

A Culture that is Hard to Defend: Extralegal Factors in Federal Death Penalty Cases

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Abstract

Empirical research has exposed a troubling pattern of capital punishment in the United States, with extralegal factors such as race, class, and gender strongly correlated with the probability of a death sentence. Capital sentencing also shows significant geographic disparities, although existing research tends to be more descriptive than explanatory. This study offers an alternative conception of local legal culture to explain place-based variation in the outcomes of federal capital trials, accounting for the level of attorney time and expert resources granted by the federal courts to defend against a death sentence. Using frequentist and Bayesian methods—supplemented with expert interviews—we empirically assess the processes determining the total allocation of defense resources in federal death penalty trials at the peak of the federal death penalty—between 1998 and 2004. Our findings strongly connect extralegal factors to the lowest levels of defense resources, which in turn correlate with a higher risk of a death sentence. Far from being idiosyncratic discrepancies, these are systemic and systematic extralegal factors that stand between a defendant and his opportunity to defend against a death sentence. Ultimately, we argue for a reconceptualization of extralegal influences and the relationship between local legal culture and capital case outcomes.

Keywords: Federal death penalty, local legal culture, capital punishment.

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I. Introduction

The U.S. Supreme Court's 1972 ruling in *Furman v. Georgia*³ and its subsequent 1976 ruling in *Gregg v. Georgia*⁴ prompted an explosion of scholarship surrounding the death penalty, with particular emphasis on the extralegal factors observed in sentencing patterns.⁵ Rather than entertaining whether capital punishment is justified in principle, empirical scholarship has focused primarily on disparities in the death penalty's practice and administration.⁶ Contemporary social science research has firmly established "a pattern of evidence indicting racial disparities in the charging, sentencing, and imposition of the death penalty after the *Furman* decision."⁷ In particular, research indicates that capital defendants are more likely to receive the death penalty if, among other factