He appointed John Ashcroft as his Attorney General. Ashcroft’s Department of Justice released a new report acknowledging that the statistics are correct; minority group defendants are overrepresented in death penalty prosecutions.<sup>48</sup> But the report concluded that this disparity is not due to racial or ethnic bias, but rather the reality that minority group defendants are overrepresented in the “pool of potential federal capital cases.”<sup>49</sup> In fact, according to the report, when shifting focus to the death-authorization rate among death-eligible federal minority group defendants, black and Hispanic defendants are *less likely* to be selected for federal capital prosecution: “[T]he Attorney General ultimately decided to seek the death penalty for 27% of the white defendants (44 out of 166), 17% of the black defendants (71 out of 408), and 9% of the Hispanic defendants (32 out of 350).”<sup>50</sup>

Attorney General Ashcroft’s reconfiguration of the statistical analysis was flawed. By looking solely at death-authorized defendants and not attempting to appreciate how or why black defendants were overrepresented in the pool of federal defendants, Ashcroft’s approach was

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45. *Id.*; see also Death Penalty Information Center, *The Federal Death Penalty System: A Statistical Survey (1988–2000): A Summary of the Report on the Federal Death Penalty* by the Death Penalty Information Center, <http://www.deathpenaltyinfo.org/dpic-summary-quotthe-federal-death-penalty-sytem-statistical-surveyquot#race> (last visited June 28, 2010).

46. Michelle Mittlestadt, *Sizable Racial Disparity Found in Federal Death-Penalty Cases*, DALLAS MORNING NEWS, Sept. 13, 2000, at 3A.

47. Lacey & Bonner, *supra* note 1.

48. U.S. DEP’T OF JUSTICE, *THE FEDERAL DEATH PENALTY SYSTEM: SUPPLEMENTARY DATA, ANALYSIS AND REVISED PROTOCOLS FOR CAPITAL CASE REVIEW 10* (June 6, 2001), available at <http://www.justice.gov/dag/pubdoc/deathpenaltystudy.htm>.

49. *Id.*

50. *Id.*

akin to checking the back of the bus to see whether blacks were being discriminated against, and determining that no discrimination existed because blacks were over-represented as bus-riders.<sup>51</sup> And so the Ashcroft Report met swift criticism. Professor David Baldus sent a statement to Senator Russell Feingold reporting that the Ashcroft Report “utterly fails to convince me that there is no significant risk of racial unfairness and geographic arbitrariness in the administration of the federal death penalty.”<sup>52</sup> Baldus observed however, the relevant unanswered question: the representativeness of racial minorities in the broader pool of murder defendants, and whether bias occurs at the point where United States Attorneys decide whether and how to charge murder defendants.<sup>53</sup>

But Professor Baldus’ statement and both the Reno and Ashcroft reports failed to consider another cause of race bias in the administration of the federal death penalty: the exploitation of demographically chiaroscurist jury pools. Most federally-prosecuted capital crimes occur in minority-concentrated areas.<sup>54</sup> Thus, expansion of the venire to the federal district level (which often includes white-flight suburbs) has a dramatic effect on the circumstance of the prosecution.<sup>55</sup> Moving the relevant “community” from the county to the federal district dilutes the voice of the population impacted most by violent crime.<sup>56</sup> Moreover, as the jury pools get whiter, the opportunity for implicit race bias increases (and minority group defendants suffer the consequences).<sup>57</sup> Far from considering the influence of racialized jury pools as a potential cause of

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51. Chief Justice Krivosha of the Nebraska Supreme Court described the flaws in such an approach:

If one wants to determine whether individuals are being discriminated against in public transportation, one does not merely look at those who are required to sit at the back of the bus and conclude that since everyone in the back of the bus looks alike, there is no discrimination. One, of necessity, must look at who is riding in the front of the bus as well in order to determine whether persons in the back are being discriminated against. So, too there is no way that we can determine whether those who are sentenced to death are being discriminated against if we do not examine those cases having the same or similar circumstances which, for whatever reason, did not result in the imposition of death.

State v. Palmer, 399 N.W.2d 706, 752 (Neb. 1986) (Krivosha, C.J., concurring in part and dissenting in part).

52. Statement of David C. Baldus, Professor of Law, University of Iowa, to Russell D. Feingold, Committee on the Judiciary, U.S. Senate (June 11, 2001), *available at* <http://www.deathpenaltyinfo.org/node/86>.

53. *Id.*

54. *See infra* Part III.

55. *See infra* Part III.

56. *See infra* Part III.

57. *See infra* Part IV.D.

race bias in the administration of the federal death penalty, neither the Reno nor the Ashcroft reports even mentioned the stark geography of race that results from federal death penalty prosecutions.

Neither the Baldus investigation nor the DOJ reports explain why the vast majority of the federal death sentences come from a narrow band of jurisdictions. While there are ninety-four federal jurisdictions,<sup>58</sup> forty-three (75%) death sentences have come from sixteen districts; and just nine districts have returned nearly half (twenty-nine) of the death sentences.<sup>59</sup>

<b>Federal Districts with Most Death Sentences Since 1988<sup>60</sup></b>	
<b>Federal Jurisdiction</b>	<b>Death Sentences</b>
Western District of Missouri	5
Eastern District of Virginia	4
Eastern District of Louisiana	3
Eastern District of Missouri	3
Western District of Texas	3
Eastern District of Oklahoma	3
Northern of District of Texas	3
Eastern District of Texas	3
District of Maryland	2
<b>TOTAL</b>	<b>29</b>

For example, one wonders how Missouri—with eight federal death sentences between its two districts—has returned more federal death sentences than New York, California, Florida, and the thirty-seven federal districts that have never returned a federal death penalty, combined.<sup>61</sup> When a disproportionately large number of federal death sentences come from a narrow band of jurisdictions—even though there is supposed to be federal oversight from the Attorney General to avoid the arbitrary imposition of the death penalty—focused attention on the demographics of these jurisdictions is warranted. Eight jurisdictions have returned more than two death sentences, resulting in almost half of

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58. 28 U.S.C. §§ 81–144 (2006). The U.S. Courts website contains a helpful map of the 94 federal judicial districts, which is available at <http://www.uscourts.gov/images/CircuitMap.pdf>.

59. See Appendix 1, *supra* note 16.

60. See *id.*

61. See *id.*

the defendants on death row.<sup>62</sup> The eight federal districts that have returned more than two death sentences are not exclusively white jurisdictions, nor are they jurisdictions with predominantly black or other minority group populations.<sup>63</sup> However, what is striking about these jurisdictions is that the county of the offense generally has a high percentage of blacks, but is located within federal districts which are heavily white.<sup>64</sup>

We focus in Part III on the impact that the expansion of the venire has on the operation of the death penalty in the districts that have returned the majority of federal death sentences. This focus demonstrates that no assessment of the federal death penalty can be sufficient without an understanding of why death sentences come disproportionately from racially-divided districts. But before addressing the demographic shift that occurs in this small band of districts that have returned multiple death sentences, it is important to identify the historical link between the jury and the county of offense, and the racial issues that emerge in the shift to expand the venire to a district level.

## II. COUNTY-LEVEL JURIES, AS OPPOSED TO JURIES DRAWN FROM THE ENTIRE FEDERAL DISTRICT, MAINTAIN THE LINK BETWEEN COMMUNITY VALUES AND THE IMPOSITION OF CAPITAL PUNISHMENT

### A. *Historically, the Link Between the Sentencing Jury and the County of the Offense Was an Essential Component of the Fair Trial Guarantee*

Anglo-American common law is rooted in the belief that a defendant should be tried by representatives of the community in which the crime was committed, by neighbors and equals of the defendant—the vicinage presumption.<sup>65</sup> The Sixth Amendment protects the right to vicinage in criminal cases, but sketches only the outer limits of the constitutionally acceptable space from which a jury can be drawn.<sup>66</sup> Within the outer limit—the federal judicial district previously ascertained by law—the

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62. *See id.*

63. *See infra* Part III.

64. *See infra* Part III.

65. *See* Steven A. Engel, *The Public's Vicinage Right: A Constitutional Argument*, 75 N.Y.U. L. REV. 1658, 1660–61 (2000).

66. U.S. CONST. amend. VI (“[T]he accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . .”).

precise area depends upon the impact the chosen geographic scope has on the right to an impartial trial and the right of the impacted community to be a stakeholder in the justice process.

At the nation's founding, the relevant community in federal capital cases was the county where the crime occurred.<sup>67</sup> Today, federal capital juries are generally drawn from the entire federal district that encompasses the county where the crime occurred.<sup>68</sup> This is not an innocuous geographical shift, but rather one that results in robust demographic, experiential, political, and attitudinal changes in the community assigned to determine if a particular person deserves death.

The ability to receive an impartial trial has always been tethered to place, and a conception of "neighbors" imposing justice. Though the location of the crime consistently serves as the epicenter for determining the geographic area from which jurors can be summoned, the outer bounds of the physical space encasing the location of the crime is elastic. At its narrowest expanse, in medieval England, jurors were summoned from the neighborhood where the crime occurred.<sup>69</sup> Pulling jurors from the neighborhood meant the jurors were *more likely* to know information related to the character of parties and witnesses. This "local knowledge" allowed jurors to assess the credibility of both witnesses and evidence. But the benefit of local knowledge came at the cost of increased risk of passion and prejudice. Gradually England began to summon jurors from the "county at large."<sup>70</sup> By pulling from the entire county, jurors would still possess local knowledge and community values, but would be less likely to be prejudiced by knowledge of the particular parties or events in question.

Vicinate crossed the ocean with the English and settled in the Colonies. On March 5, 1770, five insult-slinging, snowball-throwing Bostonians died after provoking the anger of five gun-wielding, trigger-

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67. See Engle, *supra* note 65 at 1679–85.

68. *But see* 18 U.S.C. § 3235 (2006) ("The trial of offenses punishable with death shall be had in the county where the offense was committed, where that can be done without great inconvenience.").

69. 2 WILLIAM BLACKSTONE, COMMENTARIES, \*350–51 (T. Cooley 4th ed. 1899) (noting requirement that sheriff return jurors from "the visne or neighbourhood; which is interpreted to be of the county where the fact is committed."); *see* 1 EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 125.a. (Francis Hargrave & Charles Butler eds., 19th ed. 1853); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 654–62 §§ 1775–1785 (1833); MATTHEW HALE, THE HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND 263 (1713).

70. See BLACKSTONE, *supra* note 2.

happy British officers.<sup>71</sup> A grand jury returned murder indictments against the five officers. Despite the extreme sentiments swirling around Boston—this would later be dubbed the “Boston Massacre”—the trial took place in Boston and local jurors were summoned.<sup>72</sup> Most of the defendants were acquitted on most of the charges.<sup>73</sup> The Crown got word of the local trials against the officers, and, in 1774, declared that all future trials of British officers would take place in England.<sup>74</sup> The colonists dubbed this dislocation of trial from the place of offense an “Intolerable Act.”<sup>75</sup> John Adams, one of the defense attorneys for the officers, helped pen the Declaration of Independence, which referred to the proposed off-site trials of British officers as a “Mock Trial” regime.<sup>76</sup>

Though Article III establishes the state of offense as the outside territorial boundary for where a federal criminal trial could take place,<sup>77</sup> the United States Constitution does not expressly grant an independent vicinage right. Noting the absence of an express vicinage clause in the Constitution, James Madison introduced the following proposed amendment to what would become the Sixth Amendment: “The trial of all crimes . . . shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites . . .”<sup>78</sup> The proposed amendment passed the House, but emerged from the Senate (and the subsequent Conference Committee) without the vicinage language.

The Senate believed that the Judiciary Act of 1789 would adequately preserve common law vicinage rights, and thus, a constitutional amendment to the same effect would be extravagant.<sup>79</sup> A letter from James Madison to Edmund Pendleton, dated September 23, 1789, provides further insight:

The vicinage they contend is either too vague or too strict a term; too vague if depending on limits to be fixed by the

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71. See Akhil Amar, A Tale of Two Cities, [http://writ.news.findlaw.com/commentary/20000501\\_amar.html](http://writ.news.findlaw.com/commentary/20000501_amar.html) (last visited Dec. 15, 2009).

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. See U.S. CONST., art. III, § 2 (providing that trial shall be by jury, and take place in the state of the offense).

78. *Williams v. Florida*, 399 U.S. 78, 94 (1970) (quoting 1 Annals of Cong. 435 (1789)) (internal quotation marks omitted).

79. *Id.* at 94–95.



pleasure of the law, too strict if limited to the county. It was proposed to insert after the word Juries, 'with the accustomed requisites,' leaving the definition to be construed according to the judgment of professional men. Even this could not be obtained . . . . The Senate suppose, also, that the provision for vicinage in the Judiciary bill will sufficiently quiet the fears which called for an amendment on this point.<sup>80</sup>

The fear that the vicinage right would be too narrow if delimited by the county had to do with the difference in size between an English county and a United States county. In England, the population of the average county totaled 180,000 people.<sup>81</sup> The average American county had 13,656 residents.<sup>82</sup> The underlying political concern driving the anxiety over equating vicinage with the relatively small size of the American county was the fear that Anti-Federalists would rebel, be tried by their friends and neighbors from their home counties, and thus get away with treason.<sup>83</sup> Another factor that influenced the decision not to freeze vicinage into the Constitution was the evolving role of the American jury: jurors were now required to base convictions solely on the independent weight of the evidence introduced into the trial (rather than local knowledge or the moral leanings of the jurors).<sup>84</sup> This shift meant that the functional role of the community-level juror (e.g., bringing the "conscience of the community" or local knowledge to bear on guilt determinations) became increasingly less relevant.

It is important to note here that the impartial jury right still depended on place. But because of the changing role of the jury and the limited size of the American county, among other factors, the minimum geographic area from which to summon jurors had expanded. The relevant geographic area, as preserved by the Sixth Amendment, is the "State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . ."<sup>85</sup> Congress created federal districts to be generally co-extensive with the territorial boundaries of the state. Because a majority of the states pulled jurors from the entire state, the newly established federal districts aligned with

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80. Letter from James Madison to Edmund Randolph (Sept. 23, 1789), *quoted in Williams*, 399 U.S. at 95–96.

81. Brian C. Kalt, *Crossing Eight Mile: Juries of the Vicinage and County-Line Criminal Buffer Statutes*, 80 WASH. L. REV. 271, 300 n.99 (2005).

82. *Id.*

83. Drew L. Kershen, *Vicinage*, 29 OKLA. L. REV. 801, 824 (1976).

84. *Id.* at 835.

85. U.S. CONST. amend. VI.

state practice. But keep two things in mind: First, the population of the average state was slightly larger than the population of the average county in England.<sup>86</sup> So the population density of the “vicinage” meshed with the English practice. Second, under the Judiciary Act of 1789, federal judges retained discretion in non-capital trials to draw jurors from a narrower community (including the county level) should that be necessary to obtain an impartial jury.<sup>87</sup>

The First Federal Congress enacted the Judiciary Act of 1789 just two years after the signing of the Constitution (and one day before Congress submitted the Bill of Rights to state legislatures).<sup>88</sup> Section 29 of the Judiciary Act guaranteed that federal capital trials “shall be had in the county where the offence was committed, or where that cannot be done without great inconvenience, twelve petit jurors at least shall be summoned from thence.”<sup>89</sup> This deviation from the general unwillingness to equate vicinage with the county is not a historical accident, but rather reflects the understanding that in the most serious cases, where both the defendant and the impacted community have the most on the line, the best practice is to locate the trial as close as possible to the location of the crime.

From 1789 until 1862, the right to a jury (or at least twelve petit jurors) from the county of the offense in capital cases remained part of Section 29.<sup>90</sup> However, in 1862, upon a confusing and un-debated motion by a Connecticut congressman to repeal the portion of Section 29 that requires twelve petit jurors to be summoned from the county of offense, Congress dropped the requirement.<sup>91</sup> But the ease of the repeal effort does not warrant the conclusion that no weighty purpose drove the

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86. See Kalt, *supra* note 81, at 300.

87. Judiciary Act of 1789, § 29, 1 Stat. 73, 88 (“[J]urors . . . shall be returned as there shall be occasion for them, from such parts of the district from time to time as the court shall direct, so as shall be most favourable to an impartial trial . . .”).

88. Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 49 (1923) (“The Federal Judiciary Act of September 24, 1789, was Senate Bill No. 1, in the First Session of the First Congress.”).

89. Judiciary Act of 1789, § 29, 1 Stat. at 88; see also *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 108 (1807) (“So by the 29th section of the judiciary act of 1789 . . . in all cases punishable with death, the trial shall be had in the county where the offence was committed, or where that cannot be done, without great inconvenience, twelve petit jurors, at least, shall be summoned from thence . . .”); *United States v. Insurgents of Pennsylvania*, 3 U.S. (Dall.) 513, 513 (1799) (“In cases punishable with death, the trial shall be had in the county where the offence was committed, or where that cannot be done, without great inconvenience, twelve petit jurors at least shall be summoned from thence.”).

90. Drew L. Kershen, *Vicinage*, 30 OKLA. L. REV. 1, 56 (1977).

91. *Id.* at 57.

motion to repeal the “12 petit jurors from the county of offense rule.” Northerners, again concerned about the ability of county-level Southern juries to return treason verdicts against would-be secessionists, wanted the county-level juror requirement removed so that a more diverse jury could be drawn from the entire federal district.<sup>92</sup>

Reconstruction reinforced the need for a broader geographic area from which to summon petit jurors. A trend in the administration of Southern criminal justice emerged following the completion of the Civil War: all-white juries consistently (over-) punished black defendants, but refused to punish white defendants who harmed black victims.<sup>93</sup> Realizing that hard-won equality under the law was being lost in countless courthouses throughout the South, Congress passed the Ku Klux Klan Act of 1871, which gave federal prosecutors the ability to charge these racially antagonistic crimes in federal court.<sup>94</sup> Armed with the Act of 1871, the federal government mobilized quickly to South Carolina, a state gripped by particularly savage and widespread race-motivated violence.<sup>95</sup>

On March 6, 1871, forty-odd members of the Ku Klux Klan initiated a “savage rampage” against blacks in York County, South Carolina and their Republican counterparts.<sup>96</sup> In response to this uprising, and the lynching of James Rainey, an officer in an all-black militia, in particular, President Grant ordered federal troops and federal prosecutors into South Carolina. Defense attorneys representing the suspects arrested in connection with the March 6 rampage moved for the federal court to draw jurors solely from the locality where the crime had occurred.<sup>97</sup> The federal judge denied the motion and drew the jury pool from the entire federal district. Senator Coburn explained the rationale for broadening the geographic scope of the jury pool beyond the location where the crime occurred:

The United States courts are further above mere local influence than the county courts; their judges can act with more independence, cannot be put under terror, as local judges can; their sympathies are not so nearly identified with those of the vicinage; the jurors are taken from the State, and not the

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92. *Id.* at 58–59.

93. James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 *YALE L.J.* 895, 909–10 (2004).

94. Ku Klux Klan Act, 17 Stat. 13 (1871).

95. Forman, *supra* note 93, at 924.

96. *Id.*

97. *Id.*

neighborhood; they will be able to rise above prejudices or bad passions or terror more easily. The marshal, clothed with more power than the sheriff, can make arrests with certainty, and, with the aid of the General Government, can seize offenders in spite of any banded and combined resistance such as may be expected.<sup>98</sup>

This initial effort to ensure that blacks had legal protection from lynchings and vigilante violence would ultimately be transformed into a mechanism that subjected black defendants to all-white or predominantly white juries.

*B. Shifting Demographics Have Transformed the Expanded Venire from a Shield Against Racism Into a Trap that Exploits It*

While the expansion of the venire was initially promulgated to protect the rights of minorities, specifically blacks, over time the expansion of the venire has reduced the protections provided by a jury of “equals and neighbors.” Over the more than one hundred years from Reconstruction through today, the result of racial equality efforts and enforcement (and particularly the integration of public schools) has led to an unprecedented migration of white citizens from inner-city areas into peripheral suburbs. In major cities across the United States (and especially in the South), the white citizens who left the city took much of the wealth with them, leaving pockets of cities that suffer from concentrated poverty and the attendant evils that come with that reality. Take New Orleans, for example.<sup>99</sup>

In the wake of the civil rights movement in the 1960s, white New Orleans residents began to flee the city (which is located in Orleans Parish) and relocate to Metairie (which is part of neighboring Jefferson

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98. Robert D. Goldstein, Blyew: *Variations on a Jurisdictional Theme*, 41 STAN. L. REV. 469, 509 (1989). The wider geographic scope from which the jury pool was drawn, combined with the provision of the Ku Klux Klan Act that required prospective jurors to swear an oath of non-affiliation with Klan activity, led to juries with a disproportionately high number of black citizens. Overall, “two-thirds of all the petit jurors were black, with no Klansman tried by a jury that was majority white.” Forman, *supra* note 93, at 925.

99. As of 2006, 22.2% of New Orleans residents lived below the poverty line (30.6% of blacks compared to 9% of white). WILLIAM H. FREY, AUDREY SINGER & DAVID PARK, BROOKINGS INST., RESETTLING NEW ORLEANS: THE FIRST FULL PICTURE FROM THE CENSUS 11(2007), [http://www.brookings.edu/~media/Files/rc/reports/2007/07katrinafreysinger/20070912\\_katrinafreysinger.pdf](http://www.brookings.edu/~media/Files/rc/reports/2007/07katrinafreysinger/20070912_katrinafreysinger.pdf).

Thirty-eight percent (38%) of children in New Orleans live below the poverty line. SARAH FASS & NANCY K. CAUTHEN, NAT'L CTR. FOR CHILDREN IN POVERTY, CHILD POVERTY IN STATES HIT BY HURRICANE KATRINA 1 (2005), available at [http://nccp.org/publications/pdf/text\\_622.pdf](http://nccp.org/publications/pdf/text_622.pdf). These numbers render New Orleans among the poorest of large cities in America.

Parish).<sup>100</sup> As a federal district court judge sitting in the Eastern District of Louisiana observed: “The historical record of discrimination in the . . . Parish of Jefferson is undeniably clear, and the record suggests it has not ended even now.”<sup>101</sup> Until at least 1963, “Jefferson Parish blacks, unlike whites, were required . . . to state their age exactly in terms of number of years, months and days, and to recite the preamble to the United States Constitution in order to register to vote.”<sup>102</sup> Until at least the mid-1970s, “[b]lacks were systematically denied access to restaurants, forced to sit in the rear of buses and subjected to separate and unequal facilities.”<sup>103</sup> Education services provided to black children were “qualitatively inferior to those provided to whites.”<sup>104</sup>

Jefferson Parish voters elected David Duke, former Ku Klux Klan Grand Wizard and founder of the National Association for the Advancement of White People, to the state legislature in 1989.<sup>105</sup> Duke carried Jefferson Parish in his (unsuccessful) 1990 bid for the United States Senate<sup>106</sup> and received 41% of the Jefferson Parish vote when he ran for Governor in 1991.<sup>107</sup>

In 1994, in response to a black suspect dying after being improperly restrained by the Jefferson Parish Sheriff’s Office, Sheriff Harry Lee removed police units from a black neighborhood in the parish. His rationale: “To hell with them . . . I haven’t heard one word of support from one black person.”<sup>108</sup> Because “[i]f you live in a predominantly white neighborhood and two blacks are in a car behind you, there’s a pretty good chance they’re up to no good,” Sheriff Lee ordered his deputies to stop and question all blacks in “rinky-dink car[s].”<sup>109</sup> After ordering the construction of a barricade between Orleans and Jefferson

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100. See, e.g., Brief of Nine Jefferson Parish Ministers as Amici Curiae Supporting Petitioner at 15, *Snyder v. Louisiana*, 552 U.S. 472 (2008) (No. 06-10119) [hereinafter Brief of Ministers] (citing James Brandt & Robert K. Whelan, *New Orleans: Metropolis Against Itself*, in METROPOLITAN GOVERNANCE WITHOUT METROPOLITAN GOVERNMENT 135 (Donald Phares, ed. 2004)).

101. *Citizens for a Better Gretna v. City of Gretna*, 636 F. Supp. 1113, 1116 (E.D. La. 1986).

102. *Id.* at 1117.

103. *Id.*

104. *Id.* at 1118.

105. Brief of Ministers, *supra* note 100, at 17 (citing Frances Frank Marcus, *Winner in Louisiana Vote Takes on G.O.P. Chairman*, N.Y. TIMES, Feb. 20, 1989, at A1).

106. *Id.*

107. David Meeks, *An Ill-Conceived Business Boycott*, TIMES-PICAYUNE, Nov. 24, 1991, at B7.

108. Brief of Ministers, *supra* note 100, at 17 n.29.

109. J. Michael Kennedy, *Sheriff Rescinds Order to Stop Blacks in White Areas*, L.A. TIMES, Dec. 4, 1986, at 18, available at [http://articles.latimes.com/1986-12-04/news/mn-1380\\_1\\_white-area](http://articles.latimes.com/1986-12-04/news/mn-1380_1_white-area).

to keep black New Orleans citizens out of Jefferson, Sheriff Lee returned to the segregation theme in the midst of Hurricane Katrina. He ordered deputies to stand at the bridge connecting Orleans and Jefferson, and to point assault weapons at the New Orleans residents (the vast majority of whom were black) trying to escape the flooded city.<sup>110</sup> Sheriff Lee died in 2007, but he managed to spark one last controversy shortly before his death, announcing his new violent crime policy: “We’re only stopping black people.”<sup>111</sup>

Jefferson Parish, Louisiana serves as a paradigmatic example of the demographic changes that we must consider when evaluating the relationship between the place of the crime and the ability to obtain an impartial jury. Whereas Reconstruction considerations required an expanded geographic scope of the vicinage in order to obtain an impartial jury, the current practice of drawing from the entire federal district (rather than the county of offense) has the distinct feel of chasing after the devil. So, again, we ask, *what community?* While the decision to expand the venire beyond the county of offense appears to have had beneficent motivation, it currently operates to racialize the decision to prosecute federally. Without the expansion of the venire, the decision to prosecute for murder in state or federal court has no racial significance; however, the expansion of the venire from the county of offense to the entire district means that the federal government’s decision to prosecute can have a significant demographic impact on the composition of the jury.

### III. DISTRICTS WITH THE HIGHEST DEATH SENTENCING RATES TEND TO BE COMPRISED OF A LARGELY BLACK COUNTY SURROUNDED BY LARGELY WHITE COUNTIES

While the decision to prosecute federally rather than in state court has little or no difference on the jury demographics in many jurisdictions, it is highly significant in the federal judicial districts responsible for most of the black defendants on death row. In each of these districts, the county where the offense occurs has a high minority group population, but the overall composition of the federal district is heavily white. Thus, the shift to federal court results in a far whiter jury pool. We examine the demographic shift from county to district in four instances below.

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110. Patrick Healey, *Clinton Accepts Aid from a Divisive Figure*, N.Y. TIMES, May 20, 2007, <http://www.nytimes.com/2007/05/20/us/politics/20commence.html> (last visited Apr. 16, 2010).

111. Adam Nossiter, *Harry Lee, Outspoken Louisiana Sheriff, Dies at 75*, N.Y. TIMES, Nov. 2, 2007, at B6, available at <http://www.nytimes.com/2007/10/02/us/02lee.html>.

A. *Orleans Parish (New Orleans) and the Eastern District of Louisiana*

Orleans is a majority-minority group parish. According to 2008 federal census data, nearly 62% of the population of Orleans Parish is black and about 34% is white.<sup>112</sup> Orleans Parish juries have sentenced only one person to death in the past twelve years.<sup>113</sup> This is not for lack of opportunity: New Orleans consistently leads the nation in the infamous “most murders per capita” category, with 64 per 100,000 people in 2008.<sup>114</sup> Comparing Orleans to Jefferson Parish (its neighbor and second most populous parish in the Eastern District) is telling. In Jefferson during the same period (1998–2009) ten out of the fourteen cases to proceed to a capital trial (71%) resulted in death sentences.<sup>115</sup>

The United States District Court for the Eastern District of Louisiana has jurisdiction over federal capital trials held in connection with crimes that occur in Orleans Parish.<sup>116</sup> The United States Attorney General has authorized federal death penalty prosecutions against ten defendants within the Eastern District of Louisiana.<sup>117</sup> All ten defendants authorized for federal capital prosecutions were charged with murders that occurred within the confines of Orleans Parish.<sup>118</sup> All ten are either black or

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112. U.S. Census Bureau, State & County QuickFacts, Orleans Parish, Louisiana, <http://quickfacts.census.gov/qfd/states/22/22071.html> (last visited June 30, 2010) (noting 61.8% black and 33.9% white).

113. On August 30, 2009, an Orleans Parish jury returned a death sentence against Michael Anderson, following his conviction for the first-degree murder of five teenagers. *Orleans Parish Justice System Improving: Anderson Death Recommendation Is First Since 1997*, WDSU, Aug. 30, 2009, <http://www.wdsu.com/news/20637947/detail.html> (last visited Nov. 13, 2009). This conviction and death sentence was reversed based upon the trial court’s finding of a serious *Brady* violation. See Gwen Filosa, *Judge Grants Michael Anderson New Trial in 2006 Central City Massacre Case*, TIMES-PICAYUNE, Mar. 8, 2010, [http://www.nola.com/crime/index.ssf/2010/03/judge\\_grants\\_michael\\_anderson\\_new\\_trial.html](http://www.nola.com/crime/index.ssf/2010/03/judge_grants_michael_anderson_new_trial.html) (last visited July 1, 2010).

114. *Despite Drop in Crime, New Orleans’ Murder Rate Continues to Lead Nation*, TIMES-PICAYUNE, June 1, 2009, [http://www.nola.com/news/index.ssf/2009/06/despite\\_drop\\_in\\_crime\\_new\\_orle.html](http://www.nola.com/news/index.ssf/2009/06/despite_drop_in_crime_new_orle.html) (last visited Nov. 14, 2009).

115. Paul Purpura, *Surge in Death Penalty Prosecutions Slows in Jefferson Parish*, TIMES-PICAYUNE, July 6, 2009, [http://www.nola.com/news/index.ssf/2009/07/surge\\_in\\_capital\\_cases\\_slows\\_i.html](http://www.nola.com/news/index.ssf/2009/07/surge_in_capital_cases_slows_i.html) (last visited July 29, 2010).

116. 28 U.S.C. § 98(a) (2006).

117. See Appendix 2, *supra* note 26, at 152–161.

118. See *United States v. Davis*, 380 F.3d 821, 823 (5th Cir. 2004) (discussing defendants Len Davis and Paul Hardy); Brief for the United States at \*5, *United States v. Green*, 158 F.3d 583 (5th Cir. 1998) (Nos. 92-CR-468 & 96-CV-3188-H) (discussing defendants William Green and Oliver Brown); Brief for Appellant Richard Porter at \*5–7, *United States v. Porter*, 124 F. App’x. 838 (5th Cir. July 6, 2004) (No. 03-30918) (discussing defendant Johnny Davis); Second Superseding Indictment for Conspiracy to Commit Armed Bank Robbery, Armed Bank Robbery Resulting in

Hispanic.<sup>119</sup> Three defendants (out of the four whose cases proceeded to capital trials) received death sentences.<sup>120</sup> All three are black.<sup>121</sup>

Out of the hundreds of thousands of murders that were federally cognizable, and the fifty-seven that resulted in death sentences,<sup>122</sup> how did three black men who committed murder in Orleans Parish end up on federal death row? The answer lies in the contrasting demographics of Orleans Parish and the rest of the Eastern District of Louisiana. If jury pool eligibility remains roughly consistent with the population of a parish, then a state prosecution for a crime committed in Orleans Parish would reflect a jury pool consisting of 62% black jurors and 34% white jurors.<sup>123</sup> These numbers change dramatically when the case is prosecuted federally and the jury pool draws from the entire Eastern District of Louisiana.<sup>124</sup> The Eastern District encompasses a population of 1,541,720.<sup>125</sup> In Eastern District of Louisiana parishes (other than Orleans), 72% of the population is white and only 24% is black.<sup>126</sup> Overall, the population of the Eastern District (including Orleans Parish) is 64.4% white and 31.4% black.<sup>127</sup> Federal prosecutors are able to dilute minority-concentrated populations (obtaining far whiter jury pools) simply by prosecuting the same case in federal rather than state court.<sup>128</sup>

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Death and Violation of the Federal Firearms Act, *United States v. Johnson*, No. 04-CR-017 (E.D. La. Jan. 28, 2005) (discussing defendants Joseph Smith and John Johnson); *see also Major Drug Ring Operated Out of B.W. Cooper, Feds Say*, WDSU.COM, <http://www.wdsu.com/news/2422280/detail.html> (last visited July 25, 2010) (discussing defendant Terrance Benjamin); *United States v. Nelson*, No. 02-CR-304 (E.D. La. Oct. 17, 2002); *United States v. Pena*, No. 97-CR-145 (E.D. La. May 22, 1997).

119. *See* Appendix 2, *supra* note 26, at 152G–161G.

120. *See id.* at 154E, 155E, 160E.

121. *See id.* at 154G, 155G, 160G.

122. *See supra* note 112.

123. *See id.*

124. In one Eastern District case out of Orleans Parish, *United States v. Johnson*, 2010 WL 1294058 (E.D.La. Mar. 29, 2010), only two jurors who sat on Johnson's jury were from Orleans. Indeed, the Government used seven of its peremptory strikes to remove jurors from Orleans. Note that one of the authors of this Article is counsel for Johnson.

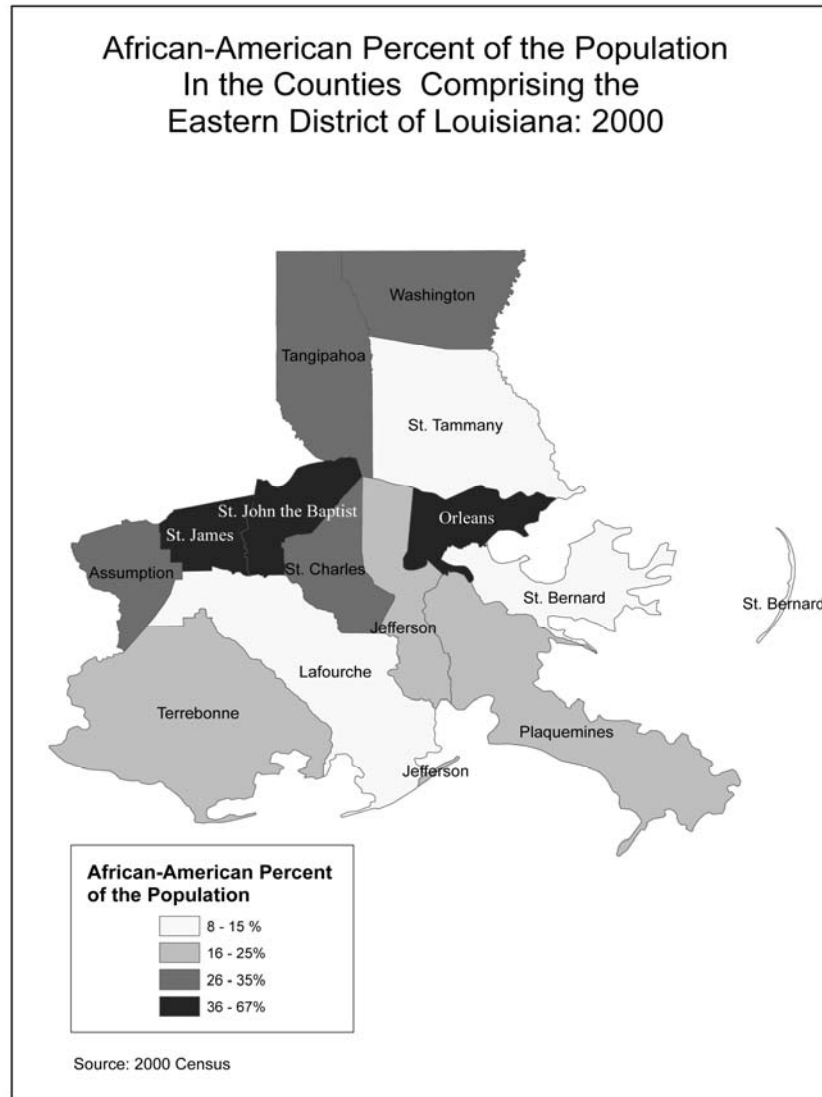
125. *See* Appendix A: Demographics of the Eastern District of Louisiana at 16B [hereinafter Appendix A], *available at* <http://www.law.washington.edu/wlr/issues/v085/docs/>.

126. *See id.* at 18D, 18F.

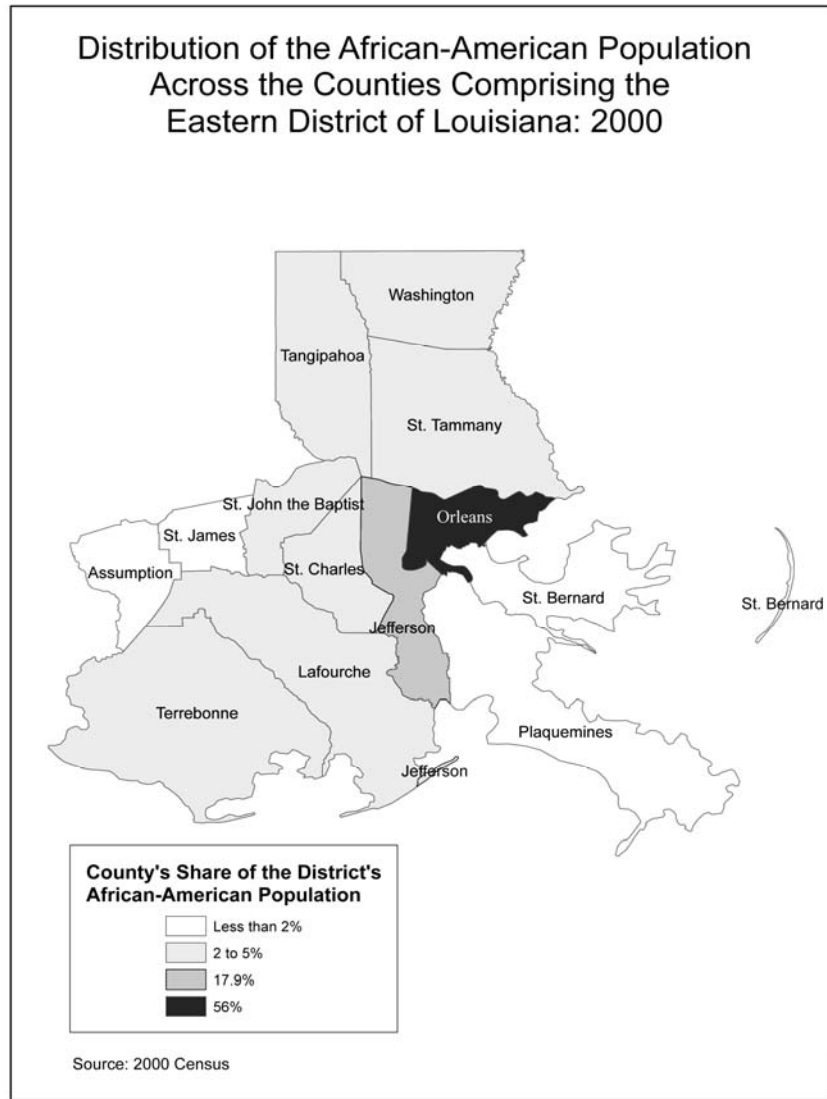
127. *Id.* at 16D, 16F. The population of Orleans Parish is 311,853, *see id.* at 5B, and contains 33.9% white and 61.8% black residents. *Id.* at 5D, 5F.

128. The Eastern District of Louisiana is not only racially imbalanced, but it provides a locus at the height of racial tension. *See, e.g.,* Brief of Ministers, *supra* note 100 at 15–18 (describing modern history of race tensions in Jefferson Parish, Louisiana, including the election of former Ku Klux Klan Grand Wizard David Duke as a state representative); Suzanne Le Breton, *Trial Begins for Alleged KKK Wizard*, ST. TAMMANY NEWS, May 5, 2010, <http://www.thestammanynews.com/articles/2010/05/09/news/doc4be0a1b3e3d4c610486902.txt> (last visited Aug. 3, 2010); Mary Foster,





*Interracial Couple Denied Marriage License in Tangipahoa Parish*, NOLA.COM, Oct. 16, 2009, [http://www.nola.com/crime/index.ssf/2009/10/interracial\\_couple\\_denied\\_marr.html](http://www.nola.com/crime/index.ssf/2009/10/interracial_couple_denied_marr.html) (last visited Aug. 3, 2010).



B. *St. Louis, Missouri and the Eastern District of Missouri*

The city of St. Louis has a population of 356,587.<sup>129</sup> About half (48.9%) of the city's residents are black and 47.2% are white.<sup>130</sup> Only four people (out of forty-nine) on Missouri's death row were convicted in St. Louis city.<sup>131</sup> St. Louis juries have returned only one death sentence since 2000.<sup>132</sup> Again, this is not for lack of violent crime. St. Louis trails only New Orleans in the competition for worst per capita murder rate.<sup>133</sup> Saint Louis County neighbors St. Louis city. Saint Louis County is 73.4% white, 21.8% black,<sup>134</sup> and has a population of 992,408.<sup>135</sup> Saint Louis County juries sentenced to death seventeen of the forty-nine death row inmates in Missouri.<sup>136</sup>

The United States District Court for the Eastern District of Missouri has jurisdiction over federally prosecuted crimes committed in St. Louis.<sup>137</sup> The Eastern District of Missouri has a population of 2,910,039.<sup>138</sup> Overall, the Eastern District is 81.8% white and 15.5% black.<sup>139</sup> The Eastern Division ("Saint Louis Division") of the Eastern District of Missouri draws jurors from fifteen counties and the city of St. Louis.<sup>140</sup> The Saint Louis Division has a population of 2,330,358 and is

129. U.S. Census Bureau, State & County QuickFacts, St. Louis city, Missouri, <http://quickfacts.census.gov/qfd/states/29/29510.html> (last visited Aug. 14, 2010) (2009 estimate).

130. U.S. Census Bureau, State & County QuickFacts, St. Louis city, Missouri, <http://quickfacts.census.gov/qfd/states/29/29510.html> (last visited Aug. 3, 2010) (2008 estimate).

131. *See* Missouri Death Row, Current Inmates, <http://missourideathrow.com/current-inmates/> (last visited July 4, 2010) (listing inmates by place of offense).

132. Missouri Death Row, Executions: 1989–2009, <http://missourideathrow.com/current-inmates> (last visited Jan. 12, 2010) (listing executions by place of offense).

133. Brendan McCarthy, *Police Chief Calls New Orleans Top Murder Rank Misleading*, TIMES-PICAYUNE, June 3, 2009, [http://www.nola.com/news/index.ssf/2009/06/police\\_chief\\_calls\\_new\\_orleans.html](http://www.nola.com/news/index.ssf/2009/06/police_chief_calls_new_orleans.html) (last visited July 4, 2010) ("St. Louis [city] has the nation's second-highest rate, about 47 murders per 100,000 people.").

134. *See* U.S. Census Bureau, State & County QuickFacts, St. Louis County, Missouri, <http://quickfacts.census.gov/qfd/states/29/29819.html> (last visited Aug. 3, 2010) (2008 estimate).

135. U.S. Census Bureau, State & County QuickFacts, St. Louis County, Missouri, <http://quickfacts.census.gov/qfd/states/29/29189.html> (last visited Aug. 14, 2010).

136. *See supra* note 132.

137. 28 U.S.C. § 105(a)(1) (2006).

138. *See* Appendix B: Demographics of the Eastern District of Missouri, at 52B [hereinafter Appendix B], available at <http://www.law.washington.edu/wlr/issues/v085/docs/>.

139. *See id.* at 52D, 52F.; *see also* U.S. Census Bureau, State & County QuickFacts, Missouri, <http://quickfacts.census.gov/qfd/states/29000.html> (last visited June 29, 2010); FedStats.gov, Demographic and Economic Profile, Federal Judicial District: Missouri Eastern, <http://www.fedstats.gov/mapstats/demographic/fjd/45.html> (last visited June 29, 2010).

140. United States District Court Eastern District of Missouri, Jury—Frequently Asked Questions, [http://www.moed.uscourts.gov/jury/Jury\\_FAQ.html#I\\_Dont\\_Live\\_In\\_The\\_City\\_-](http://www.moed.uscourts.gov/jury/Jury_FAQ.html#I_Dont_Live_In_The_City_-)

78.4% white and 17.9% black.<sup>141</sup> Again assuming proportional minority representation in the population and jury pools, a St. Louis defendant who is charged federally will have barely one-third the percentage of black citizens (48.9% versus 17.9%) and roughly two-thirds more the percentage of white citizens (47.2% versus 78.4%) in the pool of potential jurors than if that defendant had been tried in state court.

The United States Attorney General has authorized capital prosecutions against six individuals in the Eastern District of Missouri.<sup>142</sup> All six defendants are black.<sup>143</sup> All but one victim was white.<sup>144</sup> The two defendants charged with killing the only black victim received life sentences from juries.<sup>145</sup> One defendant pleaded guilty.<sup>146</sup> Three defendants from the Eastern District of Missouri are on federal death row.<sup>147</sup> All three are black and committed murders in St. Louis against white victims.<sup>148</sup>

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Why\_Do\_I\_Have\_To\_Serve\_There (last visited June 29, 2010).

141. See Appendix B-2: Demographics of the Saint Louis Division of the Eastern District of Missouri [hereinafter Appendix B-2], available at <http://www.law.washington.edu/wlr/issues/v085/docs/>. The Saint Louis Division is comprised of fifteen counties and includes the city of Saint Louis. See U.S. Dist. Court, E.D. Missouri, <http://www.moed.uscourts.gov/clerksoffice/Counties.html> (last visited July 4, 2010).

142. See Appendix 1, *supra* note 16.

143. See Appendix 2, *supra* note 27, at 211G–216G.

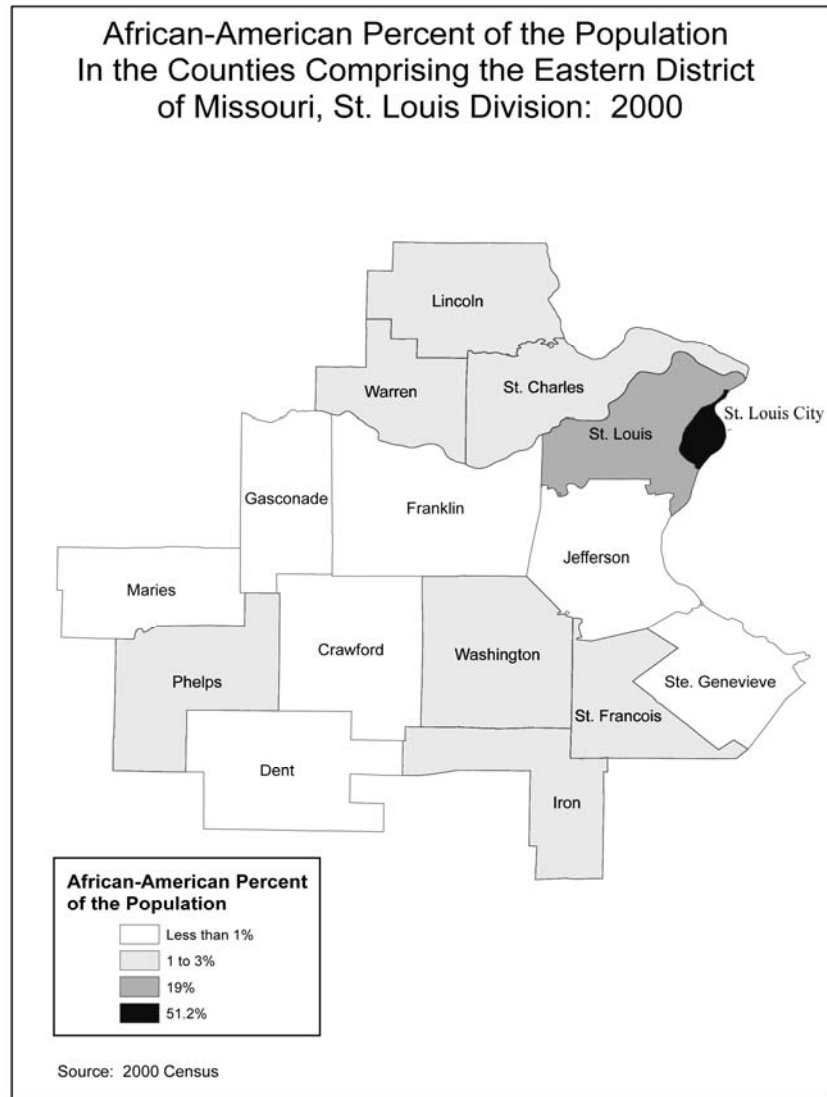
144. *Id.* at 211I–216I.

145. *Id.* at 214I–215I, 214E–215E.

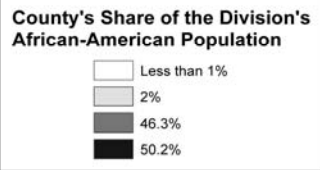
146. *Id.* at 211E.

147. *Id.* at 212E, 213E, 216E.

148. *Id.* at 212G, 212I, 213G, 213I, 216G, 216I; see also *United States v. Allen*, 406 F.3d 940, 941 (8th Cir. 2005) (discussing defendants Billie Allen Jerome and Norris Holder); *United States v. Bolden*, 545 F.3d 609, 612 (8th Cir. 2008).



Distribution of the African-American Population  
Across the Counties Comprising the Eastern District  
of Missouri, St. Louis Division: 2000



Source: 2000 Census

C. *Richmond and the Eastern District of Virginia*

The city of Richmond, Virginia has a population of 204,451.<sup>149</sup> Blacks comprise 52.2% of the population; whites comprise 44%.<sup>150</sup> Richmond suffered thirty-one homicides in 2008, which is roughly six times higher than the national murder rate.<sup>151</sup> But only one of the eleven inmates currently on Virginia's death row was sent there by a Richmond jury.<sup>152</sup> By contrast, Prince William County, also in the Eastern District of Virginia, has three residents on Virginia's death row, but has a population of 379,166 and had only twelve homicides in 2008.<sup>153</sup> One major difference is the complexion of the jury pool. In contrast to the 52.2% black population percentage in Richmond city, Prince William County has a black population percentage of 20.1% and a white population percentage of 69.2%.<sup>154</sup>

A shift in population complexion is evident whenever a capital crime committed in Richmond is prosecuted federally. The Eastern District of Virginia, with a total population of 5,637,640, is 23.2% black and 67.9% white.<sup>155</sup> Four defendants from the Eastern District of Virginia are on death row.<sup>156</sup> All four are black.<sup>157</sup> Three of the four death-sentenced defendants committed murder within Richmond city.<sup>158</sup> The Eastern District is divided into four divisions, and murders committed in

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149. U.S. Census Bureau, State & County QuickFacts, Richmond (city), Virginia, <http://quickfacts.census.gov/qfd/states/51/51760.html> (last visited Aug. 14, 2010).

150. *Id.*

151. Criminal Justice Info. Serv. Div., Fed. Bureau of Investigation, *2008 Crime in the United States*, [http://www.fbi.gov/ucr/cius2008/data/table\\_08\\_va.html](http://www.fbi.gov/ucr/cius2008/data/table_08_va.html) (last visited Nov. 24, 2009).

152. *See* Virginians for Alternatives to the Death Penalty, Virginia's Death Row, <http://www.vadp.org/death-row-inmate-profiles.html> (last visited July 25, 2010).

153. U.S. Census Bureau, State & County QuickFacts, Prince William County, Virginia, <http://quickfacts.census.gov/qfd/states/51/51153.html> (last visited Aug. 14, 2010); PRINCE WILLIAM COUNTY POLICE DEP'T, 2008 CRIME STATISTICS, available at <http://www.pwcgov.org/docLibrary/PDF/009958.pdf>.

154. U.S. Census Bureau, State & County QuickFacts, Prince William County, Virginia, <http://quickfacts.census.gov/qfd/states/51/51153.html> (last visited June 14, 2010).

155. *See* Appendix C: Demographics of the Eastern District of Virginia, at 66B, 66F, 66D [hereinafter Appendix C], available at <http://www.law.washington.edu/wlr/issues/v085/docs/>; *see* U.S. Census Bureau, State & County QuickFacts, Virginia, <http://quickfacts.census.gov/qfd/states/51000.html> (last visited July 2, 2010).

156. *See* Appendix 2, *supra* note 26, at 402E, 403E, 405E, 438E.

157. *Id.* at 402G, 403G, 405G, 438G.

158. *See* *United States v. Roane*, 378 F.3d 382, 389 (4th Cir. 2004) (discussing Richmond city defendants Corey Johnson, James Roane, and Richard Tipton); *United States v. Hager*, 521 F. Supp. 2d 533, 534 (E.D. Va. 2007) (noting crime committed in Alexandria, Virginia).

Richmond are prosecuted federally in the Richmond Division.<sup>159</sup> The Richmond Division draws its jury pool from thirty-four counties and independent cities.<sup>160</sup> The population of the Richmond Division is 1,555,589 and is 66% white and 29.7% black.<sup>161</sup> Thus, a capital jury in the Richmond Division is crafted from a population with far fewer black residents (29.7% versus 52.2%) and a far larger white population (66% versus 44%) than Richmond.<sup>162</sup>

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159. *See* U.S. DIST. COURT E. DIST. OF VA., LOCAL RULES FOR THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF VIRGINIA 2, *available at* <http://www.vaed.uscourts.gov/localrules/EDVALRMay2009.pdf>.

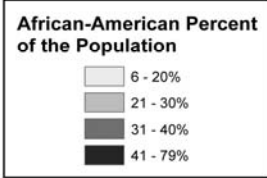
160. *See id.*

161. *See* Appendix C-2: Demographics of the Richmond Division of the Eastern District of Virginia, at 37B, 37D, 37F, *available at* <http://www.law.washington.edu/wlr/issues/v085/docs/>.

162. *Compare id.* at 37F, 4F *with id.* at 37D, 4D.

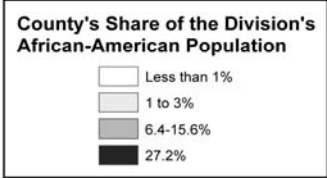


African-American Percent of the Population  
 In the Counties Comprising the Eastern District  
 of Virginia, Richmond Division: 2000



Source: 2000 Census

Distribution of the African-American Population  
 Across the Counties Comprising the Eastern District  
 of Virginia, Richmond Division: 2000



Source: 2000 Census

D. *Prince George's County and the District of Maryland*

Other than the city of Baltimore, Prince George's County has the highest percentage of black citizens in Maryland.<sup>163</sup> Prince George's County's population totals 834,560. Nearly 66% of the citizens in Prince George's County are black, while 28.1% are white.<sup>164</sup> Prince George's County juries have sent two defendants to death row since 1978.<sup>165</sup> By contrast, Baltimore County, which is roughly the same size (789,814), but is 68.8% white and 25.1% black,<sup>166</sup> has sent fourteen defendants to death row over the same time period.<sup>167</sup> Notably, all fourteen defendants (six white, eight black) were sentenced to death for the murder of white victims.<sup>168</sup>

The United States District Court for the District of Maryland encompasses a population of 5,699,478.<sup>169</sup> Approximately 63% of the population in the District of Maryland is white.<sup>170</sup> The black population equals 29.4%.<sup>171</sup> United States Attorneys General have authorized the death penalty against twenty-six individuals in the District of Maryland.<sup>172</sup> All twenty-six defendants are minority group members: twenty-three black and three Hispanic.<sup>173</sup> Both federal death row inmates from the District of Maryland are black.<sup>174</sup> Both committed crimes in Prince George's County.<sup>175</sup> The Southern Division (52.3% white and

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163. See Appendix D: Demographics of the District of Maryland, *available at* <http://www.law.washington.edu/wlr/issues/v085/docs/>. The City of Baltimore is an independent city in Maryland, and is thus the functional equivalent of a county.

164. U.S. Census Bureau, State & County QuickFacts, Prince George's County, Maryland, <http://quickfacts.census.gov/qfd/states/24/24033.html> (last visited July 2, 2010).

165. See Case Maryland, Maryland Citizens Against State Executions, Maryland's Death Row, <http://www.mdcase.org/node/24> (last visited Nov. 24, 2009). Heath Burch is listed under "Current Death Row" and Jean Clermont is listed under "MD Inmates Removed from Death Row (Since 1978)." *Id.*

166. U.S. Census Bureau, State & County QuickFacts, Baltimore County, Maryland, <http://quickfacts.census.gov/qfd/states/24/24005.html> (last visited Aug. 14, 2010).

167. See Case Maryland, Maryland Citizens Against State Executions, Maryland's Death Row, <http://www.mdcase.org/node/24> (last visited Nov. 24, 2009).

168. *Id.*

169. U.S. Census Bureau, State & County QuickFacts, Maryland, <http://quickfacts.census.gov/qfd/states/24000.html> (last visited Aug. 14, 2010).

170. *Id.*

171. *Id.*

172. See Appendix 1, *supra* note 16, at 16C.

173. See Appendix 2, *supra* note 26, at 166G–191G.

174. See *id.* at 170E, 179E.

175. See *United States v. Higgs*, 353 F.3d 281, 288 (4th Cir. 2003); Matthew Dolan, *Jurors OK Death in Pr. George's Case*, BALT. SUN., Nov. 11, 2005, <http://articles.baltimoresun.com/2005-11->

37.2% black<sup>176</sup>) of the District of Maryland handles federal crimes committed in Prince George's County.<sup>177</sup> Had these individuals been prosecuted in state court, they would have had a jury pulled from a population with roughly twice the representativeness of blacks (65.6% versus 37.2%)<sup>178</sup> and half the representativeness of whites (28.1% versus 52.3%).<sup>179</sup>

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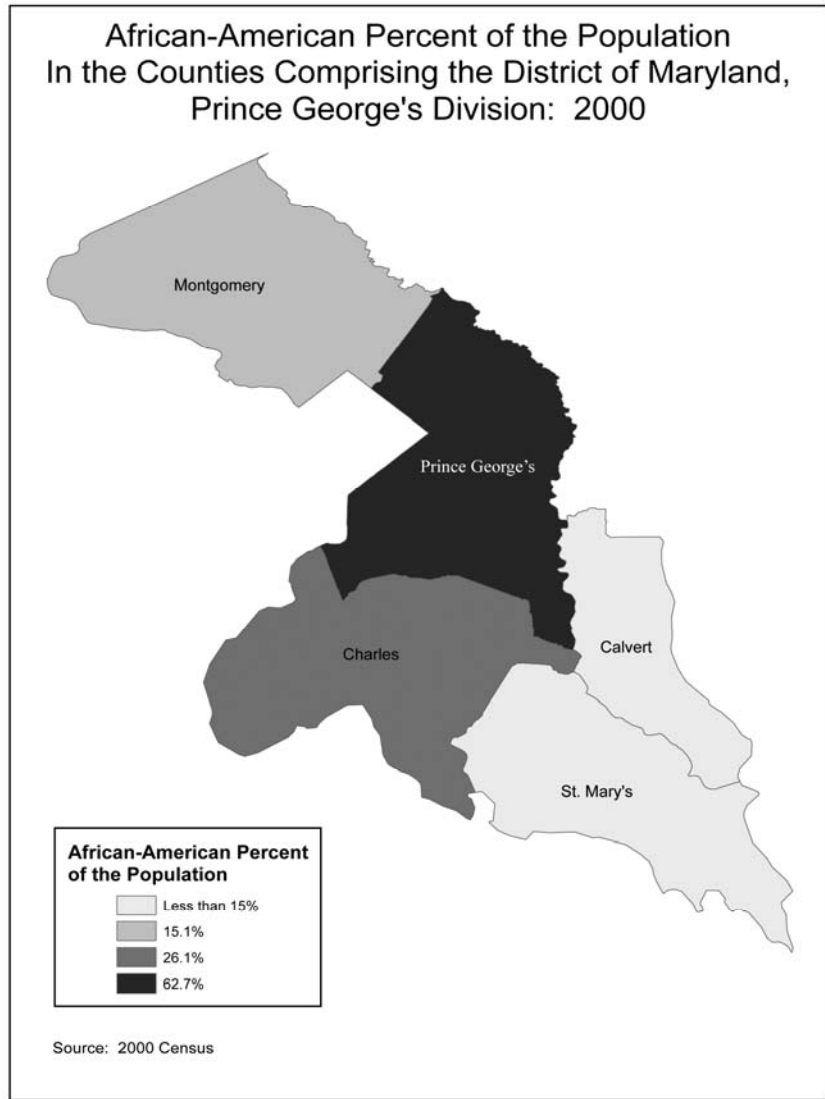
11/news/0511110140\_1\_george-county-hayes-prince-george (last visited July 25, 2010) (discussing Kenneth Lighty).

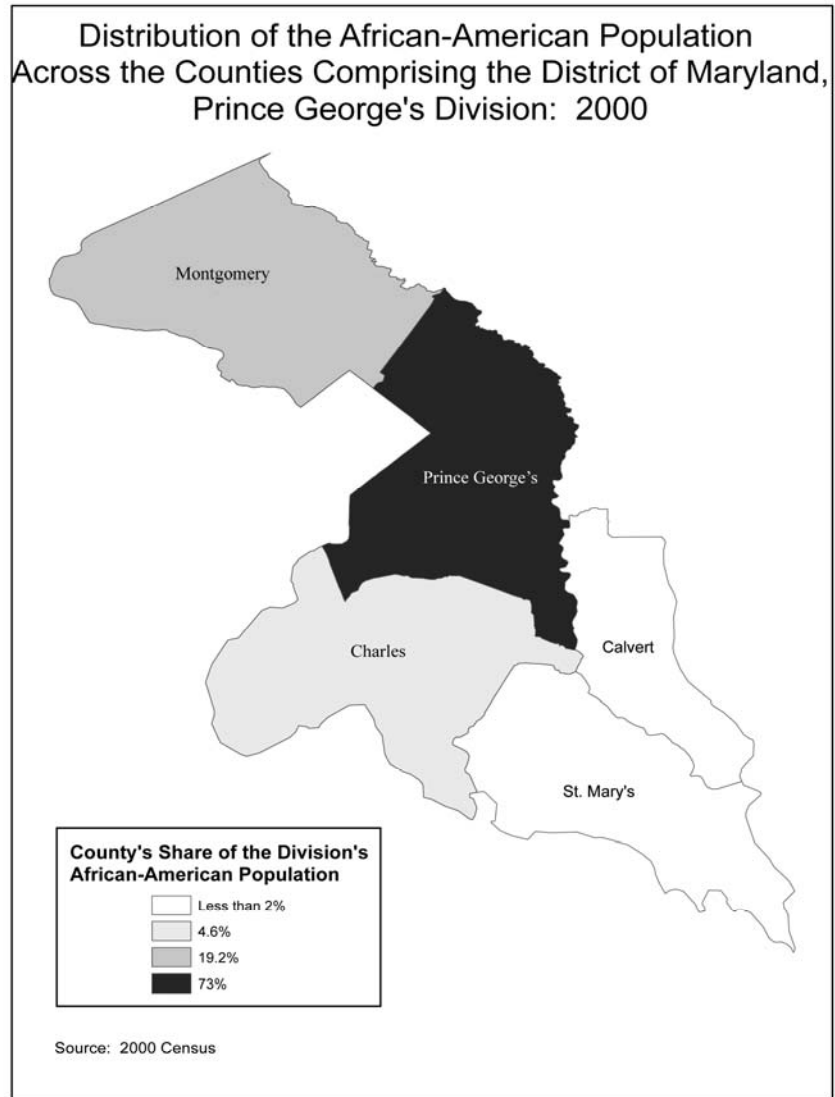
176. See Appendix D-2: Demographics of the Southern Division of the District of Maryland, at 8D, 8F [hereinafter Appendix D-2], available at <http://www.law.washington.edu/wlr/issues/v085/docs/>; see also U.S. Census Bureau, State & County QuickFacts, Maryland, <http://quickfacts.census.gov/qfd/states/24000.html> (last visited July 2, 2010).

177. 28 U.S.C. § 100(2) (2006).

178. See Appendix D-2, *supra* note 176, at 5F, 8F.

179. *Id.* at 5D, 8D.





#### IV. DOES JUROR RACE MATTER?

The demographic switch that results when death penalty cases are prosecuted federally tells us that a smaller percentage of black citizens are represented at the federal district level than in the county where most capital crimes occur. But that begs the question: *Does juror race matter?* Decisions from the United States Supreme Court, federal death penalty verdict outcomes, practical experience with jury selection, and experimental data rooted in implicit social cognition all suggest that juror race *does* matter in death penalty trials.

##### A. *The United States Supreme Court Is Divided Over Whether Juror Race Impacts Jury Deliberations*

The Court and its Justices have struggled for decades to reconcile the desire to eliminate racial barriers to inclusion with the commonsense notion that juror race impacts judgment.<sup>180</sup> In fair cross-section cases, the Court consistently acknowledges that the exclusion of black jurors (or women jurors) deprives the defendant of a tangible benefit: the voice and influence of people with different backgrounds and perspectives. Justice Marshall best stated this inclusive conception of the community in his plurality opinion in *Peters v. Kiff*<sup>181</sup>:

[W]e are unwilling to make the assumption that the exclusion of Negroes has relevance only for issues involving race. When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.<sup>182</sup>

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180. See Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2016

(1998) (“[T]he Court has suggested that race and sex matter [for fair-cross section purposes] both because they might influence individual jurors’ perspectives and because the behavior of a jury as a whole might be affected by its racial and sexual composition. On the other hand, the Court has been equally insistent that stereotypical assumptions about jurors’ attitudes are both unjustified and unjustifiable.”).

181. 407 U.S. 493 (1972).

182. *Id.* at 503–04; *cf.* Ballard v. United States, 329 U. S. 187, 193–94 (1946) (“The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a

While the Court accepts that the exclusion of an entire race from jury participation “deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented,” individual Justices are sharply divided at the single juror (or single jury) level. In *Powers v. Ohio*,<sup>183</sup> Justice Kennedy, writing for the Court, emphasized that “[r]ace cannot be a proxy for determining juror bias or competence.”<sup>184</sup> He continued: “A person’s race simply is unrelated to his fitness as a juror. We may not accept as a defense to racial discrimination the very stereotype the law condemns.”<sup>185</sup> Similarly, in *Edmonson v. Leesville Concrete Co.*,<sup>186</sup> Justice Kennedy’s opinion for the Court explained:

[While] [i]t may be true that the role of litigants in determining the jury’s composition provides one reason for wide acceptance of the jury system and of its verdicts[,] if race stereotypes are the price for acceptance of a jury panel as fair, the price is too high to meet the standard of the Constitution.<sup>187</sup>

The Court’s conservative wing, along with Justice Sotomayor, appears to hold the opposite view.<sup>188</sup> Justice Sotomayor famously stated that her Latina heritage could not help but color her judgment on the bench because of the experiential diversity and shared customs it provides her.<sup>189</sup> This connection between racial background and

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community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded.”)

183. 499 U.S. 400 (1991).

184. *Id.* at 410.

185. *Id.* (internal citations omitted).

186. 500 U.S. 614 (1991).

187. *Id.* at 630.

188. Of course, these positions are not inherently irreconcilable. One could support the ban on race-based peremptory challenges, believing that allowing parties to strike based on stereotypes is not worth the expense, and yet recognize that a black juror and a white juror are not fungible.

189. Much of the controversy surrounding the confirmation of Justice Sotomayor focused on the following portion of a speech she gave while a judge on the Second Circuit:

I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life. . . . Hence, one must accept the proposition that a difference there will be by the presence of women and people of color on the bench. Personal experiences affect the facts that judges choose to see. My hope is that I will take the good from my experiences and extrapolate them further into areas with which I am unfamiliar. I simply do not know exactly what that difference will be in my judging. But I accept there will be some based on my gender and my Latina heritage.

Sonia Sotomayor, *A Latina Judge’s Voice*, 13 BERKELEY LA RAZA L.J. 87, 92 (2002). Though Justice Sotomayor’s comments sparked great controversy, the intellectual heritage of her remarks can be traced back at least until Reconstruction. See Forman, *supra* note 93, at 898 (“Reconstruction



decision-making has been a popular theme of the Court's conservative Justices in jury cases. For example, dissenting in *Georgia v. McCollum*,<sup>190</sup> Justice Thomas acknowledged that juror race matters for verdict outcomes: “[S]ecuring representation of the defendant’s race on the jury may help to overcome racial bias and provide the defendant with a better chance of having a fair trial.”<sup>191</sup> Justice Scalia’s dissent in *Powers* similarly notes the “undeniable reality . . . that all groups tend to have particular sympathies and hostilities—most notably, sympathies toward their own group members.”<sup>192</sup> Justice O’Connor, concurring in *J.E.B. v. Alabama*,<sup>193</sup> wrote:

We know that like race, gender matters. . . . [O]ur holding is that any correlation between a juror’s gender and attitudes is irrelevant as a matter of constitutional law. But to say that gender makes no difference as a matter of law is not to say that gender makes no difference as a matter of fact.<sup>194</sup>

The observations of United States Supreme Court Justices, wise as they may be, are not the sole source for determining whether jury race matters. In the remainder of this Part, we detail a variety of findings that corroborate the notion that race and ethnicity influence juror judgment.

#### *B. Practical Evidence from Federal Death Penalty Authorization Data Suggests that Juror Race Does Matter*

We discussed above how the decision to prosecute capital crimes federally results in less diverse jury pools. But do federal juries return death sentences in areas where larger minority group populations exist even at the federal district level? The three federal districts with the lowest death sentence-to-authorizations ratio are the District of

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Republicans’ case for racially diverse juries was grounded in the understanding that people’s life experiences were significantly influenced by their race, and that these experiences, in turn, often made a difference in how they performed as jurors. So while the current majority believes that eliminating jury discrimination must be predicated on the belief that race is irrelevant, Reconstruction Republicans fought to end jury discrimination because of their contrary belief that race is significant.”).

190. 502 U.S. 42 (1992).

191. *Id.* at 61 (Thomas, J., dissenting).

192. *Powers v. Ohio*, 499 U.S. 400, 424 (1991).

193. 511 U.S. 127 (1994).

194. *Id.* at 148–49 (O’Connor, J., concurring). *But see id.* at 153–54 (Kennedy, J., concurring) (“[I]t is important to recognize that a juror sits not as a representative of a racial or sexual group but as an individual citizen. Nothing would be more pernicious to the jury system than for society to presume that persons of different backgrounds go to the jury room to voice prejudice.”).

Columbia, Puerto Rico, and the Southern District of New York.<sup>195</sup> These three federal districts account for 55 of the 460 death-authorized cases but are not responsible for a single death sentence.<sup>196</sup> Each of these three federal districts has a relatively small white, non-Hispanic population: 1.2% for Puerto Rico,<sup>197</sup> 32.5% for the District of Columbia,<sup>198</sup> and 46.7% for the Southern District of New York.<sup>199</sup>

Federal death sentences also occur infrequently in areas where the county of offense and the federal district have similar demographic profiles. Excluding the three districts that have large minority populations (District of Columbia, Puerto Rico, Southern District of New York), ten federal districts have had five or more death-authorizations but have obtained zero death sentences.<sup>200</sup> Eight of these districts have similar demographic profiles between the federal district and most populous county<sup>201</sup>:

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195. See Appendix 1, *supra* note 16, at 38E, 63E, 57E. The Eastern District of Michigan has the same death sentence-to-authorization rate as the Southern District of New York, see *id.* at 48E, but the Eastern District of Michigan is 74% white and 18% black. See FedStats.gov, Demographic and Economic Profile, Federal Judicial District: Michigan Eastern, <http://www.fedstats.gov/mapstats/demographic/fjd/40.html> (last visited June 13, 2010) (calculating percentages based on 2005–2006 population figures). Wayne County, which encompasses Detroit, is 55% white and 42% black. See FedStats.gov, Wayne County, Michigan, <http://www.fedstats.gov/qf/states/26/26163.html> (last visited June 13, 2010). Of the sixteen death-authorizations in the Eastern District of Michigan, two resulted in acquittal, four are pending trial, two were withdrawn by the Government, one was dismissed, one never went to trial due to the death of the defendant, five resulted in guilty pleas, and one resulted in a life sentence from a jury. See Appendix 2, *supra* note 26, at 192E–207E. One possible causal explanation is that Michigan does not have the death penalty (and never has). See Death Penalty Information Center, States Without the Death Penalty, <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited July 4, 2010). Of course, this explanation confounds race as an independent explanatory factor as the District of Columbia, Puerto Rico, and New York are all without the death penalty. See *id.*; see also *United States v. Fell*, 571 F.3d 264, 289 (2d Cir. 2009) (Calabresi, J., dissenting) (citing Alan Feuer, *An Aversion to the Death Penalty, but No Shortage of Cases*, N.Y. TIMES, Mar. 10, 2008, at B1 (“The very asking of the death penalty had long been unusual for federal prosecutors in much of our Circuit. And even when they have asked for it, juries—constitutionally mandated juries of the state and district—have refused to impose it. In other words, as a matter of judgment, applying the norms of their ‘state and district,’ local federal juries have repeatedly and overwhelmingly rejected Washington’s invitation to execute criminals in their states.”)).

196. See Appendix 2, *supra* note 26.

197. U.S. Census Bureau, Census 2000 Data for Puerto Rico, <http://www.census.gov/census2000/states/pr.html> (last visited Jun. 16, 2010).

198. U.S. Census Bureau, Census 2000 Data for the District of Columbia, <http://www.census.gov/census2000/states/dc.html> (last visited Jun. 16, 2010).

199. FedStats.gov, Demographic and Economic Profile, Federal Judicial District: New York Southern, <http://www.fedstats.gov/mapstats/demographic/fjd/55.html> (last visited June 13, 2010) (calculating percentages based on 2005–2006 population figures).

200. See Appendix 1, *supra* note 16.

201. See *id.*

<b>Federal Jurisdiction</b>	<b>Number of Death Authorizations/Sentences<sup>202</sup></b>	<b>Percentage Whites/Blacks: District<sup>203</sup></b>	<b>Percentage Whites/Blacks: Populous County(ies)<sup>204</sup></b>
Eastern District of California	6/0	80/6	70/10
Northern District of California	8/0	69/6	58/7
District of Colorado	6/0	89/1	83/10
District of Connecticut	5/0	85/10	83/11 81/14
District of Kansas	7/0	89/6	82/9 85/9
District of New Mexico	8/0	84/3	92/1 86/4
Northern District of New York	5/0	91/5	82/12 85/10
Middle District of Pennsylvania	7/0	93/4	93/3

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202. *See id.*

203. The population percentages for the listed federal districts are calculated based on 2005–2006 population figures from the “Federal Judicial Districts” database on FedStats.gov. *See* <http://www.fedstats.gov/mapstats/fjd/> (last visited July 3, 2010). Data for an individual district can be accessed by selecting a state from the drop down list and selecting the individual district.

204. The population percentages for individual counties are from the “MapStats: United States” database on FedStats.gov. *See* <http://fedstats.gov/qf/> (last visited July 3, 2010). Data for an individual county can be accessed by selecting a state from the drop down list and then selecting the individual county from the drop down list on the next page. The most populous county or counties for the listed districts are as follows: Eastern District of California (Sacramento County), Northern District of California (San Francisco County), District of Colorado (Denver County), District of Connecticut (Fairfield County and Hartford County), District of Kansas (Sedgwick County and Shawnee County), District of New Mexico (Santa Fe County and Bernalillo County), Northern District of New York (Albany County and Onondaga County), and Middle District of Pennsylvania (Cumberland County). *See id.*

These statistics illustrate that the degree of demographic similarity between an overall federal district and its counties has an observable impact on death sentencing rates.<sup>205</sup>

### C. Attorneys Know that Juror Race Does Matter

The Constitution's Equal Protection Clause prohibits attorneys from striking jurors on the basis of their race.<sup>206</sup> But that does not stop prosecutors from striking black jurors in criminal cases.<sup>207</sup> In *Snyder v. Louisiana*,<sup>208</sup> Justice Alito wrote the opinion for seven members of the Court reversing a death sentence out of Jefferson Parish, Louisiana, where the prosecution struck all five prospective black jurors.<sup>209</sup> The

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205. At first glance, the Southern District of Illinois (six authorizations, zero death sentences) appears to be an exception to the trend we document. See Appendix 1, *supra* note 16, at 44C, 44D. The Southern District is 88% white and 10% black. See FedStats.gov, Demographic and Economic Profile, Federal Judicial District: Illinois Southern, <http://www.fedstats.gov/mapstats/demographic/fjd/26.html> (last visited June 13, 2010) (calculating percentages based on 2005–2006 population figures). Saint Clair County, which encompasses East Saint Louis, is 67% white and 29% black. FedStats.gov, St. Clair County, Illinois, <http://www.fedstats.gov/qf/states/17/17163.html> (last visited June 13, 2010). However, no jury in the Southern District ever has decided a capital case. Out of the six authorizations, five authorizations were withdrawn before trial. The final defendant pleaded guilty. Appendix 2, *supra* note 26. Both the Western District of Tennessee (nine authorizations, zero death sentences) and Shelby County, which encompasses Memphis, have (relatively) high black citizen populations at 38% and 52% respectively. See Appendix 1, *supra* note 16, at 65C and 65D; see also FedStats.gov, Demographic and Economic Profile, Federal Judicial District: Tennessee Western, <http://www.fedstats.gov/mapstats/demographic/fjd/75.html> (last visited June 13, 2010) (calculating percentages based on 2005–2006 population figures); FedStats.gov, Shelby County, Tennessee, <http://www.fedstats.gov/qf/states/47/47157.html> (last visited June 13, 2010). The Middle District of Tennessee (five authorizations, zero death sentences) is closer to being an exception to the trend. See Appendix 1, *supra* note 16, at 64C and 64D. The Middle District is 82% white and 13% black. See FedStats.gov, Demographic and Economic Profile, Federal Judicial District: Tennessee Middle, <http://www.fedstats.gov/mapstats/demographic/fjd/74.html> (June 13, 2010) (calculating percentages based on 2005–2006 population figures). Davidson County, which encompasses Nashville, is 67% white and 27% black. FedStats.gov, Davidson County, Tennessee, <http://www.fedstats.gov/qf/states/47/47037.html> (last visited June 13, 2010).

206. *Batson v. Kentucky*, 476 U.S. 79, 89 (“[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State’s case against a black defendant.”).

207. In federal capital prosecutions where the shift in the jury pool dilutes minority representation, *Batson* violations compound the problem. For example, in a case involving a black defendant sentenced to death out of Orleans Parish, prosecutors used eight strikes to remove all but two black jurors. Memorandum of Law and Points of Authority in Support of Movant’s Motion for New Trial at 6, *United States v. Johnson*, 2010 WL 1294058 (E.D. La. Mar. 29, 2010) (No. 04-CR-00017), 2009 WL 2968118 at ¶ 12.

208. 552 U.S. 472 (2008).

209. *Id.* at 474–76. “Although African Americans made up approximately 20% of the population of Jefferson Parish in 1996, nine—10.6%—of the eighty-five prospective jurors questioned in the

trial judge asked the prosecutor to proffer a race-neutral explanation for striking one of the black jurors,<sup>210</sup> Mr. Brooks. The prosecutor explained that Brooks looked “nervous” about missing his time as a student teacher (even though the judge received assurance from Brooks’ dean that his absence would be excused).<sup>211</sup> By contrast, the State did not strike a white juror, Mr. Laws, who was “a self-employed general contractor,” with “two houses that are nearing completion.”<sup>212</sup> One of the houses had occupants “moving in [that] weekend,” and Mr. Laws explained that if he served on the jury then “the people won’t [be able to] move in.”<sup>213</sup> Moreover, Mr. Laws stated “[m]y wife just had a hysterectomy, so I’m running the kids back and forth to school, and we’re not originally from here, so I have no family in the area, so between the two things, it’s kind of bad timing for me.”<sup>214</sup>

The strike-pattern in the *Snyder* case is not an aberration in Jefferson Parish (a heavily white parish adjacent to Orleans Parish, Louisiana). The Louisiana Supreme Court has addressed three convictions in the last decade where Jefferson Parish prosecutors appeared to exclude jurors on the basis of race.<sup>215</sup> Jefferson Parish prosecutors are particularly adept at keeping blacks off of Jefferson Parish capital juries: prosecutors successfully struck forty-two of forty-nine (90%) qualified black jurors (and attempted to strike two more) in twelve capital prosecutions.<sup>216</sup> These strike rates left zero black jurors on seven death cases, one black

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six panels were black. Four were dismissed for cause. The prosecution used peremptory strikes to remove the remaining five.” Brief for the Petitioner at 10, *Snyder*, 552 U.S. 472 (No. 06-10119) (internal citations omitted).

210. There are three steps to the *Batson* inquiry: “First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties’ submissions, the trial court must determine whether the defendant has shown purposeful discrimination.” *Snyder*, 552 U.S. at 476–77 (internal citations omitted).

211. *Id.* at 478, 480–81.

212. *Id.* at 483.

213. *Id.* at 483–84.

214. *Id.* at 484.

215. *State v. Harris*, 820 So. 2d 471, 472, 474 (La. 2002) (reversed on *Batson* grounds where prosecutor gave the following race-neutral reason for striking a black juror: he is “a single black male on the panel with no children”); *State v. Jacobs*, 789 So. 2d 1280, 1283 n.2 (La. 2001) (noting that judge failed to “properly address *Batson* challenges” where prosecutor appeared to strike jurors for racially discriminatory purposes); *State v. Myers*, 761 So. 2d 498, 499–500, 503 (La. 2000) (reversing where trial court neglected *Batson* analysis despite the State striking six of seven black venire members).

216. Brief of Ministers, *supra* note 100, at 9–10.

juror on four death cases, and two black jurors on one death case.<sup>217</sup> These numbers are only slightly better in non-capital cases. A study of 390 trials and 10,000 prospective jurors in Jefferson Parish from 1994 to 2002 reveals that prosecutors struck 55% of qualified black jurors but only 16% of qualified white jurors.<sup>218</sup>

The Jefferson Parish experience is not unique. In *Miller-El v. Dretke*,<sup>219</sup> the Court reversed a capital conviction where prosecutors used their peremptory challenges to strike ten of eleven prospective black jurors.<sup>220</sup> The Court noted that the Dallas, Texas prosecutor's office had a long-standing history of striking as many black jurors as possible, used a twenty year-old voir dire manual that instructed line prosecutors to exclude prospective black jurors, took advantage of a "jury shuffle" process to dilute the concentration of blacks on jury panels, and used different lines of scripted questioning for black and white jurors.<sup>221</sup> The Court also noted testimony from a district court judge, who was formerly a prosecutor at the Dallas District Attorney's office, that allowing a black person to serve on a jury constituted a terminable offense at the office during the 1950s and 1960s.<sup>222</sup> In Pennsylvania, a study of 317 Philadelphia capital trials revealed that prosecutors struck 51% of black jurors but 26% of non-black jurors.<sup>223</sup>

Blacks are not struck *because* they are black, but rather because of the perceptions that black Americans have an appreciation for the complex circumstances that lead a criminal defendant—especially a black criminal defendant—to commit an offense.<sup>224</sup> Prosecutors also believe that black jurors tend to be more mistrusting of law enforcement than

217. *Id.* at 11.

218. *Id.* at 11 (citing Richard Bourke, Joe Hingston & Joel Devine, *Black Strikes: A Study of the Racially Disparate Use of Peremptory Challenges By the Jefferson Parish District Attorney's Office* (Sep. 2003), available at [http://blackstrikes.com/resources/report/black\\_strikes\\_report\\_september\\_2003.pdf](http://blackstrikes.com/resources/report/black_strikes_report_september_2003.pdf)).

219. 545 U.S. 231 (2005).

220. *Id.* at 237, 265.

221. *Id.* at 253–55, 264 (noting the "widely known evidence of the general policy of the Dallas County District Attorney's Office to exclude black venire members from juries").

222. *Miller-El v. Cockrell*, 537 U.S. 322, 334 (2003).

223. See *Dretke*, 545 U.S. at 268 (Breyer, J., concurring) (citing David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 52–53, 73 n.197 (2001)).

224. See, e.g., Samuel R. Sommers & Michael I. Norton, *Race and Jury Selection: A Psychological Perspective on the Peremptory Challenge Debate*, 63 AM. PSYCHOLOGIST 527, 531 (2008) ("A provocative issue in considering juror stereotypes is that some of these assumptions about race may be accurate. Research suggests, for instance, that Black jurors are often more lenient toward Black defendants than are White jurors.").

white jurors.<sup>225</sup> Whether or not these stereotypes are accurate, the larger point is that juror race (or at least race by proxy) matters. Otherwise *Batson*'s command that jurors not be struck on account of race would be far easier to enforce.<sup>226</sup>

*D. Experimental Evidence Suggests that Both Jury Composition and Juror Race Mediate Verdict Outcomes*

Dissenting in *Georgia v. McCollum*,<sup>227</sup> Justice O'Connor underscored the "substantial reason to believe that the distorting influence of race is minimized on a racially mixed jury."<sup>228</sup> Minority group juror dilution can impact the outcomes of capital cases.<sup>229</sup> Majority group jurors exhibit greater implicit (if not explicit) bias against black defendants.<sup>230</sup> Further, as this section discusses, majority group jurors also interpret ambiguous evidence in racially-biased ways, utilize stereotypes to prejudice black defendants, are susceptible to ubiquitous priming devices that shape outcomes in racially influenced directions, and may treat black defendants more harshly than white defendants.

Social science research using mock jury studies, as well as juror interviews from real capital jurors, lend empirical support to the claim by suggesting that diverse juries deliberate more thoroughly, discuss a broader range of evidence, perceive evidence more accurately, and perceive themselves as more legitimate than all-white juries.<sup>231</sup>

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225. *Id.*

226. See *Dretke*, 545 U.S. at 270 (Breyer, J., concurring) (noting that, despite *Batson*, "the use of race- and gender-based stereotypes in the jury-selection process seems better organized and more systematized than ever before").

227. 505 U.S. 42 (1992).

228. *Id.* at 68 (O'Connor, J., dissenting).

229. For a broader examination of how federal prosecutions impact the jury pool in non-capital cases, see Laura G. Dooley, *The Dilution Effect: Federalization, Fair Cross-Sections, and the Concept of Community*, 54 DEPAUL L. REV. 79, 80 (2004) ("But a new, subtler manipulation of the jury composition scheme is emerging, one that makes the theoretical issues around the concept of community immediate and compelling. Federal prosecutors are taking control in increasing numbers of criminal prosecutions previously within the purview of state prosecutors. This 'federalization' of so-called street crime, notably murders and robberies, has the effect in most states of widening the 'community' from which jurors will be drawn from a county within a state to a federal district or division encompassing several counties. A troubling second-order effect of this practice, then, is to de-localize juries, often diluting any significant minority representation.").

230. See Janet Bond Arterton, *Unconscious Bias and the Impartial Jury*, 40 CONN. L. REV. 1023, 1025–29 (2008); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L. J. 345, 350–73 (2007).

231. See Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597 (2006). In 2006, Professor Sommers conducted a mock jury experiment aimed at

Community members also view verdicts from diverse juries as more legitimate.<sup>232</sup> Jury diversity also impacts verdict outcomes. The notion that black jurors return guilty verdicts less frequently than white jurors is no longer surprising. But experimental evidence suggests that *white jurors* who serve on diverse juries return guilty verdicts less frequently than white jurors serving on all-white juries.<sup>233</sup> The experimental data converges with other findings on the effects of racial diversity on jury outcomes. Professor William Bowers studied seventy-four capital jury trials with a black defendant and a white victim, and found that juries with four or more white jurors have a much higher death sentencing rate than juries with two or more black jurors.<sup>234</sup> Simply adding a single black person altered the deliberation outcomes. Juries with no black members imposed death sentences in 71.9% of cases.<sup>235</sup> When at least one black person served on the jury the number plummeted to 42.9%.<sup>236</sup>

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measuring the impact of juror diversity on jury deliberations and outcomes. Sommers used 200 jury-eligible participants, who, with the help of local judges and jury-pool administrators, were recruited largely at a Michigan courthouse where the jurors had arrived for jury service. *Id.* at 602. Sommers first divided participants into two types of juries: homogenous juries (six white jurors) and heterogeneous juries (four white jurors and two black jurors). *Id.* at 600. He then provided each jury with either a race-neutral or race-salient voir dire questionnaire. Next, he showed each jury a 30-minute *Court TV* video trial summary of a black defendant in a sexual assault case. Each jury then heard an experimenter read Michigan jury instructions and remind the jurors that their objective was to reach unanimity. Finally, Sommers asked each jury to deliberate for sixty minutes. *Id.* at 602–03. Heterogeneous juries performed better across every measure of thoroughness and accuracy. Juries with four white and two black jurors deliberated longer (50.67 minutes versus 38.49 minutes), discussed more case facts (30.48 versus 25.93), made fewer factually inaccurate statements (4.14 versus 7.28), had fewer factual inaccuracies left uncorrected (1.36 versus 2.49), cited more “missing” evidence (1.87 versus 1.07), raised more race-related issues (3.79 versus 2.07), discussed possible racism more freely (1.35 versus .93), and displayed less resistance at the very mention of racism (22% of comments met with resistance versus 100%) than all-white juries. *Id.* at 605. While black jurors raised race-related issues (e.g. the role of race in police investigations) most often, white jurors on diverse juries raised these issues much more frequently than white jurors on all-white juries. Interestingly, white jurors serving on diverse juries raised the possibility of racism more than their fellow black jurors and more than white jurors on all-white juries. *Id.* at 605–06.

232. See Leslie Ellis & Shari Seidman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI.-KENT. L. REV. 1033, 1039 (2003).

233. See Sommers, *supra* note 231, at 606.

234. 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).

235. *Id.*

236. *Id.*; see also Adam Liptak, *Court Ruling Expected to Spur Convictions in Capital Cases*, N.Y. TIMES, June 9, 2007, at A1, A12 (reporting that in one study published in the University of Pennsylvania Journal of Constitutional Law where over 1,155 capital jurors were interviewed, researchers found that “the presence of a single Black male juror . . . reduc[ed] the likelihood of a death sentence to 43 percent from 72 percent”). These findings converge with the more general understanding that decision-maker diversity increases the likelihood that outcomes are not



Implicit social cognition might account for why juror race (and thus jury composition) mediates the quality and outcome of jury deliberations.<sup>237</sup> Implicit social cognition refers to the process by which the brain uses “mental associations that are so well-established as to operate without awareness, or without intention, or without control.”<sup>238</sup> Thousands of American citizens participate each year in studies designed to measure implicit associations.<sup>239</sup> Results consistently demonstrate that white participants (and, to a lesser degree, participants from a variety of other racial and ethnic backgrounds) have strong implicit associations between “White and Good,” “Black and Bad,” and “Black and Guilty.”<sup>240</sup> The results have predictive validity.<sup>241</sup> High implicit bias scores correlate with disparate treatment of black defendants: jurors tend to interpret<sup>242</sup> and misremember<sup>243</sup> evidence in

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influenced by race. *See e.g.*, Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 981 (2006) (“A significant body of social science evidence supports the conclusion that the presence of population diversity in an environment tends to reduce the level of implicit bias.”); *see generally* Kim Taylor Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1276–95 (2000) (explaining the correlation between race, experience, and verdict outcomes).

237. *See Georgia v. McCollum*, 502 U.S. 42, 69 (1992) (O’Connor, J., dissenting) (“In a world where the outcome of a minority defendant’s trial may turn on the misconceptions or biases of White jurors, there is cause to question the implications of this Court’s good intentions.”).

238. Project Implicit, *FAQS*: “What is the Difference Between ‘Implicit’ and ‘Automatic’?,” <https://implicit.harvard.edu/implicit/demo/background/faqs.html#faq5> (last visited June 13, 2010).

239. *See, e.g.*, Jerry Kang & Mahzarin Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CAL. L. REV. 1063, 1064 (2006) (“[E]vidence from hundreds of thousands of individuals across the globe shows that (1) the magnitude of implicit bias toward members of outgroups or disadvantaged groups is large, (2) implicit bias often conflicts with conscious attitudes, endorsed beliefs, and intentional behavior, [and] (3) implicit bias influences evaluations of and behavior toward those who are the subject of the bias . . .”).

240. *See* Justin D. Levinson, Huajian Cai & Danielle Young, *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, OHIO ST. J. CRIM. L. (forthcoming), available at <http://ssrn.com/abstract=1471567> (finding that participants have strong implicit associations between “Black” and “Guilty,” and that these results have strong predictive validity).

241. *But see* Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 EMORY L.J. 1053, 1068 (2009) (noting that the implicit association test could be measuring conscious racism that the beholder would rather the public not know rather than unconsciously held beliefs: “The great contribution of the [implicit association test] may be not that it captures a new type of bias, so much as that it employs a subtle and sophisticated means of measuring bias, which has become ever more elusive as research participants attempt to outsmart any test that would label them a racist.”).

242. *See* Justin Levinson & Danielle Young, *Compelling (Skin Tone) Evidence: Implicit Racial Bias and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1601615>. Professor Levinson tested whether implicit race bias impacts jurors’ interpretation of ambiguous evidence. Levinson provided a group of jury-eligible participants with a brief background story of a fictional Mini-Mart robbery and then had the participants view three pictures from the crime scene for four seconds each. The first and second

racially biased ways, correlate black physical features with criminality,<sup>244</sup> provide less “mental due process” to black defendants,<sup>245</sup> and judge black defendants more harshly.<sup>246</sup>

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pictures were innocuous. The third picture—the centerpiece of the study—displayed one masked assailant reaching over the counter with a gun in his left hand. The only identifiable race-cue for the assailant is a small section of visible flesh on his forearm. Levinson altered the skin-tone of the assailant, showing half the participants a light-skinned suspect and the other half a dark-skinned suspect. After watching the short video, suspects were told that a suspect was caught, and then provided with a series of ambiguous evidence about the suspect. Levinson asked the participants to rate the probative value of each piece of ambiguous evidence. The study produced several results. First, participants shown the photo with the dark-skinned suspect were significantly more likely to find ambiguous evidence more probative of guilt. Participants who viewed the dark-skinned defendant were also more likely to believe that the suspect was guilty—both on a scale of 0 to 100 and by a traditional guilty / not guilty measure. As Levinson concluded, these results undermine the foundational assumption that guilt is weighed solely based on the probative strength of the evidence. *Id.*

243. *See* Levinson, *supra* note 230. Professor Levinson conducted an experiment to test whether implicit race bias impacted jurors’ memories of case facts. Levinson provided jury-eligible participants with a fictional story about a confrontation between two men. Some jurors read about “William” the white defendant, while others read about “Tyronne” the black defendant. *Id.* at 350. The rest of the story remained constant. But when Levinson asked jurors to remember pertinent facts from “the confrontation,” he found that the race of the defendant affected how participants recalled the story’s details. Participants more frequently remembered aggressive details when Tyronne rather than William was the defendant. *Id.* Levinson concluded “that the race of a civil plaintiff or a criminal defendant can act implicitly to cause people to misremember a case’s facts in racially biased ways.” *Id.* The participants appeared to remember “facts” that did not appear in the story more often when those facts were stereotype-consistent, such as facts that portray black males as aggressive. *See id.* at 398–401.

244. *See* Jennifer Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 *PSYCHOL. SCI.* 383 (2006). Equipped with a dataset of 600 death-eligible defendants in Philadelphia, Pennsylvania between 1979–99 (the Baldus dataset), Professor Jennifer Eberhardt set out to determine whether a black defendant’s physical features (and, more specifically, his stereotypical “Blackness”) impacted juror views of the defendant’s death-worthiness. *Id.* at 383–84. Eberhardt took the pictures of the 44 black defendants (from the Baldus dataset) who had been convicted of killing white victims and whose trials proceeded to the penalty phase. She then asked participants (who were not told that the men in the pictures were criminals) to rate each picture in terms of stereotypical blackness. *Id.* at 384. She then took the ratings of the 44 defendants, determined whether each had been sentenced to death, controlled for six non-racial factors known to impact capital sentencing, and then calculated whether the presence of stereotypical black physical features impacted death verdict outcomes. *Id.* The results in cases with a white victim and black defendant, not only is the fact of being black influential, but the degree to which black defendants appear stereotypically black (e.g., thick lips, wide nose) correlates with the likelihood of being sentenced to death. Black defendants whose appearance situated them among the top half of the stereotypicality distribution were more than twice as likely to receive a death sentence. *Id.*

Eberhardt also investigated the relationship between the use of non-human terminology to describe black capital defendants and sentencing outcomes. *See* Phillip Atiba Goff, Jennifer L. Eberhardt, Melissa J. Williams & Matthew Christian Jackson, *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 *J. PERSONALITY & SOC. PSYCHOL.* 292 (2008). In earlier laboratory research, Eberhardt had determined that after being flashed a picture of a black face, participants are able to recognize pictures of apes in fewer frames

The social science research confirms what the architects of the Constitution appeared to understand: a jury of one's neighbors and peers is better at ferreting out the complex nuances in events—complexities that are specifically relevant in a jury's determination whether to sentence a defendant to life or death. Still the question remains: how do the courts administer this understanding?

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than immediately after being flashed a picture of a white face. *Id.* at 296. Participants were also able to pair the words “ape” and “black” together more rapidly than other combinations such as “ape” and “feline.” *Id.* at 301. When primed with a picture of an ape, participants were more likely to find that a black suspect being beaten by the police *deserved* the beating than when participants were primed with a picture of a big cat. *Id.* at 302. Moving from the lab to real capital cases, Eberhardt found that even after controlling for well-known factors that affect death-sentencing, news stories about black capital defendants made more ape-like references than news stories about white capital defendants, and that the number of times news articles made these ape-like references correlates with the rate at which black defendants are sentenced to death. *Id.* at 304.

245. See Matthew D. Lieberman et al., *An fMRI Investigation of Race-Related Amygdala Activity in African-American and Caucasian-American Individuals*, 8 NATURE NEUROSCIENCE 720 (2005). Professor Matthew Lieberman and colleagues conducted an experiment using functional magnetic resonance imaging (fMRI) technology to measure the level of amygdala activity of participants after seeing a black versus a white face. *Id.* at 720. The amygdala is a region of the brain that mediates emotional responses, including perceived threats. *Id.* Lieberman found that amygdala activity in both white and black participants increased when shown a black face versus a white face. *Id.* at 721. The authors concluded that the most plausible explanation for this universal increase in amygdala activity is likely due to the activation of “culturally learned negative associations regarding African-Americans.” *Id.* at 722. These negative associations appear to play out in practice. Professor Joshua Correll created a video game that depicted a picture of either a white or a black suspect, and then coupled that suspect with either a gun or an innocuous object (i.e. a wallet). Joshua Correll, *Event-Related Potentials and the Decision to Shoot: The Role of Threat Perception and Cognitive Control*, 42 J. EXPERIMENTAL SOC. PSYCHOL. 120, 120 (2006). Study participants were asked to play the video game by looking at the suspects as they appeared on the screen and then to determine whether or not to shoot. *Id.* The results displayed a bias against black suspects among participants: “participants shot armed Blacks more quickly than armed whites, and decided not to shoot unarmed Whites more quickly than unarmed Blacks.” *Id.* at 126.

246. See, e.g., Jack Glaser, Karin Martin & Kimberly Kahn, *Possibility of Death Sentence Has Divergent Effect on Verdicts for Black and White Defendants* (Dec. 4, 2009) (unpublished manuscript), available at <http://ssrn.com/abstract=1428943>. Professor Jack Glaser utilized a random sample of jury eligible citizens spread across the United States to test whether defendant race mediated guilty and not guilty outcomes in cases with the possibility of a death sentence. *Id.* at 2. Glaser had the participants read materials from a fictional triple murder case (including crime description, closing arguments and witness testimony). *Id.* at 3. Though the participants read the same case summary, half the participants were told that death was the maximum punishment possible while the other half of the participants were told that life without the possibility of parole was the maximum. *Id.* Half the “defendants” were black, half white. *Id.* The participants who were told that death was the maximum possible punishment convicted black defendants at a higher rate than white defendants—80.4% versus 56.5%. *Id.* at 5. In contrast, in cases where a life sentence was the maximum possible punishment, participants convicted blacks and whites at nearly equal rates—67.7% versus 66.7%. *Id.* at 1. Because defendant race impacts verdict outcome more severely in cases where death is a possible sentence, Professor Glaser concludes that “capital punishment may be more than another domain of racial disparities; it may actually be a cause.” *Id.* at 6.

## V. WHAT COMMUNITY—WHO IS MY NEIGHBOR?

“Community members are best positioned to decide how passive or aggressive they want their cops to be because they are the ones who must live with—and who may die from—the consequences of their choice. Our Founders understood this basic idea; why don’t we?”

— Akhil Amar<sup>247</sup>

Two co-existing principles govern our assessment of the federal death penalty. First, the expansion of the venire in federal death penalty cases creates a demographic shift in the racial make up of the venire. Second, the expansion of the venire beyond the county of the offense detaches the local community from the decision making in federal death sentences. This Part traces the broadening overlap of these two principles.

Determining the relevant geographic boundaries for superimposing community values onto a determination that a particular individual should receive the death penalty depends on the content of the relevant values and how those values shift as geographic regions expand. The jury’s function is key to determining which citizens constitute the proper community. The United States Supreme Court has made clear that the determination of whether a defendant lives or dies must be the moral judgment of the community—not a decision left solely to a legislature to determine which offenses require mandatory imposition of the death penalty.<sup>248</sup> But defining who constitutes the “community” or who comprises a defendant’s “equals and neighbors” has been an elusive task.

The expansion of the federal venire has relevance in the context of a variety of federal prosecutions.<sup>249</sup> However, nowhere does the expansion of the federal venire have more of an impact than in the application of the federal death penalty. This is true, in the first instance, because the determination to impose the death penalty is an exclusively subjective moral determination, and second, because it is a subjective moral determination that is susceptible to the influence of race bias. The capital jury’s morality function mirrors the “fact and law” determinations that

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247. Akhil Reed Amar, *A Tale of Two Cities*, [http://writ.news.findlaw.com/commentary/20000501\\_amar.html](http://writ.news.findlaw.com/commentary/20000501_amar.html) (last visited June 15, 2010).

248. *See* Woodson v. North Carolina, 428 U.S. 280 (1976).

249. Federal prosecutions for possession of firearms in Virginia, for instance, have received special scrutiny. *See, e.g.*, United States v. Jones, 36 F. Supp. 2d 304, 309–10 (E.D. Va. 1999).

English common law and United States' Founding-era juries had to make.<sup>250</sup> Thus, the locality or "familiarness" function that a jury of the vicinage serves is of greater relevance in capital cases today than in other federal criminal prosecutions.

In capital cases, vicinage and the Eighth Amendment's ability to track society's evolving standards of decency are closely related. The content of the Cruel and Unusual Punishment Clause depends upon the standards of decency in a modern society.<sup>251</sup> Jury verdicts provide a necessary link between community values and interpretation of the Eighth Amendment.<sup>252</sup> In death penalty cases, the consensus of the community is particularly important. In non-capital murder cases the jury must determine only whether enough evidence exists to determine that the defendant committed the crime. However, in capital cases, the sentencing jury is asked to weigh more amorphous considerations, including "the character and record of the individual offender and the circumstances of the particular offense. . . ."<sup>253</sup>

In *Turner v. Murray*,<sup>254</sup> the United States Supreme Court emphasized that a juror's decision to vote to impose a death sentence is a "highly subjective, unique [and] individualized judgment regarding the punishment that a particular person deserves."<sup>255</sup> Because of the subjective nature of the determination and, more generally, the "the range of discretion entrusted to a jury in a capital sentencing hearing," the Court underscored that the capital sentencing determination is "a unique opportunity for racial prejudice to operate but remain undetected."<sup>256</sup> The Court also noted that "subtle, less consciously held"

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250. See AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 238 (2005) ("Alongside their right and power to acquit against the evidence, eighteenth-century jurors also claimed the right and power to consider legal as well as factual issues—to judge both law and fact 'complicatedly'—when rendering any general verdict.").

251. See *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

252. As we explain below, the relevant community should be defined (in part) by reference to the geographic area most impacted by the offense. In the case of murders, the county is closer to the center of impact (though not as close as the neighborhood) than the federal district. In the context of terrorist attacks against the United States, the nationwide impact of the crime might well counsel for a broader cross-section of the community. Cf. *Miller v. California*, 413 U.S. 15, 32–33 (1973) (explaining that the federal district is the relevant community for determining obscenity standards, but authorizing federal judges to refocus the inquiry (and thus the relevant community) beyond (or presumably to a subsection within) the district's geographical expanse if necessary).

253. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (quoting *Woodson*, 428 U.S. at 304).

254. 476 U.S. 28 (1986).

255. *Id.* at 33–34 (internal quotations omitted).

256. *Id.* at 35; see also *Rose v. Mitchell*, 443 U.S. 545, 555 (1979) ("Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice.").

beliefs could operate to skew the sentencing outcome in a racially discriminatory manner.<sup>257</sup>

Though the Court acknowledges the “subjective” nature of the determination entrusted to the capital sentencing jury, it also interprets the Eighth Amendment’s prohibition on cruel and unusual punishment to require a “special need for reliability in the determination that death is the appropriate punishment in any capital case.”<sup>258</sup> This “reliability” is tricky business. Unlike the finding of whether the defendant did in fact pull the trigger and kill the bank teller, the question of whether the defendant *deserves* death is hopelessly moral and necessarily comparative and situational. For example, the relative heinousness of the crime depends upon the type of violence with which the jurors are familiar or have experienced. The relative culpability of the defendant (including acceptance of mitigating evidence such as being the victim of severe abuse) depends on how well the jurors *empathize* or *can relate* to the level of trauma experienced by the defendant and their belief that the trauma translates into lesser responsibility for undesirable actions.

Given both the “subjective” nature of the capital sentencing determination and the need for “heightened reliability” in determining which defendants in the already narrow category of convicted first-degree murderers deserve death, the federal death penalty relies upon the wisdom of twelve jurors to “express the conscience of the community on

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257. *Turner*, 476 U.S. at 35–36. For a more detailed expression of these “subtle, less consciously held” beliefs, see *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 274 (1995) (Ginsburg, J., dissenting) (“Bias both conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become the country’s law and practice.”).

258. *Johnson v. Mississippi*, 486 U.S. 578, 584–85 (1988) (citing *Gardner v. Florida*, 430 U.S. 349, 363–64 (1977) (White, J., concurring) (quoting *Woodson v. North Carolina*, 428 U.S. at 280, 305 (1976))) (internal quotation marks omitted); *California v. Ramos*, 463 U.S. 992, 998–99 (1983) (stating the law “requires a correspondingly greater degree of scrutiny of the capital sentencing determination than of other criminal judgments”); see also *Lockett*, 438 U.S. at 604 (“We are satisfied that [the] qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.”). The *Lockett* Court described the “qualitative difference” between the capital and non-capital sentencing as follows:

The considerations that account for the wide acceptance of individualization of sentences in noncapital cases surely cannot be thought less important in capital cases. Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases. A variety of flexible techniques—probation, parole, work furloughs, to name a few—and various postconviction remedies may be available to modify an initial sentence of confinement in noncapital cases. The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.

*Id.* at 605.

the ultimate question of life or death.”<sup>259</sup> So federal capital jurors of necessity should be from a narrower community, but how narrow?<sup>260</sup> A voting rights analogy is apt. In terms of participation in the democratic process, the right to serve on a jury is comparable to the right to vote.<sup>261</sup> In the voting rights context, the Court has sanctioned electoral districting based on “communities of interest.”<sup>262</sup> To determine where to draw the physical boundary lines around a “community,” the Court looks to several factors relevant to our analysis here: (1) respect for political subdivisions, (2) political affiliation, and (3) socioeconomic status.<sup>263</sup>

#### A. *Respect for Political Subdivisions*

Delimiting the county as the relevant community to adjudicate a federal capital case aligns with the notion that communities of interest should respect pre-existing political subdivisions. Today, states draw juries from counties or independent cities (e.g. St. Louis). And for good reason. The county is the largest intra-state body of government besides the state itself. But the federal district is a fictional community. There are no political ties that bind. The impact of the verdict is not dispersed throughout the federal district, but instead is disproportionately (or even solely) absorbed by the locality where the crime occurred.

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259. *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968).

260. Local juries are best able to express the unique values of the community. *See Engel, supra* note 65, at 1696 (“The jury’s political role requires it to be representative of a particular community, for the “common sense” of one people may be quite different from that of another. Only by representing the diverse perspectives within the community can the jury voice the ‘common sense’ of the community as a whole.”).

261. Interestingly, jury service appears to have a positive attitudinal and behavioral effect on civic participation, and even positively impacts likelihood to vote in subsequent elections. John Gastil et al., *Jury Service and Electoral Participation: A Test of the Participation Hypothesis*, 70 J. POL. 351 (2008); John Gastil et al., *From Group Member to Democratic Citizen: How Deliberating with Fellow Jurors Reshapes Civic Attitudes*, 34 HUM. COMM. RES. 137, 145 (2008) (“Positive changes in jurors’ civic identity and trust in fellow citizens and public institutions flow from . . . the deliberative quality of talk in the jury room and . . . overall satisfaction with the jury deliberation and verdict.”).

262. Kim Forde-Mazrui, *Jural Districting: Selecting Impartial Juries Through Community Representation*, 52 VAND. L. REV. 353, 382–84 (1999). We do not argue here, as others have done, that the Court should allow jural redistricting. *See generally id.* We simply borrow the criterion the Court considers to draw lines around the concept of a community.

263. *Id.* (“In identifying such communities, the Court permits the consideration of various demographic characteristics, including ‘traditional districting principles such as compactness, contiguity, and respect for political subdivisions,’ and other indicia of shared interest such as political affiliation, socioeconomic status, religion, or occupation.”) (quoting *Shaw v. Reno*, 509 U.S. 630, 646 (1993)).

Drawing state and federal prosecution lines at the same boundaries removes the incentive for federal prosecutors to pursue a federal capital prosecution for the purpose of obtaining a racially skewed venire.<sup>264</sup> The ability to obtain a death sentence does play a role whether to prosecute federally.<sup>265</sup> The federal prosecution of John Johnson for a killing that occurred in Orleans Parish may be illustrative.<sup>266</sup> For instance, the Government's desire to prosecute Johnson in the Eastern District of Louisiana in order to obtain a death sentence may be apparent from its refusal to allow Johnson to plead guilty and avoid the death penalty<sup>267</sup>—a privilege afforded to both the Unabomber and abortion-clinic bomber Eric Rudolph.<sup>268</sup> But selective prosecution claims are notoriously

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264. See Engel, *supra* note 65, at 1660 (“[T]he vicinage presumption provides a neutral venue rule that limits the government’s ability to select a forum inconvenient or hostile to the defendant.”).

265. Cf. *United States v. Jones*, 36 F. Supp. 2d 304, 309–10 (E.D. Va. 1999) (“At a local Bench-Bar Conference discussing the issue, an Assistant United States Attorney (‘AUSA’) stated that one goal of Project Exile [wherein the federal government prosecutes violent crimes involving firearms that would normally be prosecuted by the state] is to avoid ‘Richmond juries.’ The same admission was made by the AUSA prosecuting *United States v. Scates* . . . .”); see also *id.* at 316 (noting that where “local authorities claim to have the capacity to address the problem, the invited federal incursion raises serious motivational concerns.”). The fact that a federal district (because of its racial composition) is more likely to return a death sentence than a state court is not a legitimate reason to seek a federal death sentence. See USAM, *supra* note 15, at §9-10.090 (“When concurrent jurisdiction exists with a State or local government, a Federal indictment for an offense subject to the death penalty generally should be obtained only when the Federal interest in the prosecution is more substantial than the interests of the State or local authorities.”).

266. *United States v. Johnson* involves a federal prosecution for the killing of a security guard that occurred during a 2004 bank robbery in Orleans Parish, Louisiana. The three black defendants, John Johnson, Herbert Jones, and Joseph Smith, intended to commit robbery, but erroneously believed that only one guard was working at the bank. Jones and Smith entered first, and Smith pointed an inoperable gun at Sidney Zaffuto, the security guard. A second security guard then shot at Smith and Johnson as Johnson entered the bank. Struck by a bullet, Johnson fell to the floor and started firing his gun while the guards fired their weapons. The one bullet fired by Johnson apparently ricocheted off of Zaffuto’s gun and struck Zaffuto in the chest. Smith struggled with Zaffuto, exacerbating the wound, and Zaffuto died from the injury. Johnson attempted to plead guilty even before he knew it was his bullet that struck Zaffuto. However, Johnson was sentenced to death. In May 2010, the district court reversed this sentence. The government is appealing the reversal. See *United States v. Johnson*, No. 04-CR-017 (E.D. La. Jan. 16, 2004).

267. Memorandum in Support of Mr. Johnson’s Motion to Set Aside the Death Sentence Based Upon the Appearance of the Influence of Race and Other Arbitrary Factors at 21, *United States v. Johnson*, 2010 WL 1294058 (E.D. of La. Mar. 29, 2010) (No. 04-CR-17) (on file with author) (“Similarly, Mr. Johnson attempted to accept responsibility for his actions by pleading guilty and accepting a life sentence without the possibility of parole, and at trial agreeing in large part to the allegations presented.”).

268. See *Kaczynski Pleads Guilty, Avoids Death Sentence*, CNN.COM, Jan. 22, 1998, <http://www.cnn.com/US/9801/22/unabomb.wrap/index.html> (last visited July 4, 2010). Eric Rudolph pleaded guilty and received life imprisonment for two bombing murders, including the death of a enforcement officer in a 1998 Southside bombing of a Birmingham abortion clinic in which a clinic nurse was also severely injured. See *Rudolph Pleads Guilty in Series of Bombings*,



difficult to prove, and the cost to the democratic function of the prosecutor is large. By drawing co-extensive prosecution lines, we remove the incentive to obtain a death-sentence by any means possible and refasten the decision to prosecute federally to the relative federal interest impacted by the offense. Moreover, murders can paralyze neighborhoods, but cannot realistically be said to create a stir at the federal district level. When citizens closer to center of impact render verdicts, that message from the jury box can lead to resource allocation at the local government (often the county) level. County-level juries better provide the community most impacted by the offense (and its punishment) with the power necessary to redress the harm.

### B. *Shared Political Affiliation*

We documented above the impact on the racial demographics of the jury pool when a capital case is prosecuted federally rather than by the state. But race also acts as a proxy for political beliefs: blacks tend both to be more politically liberal and to live in the densely populated areas where most death-eligible crimes are committed. In turn, Republicans are far more likely to favor the death penalty than Democrats.<sup>269</sup> The result is that capital prosecutions in federal court also change the representation of political beliefs in the jury pool.

For example, Orleans Parish is far more liberal than the rest of the Eastern District of Louisiana. In Orleans Parish, 79.3% of voters cast a ballot for Barack Obama in the 2008 Presidential election,<sup>270</sup> while only 19.2% voted for John McCain.<sup>271</sup> Excluding Orleans Parish, 32.6% of voters voted for Obama (65.7% voted for McCain).<sup>272</sup> Overall, switching to the Eastern District of Louisiana results in a far more conservative jury pool (79.3% Obama (Orleans) versus 42.7% Obama in the entire

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MSNBC.COM, Apr. 13, 2005 (last visited July 4, 2010). Attorney General Ashcroft described Rudolph as “the most notorious American fugitive.” See Henry Schuster, *FBI: Olympic Bombing Suspect Arrested*, CNN.COM, May 31, 2003, <http://cnn.com/2003/US/05/31/rudolph.arrest/> (last visited July 4, 2010).

269. U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, tbl.2.52.2008 (2008), available at <http://www.albany.edu/sourcebook/pdf/t2522008.pdf>; see also Liptak, *supra* note 236, at A1 (“Jurors eligible to serve in capital cases are ‘demographically unique’ . . . ‘They tend to be white’ . . . ‘They tend to be politically conservative—Republican.’”) (quoting Brooke Butler, professor at the University of South Florida).

270. See Appendix 3: Voting Patterns by District, at 17F [hereinafter Appendix 3], available at <http://www.law.washington.edu/wlr/issues/v085/docs/>.

271. *Id.* at 17G.

272. See *id.* at 18F, 18G.

district).<sup>273</sup> The same trend exists in St. Louis, Missouri, Prince George's County, Maryland and Richmond, Virginia:

- Nearly 84% of St. Louis city voters cast a ballot for Obama (compared to 15.5% for McCain).<sup>274</sup> Excluding St. Louis city, voters in the Saint Louis Division of the Eastern District of Missouri cast 52.6% of their votes for Obama and 46% for McCain.<sup>275</sup>
- Nearly 89% of Prince George's County voters supported Obama (compared to 10.5% for McCain).<sup>276</sup> Without Prince George's County, the District of Maryland voted for Obama by a 57.5% to 41.2% margin.<sup>277</sup>
- Over 79% of Richmond city voters supported Obama (20% for McCain)<sup>278</sup> versus 50.6% for Obama and 49.2% for McCain in the Richmond Division of the Eastern District of Virginia (excluding the city of Richmond).<sup>279</sup>

Drawing juries from the county of offense recognizes the significant attitudinal changes regarding crime, punishment, and law enforcement that occur as the geographic lens shifts from the county to the federal district. The residents of urban areas—where most federal capital crimes occur—are more likely (70%) than residents of suburban (63%) or rural (59%) areas to believe that the way to fix crime is to fix the underlying economic and social problems (as opposed to concentrating more resources on police officers, jails, and prosecutions).<sup>280</sup> Scarcely 25% of residents living in urban areas agree that the best way to lower crime is to enhance law and order measures.<sup>281</sup> When broken down by race, a relevant proxy consideration (as discussed above), 84% of blacks (but only 61% of whites) agreed that concentrating on solving underlying

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273. *Id.* at 18F, 16F.

274. *Id.* at 31F, 31G.

275. *Id.* at 38F, 38G.

276. *Id.* at 56F, 56G.

277. *Id.*

278. *Id.* at 103F, 103G.

279. *Id.* at 104F, 104G.

280. U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, tbl.2.0013.2006 (2006), available at <http://www.albany.edu/sourcebook/pdf/t200132006.pdf>.

281. *Id.*

economic problems is the best way to lower crime.<sup>282</sup> Only 14% of blacks agreed that the best solution is found in increased law enforcement presence.<sup>283</sup>

Though blacks and urban dwellers are less likely to favor enhanced law enforcement as the primary mechanism to fight crime, blacks are far more likely than whites to worry about being the victim of serious interpersonal violent crimes, such as being murdered.<sup>284</sup> This fear is rational: blacks, and especially black males, are far more likely to be murdered than whites.<sup>285</sup> But despite this (legitimate) fear of crime, blacks are less trusting of law enforcement than are whites. For example, 27% of blacks, but only 6% of whites report “very little confidence” in the police.<sup>286</sup> Blacks are also more likely than whites to believe that law enforcement use of racial profiling is widespread (by roughly 17%).<sup>287</sup> While 67% of blacks believe that police brutality occurs in the area where they live, only 25% of whites think the same.<sup>288</sup> Blacks are also far less likely to favor the death penalty for a person convicted of murder (47%) than whites (69%).<sup>289</sup> Moreover, when asked if the death penalty is applied fairly, 59% of white but only 24% of blacks answered in the affirmative.<sup>290</sup>

### C. *Socio-Economic Status*

A person who experiences (or is surrounded by) the devastating atmospheric factors that diminish the quality of a person’s decision-

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282. *Id.*

283. *Id.*

284. U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, tbl.2.39.2008 (2008), available at <http://www.albany.edu/sourcebook/pdf/t2392008.pdf>.

285. Blacks represent 12.8% of the population, FedStats.gov, USA, <http://www.fedstats.gov/quf/states/00000.html> (last visited July 4, 2010), but constitute roughly half of all murder victims. See FED. BUREAU INVESTIGATION, CRIME IN THE UNITED STATES, Expanded Murder Data tbl.1, Murder Victims by Race and Sex (2008), available at [http://www.fbi.gov/ucr/cius2008/offenses/expanded\\_information/data/shrtable\\_01.html](http://www.fbi.gov/ucr/cius2008/offenses/expanded_information/data/shrtable_01.html).

286. U.S. DEP’T JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, tbl.2.12.2009 (2009), available at <http://www.albany.edu/sourcebook/pdf/t2122009.pdf> (also finding that 38% of blacks but 63% of whites have “a great deal” or “quite a lot” of confidence in the police).

287. U.S. DEP’T JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, tbl.2.26.2004 (2004), available at <http://www.albany.edu/sourcebook/pdf/t226.pdf>.

288. U.S. DEP’T JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, tbl.2.0002.2005 (2005), available at <http://www.albany.edu/sourcebook/pdf/t200022005.pdf>.

289. U.S. DEP’T JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, tbl.2.52.2008 (2008), available at <http://www.albany.edu/sourcebook/pdf/t2522008.pdf>.

290. U.S. DEP’T JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, tbl.2.54.2008 (2008), available at <http://www.albany.edu/sourcebook/pdf/t2542008.pdf>.

making capacity is likely in a better position to account for those situational factors than a person who lives in a neighborhood where crime is predominated by nuisance offenses and urban interlopers.<sup>291</sup> Moreover, juries comprised of a majority of individuals from low socio-economic communities can send a message about the government's allocation of resources in a different way than juries that are made up primarily of well-resourced outsiders. Therefore, if the victim of the crime, the offender, and the impacted neighborhood all exist in a realm of low resources, then individuals with similar experiences and values should determine whether or not the government should be doling out death sentences. Shared vernacular, dress, and mannerisms that often exist in such communities further underscore the point.

Though race is a proxy of poverty, it can be disentangled. As one commentator explained:

[A] Black resident of a middle-class neighborhood may be more likely to share experiences and interests in common with another Black person from the same neighborhood than with a Black person from the inner city. Indeed, the Black resident of the middle-class neighborhood may well have more interests in common with a white neighbor with respect to, for example, community policing, public schools, or welfare, than with the Black inner-city resident. Thus, although defining political groups by race alone may be adequate to capture a substantial amount of shared interests, using race in combination with other indicia of community, including residential proximity, may more effectively capture a more homogenous community.<sup>292</sup>

Other commentators note that providing a defendant with a jury of his equals and neighbors gives the defendant a firmer belief in the integrity of the proceedings:

A defendant also might feel that a local jury, with whom he or she may share cultural values, economic status, racial identity, or just a general sense of community identity, would sympathize with him more than with the police or the victim. Either way, a consistent rule requiring local juries puts the defendant on equal footing with the prosecutor, who cannot manipulate the likely

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291. Cf. generally Li-yu Song, Mark I. Singer & Trina M. Anglin, *Violence Exposure and Emotional Trauma as Contributors to Adolescents' Violent Behaviors*, 152 ARCHIVES PEDIATRIC & ADOLESCENT MED. 531 (1998).

292. Forde-Mazrui, *supra* note 262, at 383; see also Kalt, *supra* note 81, at 273. (“[P]olice-citizen relations are very different in the city than they are in the suburbs, and a scuffle between a Detroitier of any race and a suburban policeman would look very different in Detroit than it would in the suburbs. Not surprisingly, . . . prosecutors prefer [] to take the case to a suburban jury.”)

results of the trial by selecting the jurisdiction with the toughest jurors. Both sides know in advance where the jury will be from.<sup>293</sup>

Even more significantly, local juror participation gives communities in the midst of violence a certainty that the criminal justice system aims not only to be accurate but fair.<sup>294</sup> For all these reasons, the county is the best place to draw the vicinage lines in federal death penalty cases.

## VI. FINDING REMEDIES AFTER *MCKLESKEY*, *ARMSTRONG*, AND *BASS*

This Part addresses the difficulty in identifying remedies for discrimination retrospectively. First, we look at the way in which case law now requires the federal courts to ignore the appearance or possibility that race influences sentencing determination. Second, we note the difficulty of remedies that require reversal of capital convictions and death sentences. Finally, we offer three potential remedies that are prospective in nature, and that do not upend the administration of the entire federal justice system.

### A. *The Challenges of McKleskey, Armstrong, and Bass*

Indeed, defining potential remedies for problems that focus on race and the death penalty can feel like a futile exercise after *McCleskey v. Kemp*.<sup>295</sup> In *McCleskey*, the Court heard the case of a black man, Warren McCleskey, whom a Fulton County, Georgia jury convicted and sentenced to death for the murder of a white police officer.<sup>296</sup> McCleskey asserted that his death sentence was imposed arbitrarily and discriminatorily (in violation of the Eighth and Fourteenth Amendments)

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293. Kalt, *supra* note 81, at 312.

294. *Ex parte* Thompson, 153 S.W.3d 416, 421 (Tex. Crim. App. 2005) (Cochran, J., concurring) (“Our criminal justice system makes two promises to its citizens: a fundamentally fair trial and an accurate result. If either of those two promises are not met, the criminal justice system itself falls into disrepute and will eventually be disregarded.”); Engel, *supra* note 65, at 1661 (“[P]erhaps most significant, the vicinage presumption fulfills the jury’s democratic function by allowing the aggrieved community to participate through its representatives on the jury. . . . This participation is essential to what the Supreme Court has described as the ‘community therapeutic value’ of the trial, whereby the criminal trial becomes a vehicle for healing the social rupture caused by the crime.”).

295. 481 U.S. 279 (1987). The Court granted certiorari in *McCleskey* to determine “whether a complex statistical study that indicates a risk that racial considerations enter into capital sentencing determinations proves that petitioner McCleskey’s capital sentence is unconstitutional under the Eighth or Fourteenth Amendment.” *Id.* at 282–83.

296. *Id.* at 283.

because, as a black man who killed a white victim, he was statistically much more like to receive a death sentence in Georgia.<sup>297</sup> The Baldus study anchored his claim.

Professors David C. Baldus, Charles Pulaski, and George Woodworth conducted “sophisticated” and “extensive” studies that examined over 2000 Georgia murder cases.<sup>298</sup> Their results were disturbing: only 1% of cases with a black murder victim, but 11% of cases with a white murder victim, resulted in death sentences.<sup>299</sup> When a defendant is black and the victim white, 22% of cases result in death.<sup>300</sup> But Georgia juries imposed death in only 3% of cases with a white defendant and black victim.<sup>301</sup> Georgia prosecutors sought death in 70% of cases with a black defendant and a white victim, but in only 19% of cases with a white defendant and black victim.<sup>302</sup> The result is that Georgia juries imposed the death sentence on defendants who killed white victims 4.3 times more often than defendants who killed black victims.<sup>303</sup> Black defendants who killed white victims received death more frequently than any other victim/defendant race combination.<sup>304</sup>

The Court accepted the Baldus study’s validity, but rejected the claim that the demonstration of statistically significant racial disparities in the imposition of the death penalty in Georgia could prove that McCleskey faced racial discrimination in his particular case.<sup>305</sup> The Court emphasized that if McCleskey successfully pressed this claim in the capital context, other defendants would argue the same in non-capital

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297. *Id.* at 291–92.

298. *Id.* at 286–87 (“Baldus subjected his data to an extensive analysis, taking account of 230 variables that could have explained the disparities on nonracial grounds.”).

299. *Id.* at 286.

300. *Id.*

301. *Id.* Georgia also had an 8% death sentence rate in cases with a white defendant and white victim, and a 1% death sentence rate in cases with a black defendant and black victim. *Id.*

302. *Id.* at 287. Georgia prosecutors sought death in 32% of cases with a white defendant and a white victim, and in 15% of cases with a black defendant and a black victim. *Id.*

303. *Id.* (noting that this figure was calculated *after* controlling for 39 non-racial variables).

304. *Id.*

305. *Id.* at 291 n.7 (“Our assumption that the Baldus study is statistically valid does not include the assumption that the study shows that racial considerations actually enter into any sentencing decisions in Georgia. Even a sophisticated multiple-regression analysis such as the Baldus study can only demonstrate a *risk* that the factor of race entered into some capital sentencing decisions and a necessarily lesser risk that race entered into any particular sentencing decision.”). *Id.* at 292–93 (“[T]o prevail under the Equal Protection Clause, McCleskey must prove that the decision-makers in *his* case acted with discriminatory purpose. He offers no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence.”).

criminal cases.<sup>306</sup> Justice Brennan, dissenting, labeled the Court's acknowledgment that "McCleskey's claim would open the door to widespread challenges to all aspects of criminal sentencing," as "a fear of too much justice."<sup>307</sup> In other words, the Court knew that voting with McCleskey would deal a crippling blow to the death penalty in America and would leave non-capital criminal justice sentences vulnerable.

Similarly, after *McCleskey*, in *United States v. Armstrong*,<sup>308</sup> the United States Supreme Court effectively shut down litigation on race claims by holding that federal prosecutors had broad discretion to act, and that without specific proof of race discrimination (in the form of "credible evidence that similarly situated defendants of other race could have been prosecuted, but were not"), the defendant was not entitled to discovery. To justify an order for discovery, the Court held in *United States v. Bass*<sup>309</sup> that statistical evidence of racial disparities is not enough, and that a defendant needed to show both discriminatory effect as well as specific evidence of discriminatory intent.

Even where a defendant introduced evidence that race may have prompted the imposition of capital punishment, district courts after *McCleskey*, *Armstrong*, and *Bass* were powerless to reverse a death sentence or permit further litigation on the issue. In a recent case addressing this issue involving a defendant already sentenced to death, a federal district court in New Orleans acknowledged the troubling relevance of race in the administration of the federal death penalty:

The Court is aware of the disturbing statistics regarding the disproportionate number of minorities being prosecuted for capital offenses and sentenced to death, as pointed out by the Amicus Brief of the NAACP. The Court also does not doubt that conscious or, more insidiously, unconscious racism can influence decisionmaking, from an initial arrest by police through a final decision by a jury. In that regard, the Court notes with dismay the dismissive attitude of the government with regard to this issue, referencing it as a claim that has become perfunctory in modern capital cases.<sup>310</sup>

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306. *Id.* at 315–16.

307. *Id.* at 339 (Brennan, J., dissenting).

308. 517 U.S. 456 (1996).

309. 536 U.S. 862 (2002).

310. *United States v. Johnson*, No. 04-CR-00017, 2010 WL 924283, at \*5 (E.D. La. Mar. 10, 2010) (internal quotations omitted).

The district court, however, declined to reverse the death sentence or require the government to provide a race-neutral explanation for their charging decisions, without actual proof of intent to discriminate.<sup>311</sup>

*B. Prospective Remedies Can Reduce the Impact of Race in the Administration of the Federal Death Penalty, Without Dismantling the Entire System*

Perhaps one of the dangers of *McCleskey* is that it proved too much. If the United States Supreme Court accepted the theory articulated by Warren McCleskey, it would have been obligated to invalidate the death penalty imposed on him. This would not only invalidate the death sentence imposed on McCleskey and other black defendants on Georgia's death row, but it would have proved that the executions of black defendants in Georgia for over a century had been predicated on race. In contrast, re-fixing the venire for federal capital offenses to the county of offense would provide prospective relief from the possible influences of race. The county-level vicinage solution for solving race disparities that exist when the federal government prosecutes a capital crime (versus when the state prosecutes) does not suffer from the "too much justice problem." The democratic process would dictate the future of capital punishment, and the community most affected by the crime would be the body responsible for the verdicts.

Unlike the data available to the *McCleskey* Court, currently available evidence demonstrates that racial disparities in the administration of the death penalty exist in the here and now.<sup>312</sup> Implicit bias research shows that the prejudice from race disparities in capital cases likely affects every jury.<sup>313</sup> But to counteract that bias, we do not need the judiciary to dismantle the death penalty. We have prospectively available options, such as reclaiming the county as the place of vicinage in federal capital cases, which will result in more diverse and legitimate decision making. Moreover, because this vicinage right resolves to defendants in capital cases, problems that may arise in the prosecution of federal hate crimes, or in instances where a minority group defendants seek the broader protection of a district (or a change of venue from the district),

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311. *Id.*

312. Cf. Jerry Kang & Banaji, *supra* note 239, at 1065 (surveying results of implicit bias studies and concluding, "[n]o longer do we have to choose between a backward-looking frame of corrective justice (e.g., compensation for slavery) and a forward-looking frame of utilitarian engineering (e.g., potential pedagogical benefit). Instead, we can now view core 'affirmative action' programs as responses to *discrimination in the here and now.*").

313. See *supra* Part IV.D.



interposing this protection does not risk chaining those defendants with the very protections intended to benefit them.<sup>314</sup>

The creation of a *Batson*-style three-step process is another potential prospective remedy.<sup>315</sup> Under this scheme, a defendant would challenge the Government's decision to proceed with federal capital charges. The defendant would have to demonstrate that the charged conduct could have been charged as a death-eligible state crime. The defendant must also show a substantial change in the demographics of the jury pool as a result of the switch from the county of offense to the federal district. Upon this showing, the Government could rebut the presumption of race-bias by demonstrating race-neutral reasons for proceeding with cases in federal rather than state court. At the third step, the judge must decide whether improper considerations of the racial composition of the jury pool motivated the Government's decision to pursue capital punishment. The judge would take into account all the information from steps one and two (and also any information pertaining to the charging of other similar crimes by other defendants in state court). This latter remedy is far less satisfactory (especially because *Batson* itself has come under much scrutiny in the past few years<sup>316</sup>) than simply shifting vicinage to the county of offense in federal capital cases.

Finally, in the same manner that the Attorney General masks racial identifiers, the Department of Justice can remove all demographic identifiers before the Attorney General decides whether to authorize a capital charge.<sup>317</sup> If the Attorney General received case files with the

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314. A defendant's right to trial in the county of the offense and the risk of prejudicial publicity can be reconciled. We should not abandon the vicinage right because there might be pre-trial publicity. Instead, to the extent that a defendant believes that publicity in the venire is too pervasive to get a fair trial (and the judge agrees), that defendant could waive one right to secure the other.

315. The Court summarized the three-step *Batson* test in *Miller-El v. Cockrell*, 537 U. S. 322, 328–329 (2003) (citations omitted):

First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. Third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

*Id.*

316. See, e.g., *Miller-El v. Dretke*, 545 U.S. 231, 273 (2005) (Breyer, J., concurring) (discussing scrutiny by other jurists and stating "I believe it necessary to reconsider *Batson*'s test and the peremptory challenge system as a whole").

317. The 2001 United States Department of Justice report, "The Federal Death Penalty System: Supplementary Data, Analysis and Revised Protocols for Capital Case Review," explains that "[a]s a safeguard against any possible influence of racial or ethnic bias, the [death-authorization] review process is carried out in a "race-blind" manner. The United States Attorney's office does not provide information about the race or ethnicity of the defendant to review committee members, to attorneys from the Criminal Division's Capital Case unit who assist the review committee, or to the

names and races of the victim and the defendant masked and also without knowledge of where the offense took place (not even listing the state), we believe this would go far towards eliminating race and geographic disparities in the federal death penalty.<sup>318</sup> At a more general level, masking all demographic information about the offender and the victim would further the likelihood that federal capital prosecutions are based upon the relative federal interest in the case and not upon other arbitrary factors.

Today, the federal statute setting venue in capital cases, 18 U.S.C. § 3235, provides that “[t]he trial of offenses punishable with death shall be had in the county where the offense was committed, where that can be done without great inconvenience.”<sup>319</sup> Federal capital crimes are the only subsection of federal prosecutions where modern practice does not treat venue and vicinage as identical.<sup>320</sup> Under 18 U.S.C. § 3235, venue in capital cases is set at the county of offense, but jurors are drawn from the entire division (or district where no divisions exist). Refastening vicinage to the county level in the federal capital context ensures that capital defendants who must face the moral judgment of the community are not confronted with a mob of outsiders, but by a group of twelve of their “equals and neighbors.”<sup>321</sup>

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Attorney General.” U.S. DEP’T OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: SUPPLEMENTARY DATA, ANALYSIS AND REVISED PROTOCOLS FOR CAPITAL CASE REVIEW 7 (2001). We find no such provision in the Attorney General’s manual for prosecution in capital cases. Even assuming that such a process still exists, the process does not mask the racial identity of the victim. Moreover, evaluating the names of the victim and the defendant, as well as the victim’s family via “victim impact” and the defendant’s family through “mitigating evidence,” will often be an accurate proxy for race. Cf. Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Brendan More Employable than Lakisha and Jamal?*, 94 AM. ECON. REV. 991 (2004) (finding that randomly assigning identical resumes either a “very White sounding” or “very African American sounding” name resulted in 50% more call-backs for white sounding names). Finally, defendants are allowed to present any and all mitigating evidence, including accusations of systemic racial bias. See USAM, *supra* note 15, at § 9-10.120 (“The Capital Review Committee shall review the materials submitted by the United States Attorney and any materials submitted by defense counsel. The Capital Review Committee will consider all information presented to it, including any allegation of individual or systemic racial bias in the Federal administration of the death penalty.”). In sum, the Department of Justice’s “race-blind” review is (at best) akin to covering your eyes with your hands but peaking through cracked fingers.

318. Cf. Marilyn Marks, *Blind Auditions Key to Hiring Musicians*, PRINCETON WKLY. BULL., Feb. 12, 2001, at 7, available at <http://www.princeton.edu/pr/pwb/01/0212/7b.shtml> (detailing how “blind” auditions—those that mask gender—result in higher success rates for women who audition for orchestras).

319. 18 U.S.C. § 3235 (2006) (setting venue in capital cases).

320. Compare *id.* with Fed. R. Crim. P. 18 (2008) (setting venue within the district of offense in federal criminal cases).

321. One obvious response is that mob-rule historically has been the purview of the county. But

## CONCLUSION

Race and place disparities persist in the administration of the federal death penalty. Reams of paper have been spent attempting to target their source. In this Article, we attempted to look at the irregularities anew. We examined the geographic trends more closely, and found that most death penalty verdicts come from areas where the switch in vicinage from the county to the federal district results in the dilution of minority group representation in the jury pool. Capital verdicts become separated from the moral judgments of the community when fewer minority group members in the jury pool, as well as the general effects of incorporating far away decision-makers with little stake in the outcome of the proceedings (e.g., Jefferson Parish residents unfazed by murders in the New Orleans projects). The resulting juries (whiter and more conservative) are more likely to engage in implicit (or explicit) race bias against the defendant.

Refastening the place of vicinage to the county level alleviates the appearance of impropriety that surrounds the decision to prosecute a capital case federally. If federal capital juries come from the county where the offense occurred, then prosecutors are left to determine whether to seek the death penalty based on the relative federal interest in the crime (and not the prosecutorial interest to secure a death sentence by any means possible). This solution is also more democratic—the citizens most impacted by the effects of high crime, overly aggressive policing, or poor public policy are the decision-makers responsible for redressing those harms.<sup>322</sup>

Prior studies of the death penalty have assessed whether the racial dynamics of defendants sentenced to death (or their victims) mirrors the pool of individuals federally charged death sentences, or whether blacks and other minorities are disproportionately represented on federal death row. The issue left unexamined is whether the federal death penalty is imposed disproportionately in the pockets of America where the

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hate-crime motivated capital murders are so rare today relative to the number of death-eligible murders generally that we do not want to be hostage to the fear of not getting a diverse jury in some rural county at the major expense of the routine capital trial where minority vote-dilution occurs to the detriment of the defendant and the impacted community. Our suggested shift in vicinage has the added benefit of being consistent with the language of 18 U.S.C. § 3235, which states that, “[t]he trial of offenses punishable with death *shall* be had in the county where the offense was committed.” As the United States Supreme Court’s Sixth Amendment jurisprudence clarifies, the “trial” begins (at least) with the empanelment of jurors.

322. Of course, in a death penalty prosecution that centers on a crime of truly federal scope—terrorism, for example—a case can be made for expanding the vicinage to the federal district level because the impact is on the national scale (rather than merely local).

decision to prosecute federally results in a transformation of the venire demographics. The problem with focusing on disproportionate representation is that it tries to prove too much (that the entire system is infected with racism) and offers no easy remedy (beyond doing away with the death penalty altogether). The benefit of focusing on the venire is that it employs the same analytical framework as voting rights jurisprudence. Moreover, the vicinage approach offers a simple solution: select the jury from the county of the offense in federal capital cases, and there can be no argument that the decision to prosecute federally was used to exploit a shift in the demographics of the venire.

Critics of our approach might argue that our proposed solutions would destroy the federal death penalty. This may be so, but its destruction would be a democratic destruction. If juries in the places where most death-eligible crimes occur refuse to return death sentences, such a result, voiced by the community most impacted by the crime, is more democratic than retaining the use of the federal death penalty because jurors from far away locales who rarely encounter serious crime are willing to hand down death sentences against people who are not members of their communities and with whom they will have greater difficulty empathizing. As Justice Scalia wrote in his *Atkins* dissent, “[t]here is something to be said for popular abolition of the death penalty . . . .”<sup>323</sup>

But the real point of this Article is to shine new light on race- and place-based arbitrariness in the federal death penalty. As long as a narrow band of jurisdictions continue to dole out a disproportionate number of federal death sentences, and to do so against a disproportionately high number of black citizens (and against defendants who murder white victims), the federal government’s experiment with the death penalty will continue to be a failure. Considering that the disparities that persist today are just as disturbing as those that troubled Attorney General Holder in 2000, we hope that the Attorney General will examine *why* they exist and then begin to resolve them. We suggest that restoring the county as the place of vicinage—or at the very least masking the location of the crime and the relevant federal district during the authorization process—is the best way to begin that process.

We also suggest that any assessment of racial bias within the federal death penalty must consider the demographics of the jurisdictions in which the federal government has decided to seek the death penalty, and the demographics of the jurisdictions in which it has not. Importantly,

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323. *Atkins v. Virginia*, 536 U.S. 304, 353 (2002) (Scalia, J., dissenting).

this inquiry must consider those cases in which the federal government chose not to prosecute as much as those cases in which it did. Ultimately, it is the intersection of these two inquiries that suggests to us a troubling correlation between the demographic make-up and federal death sentences.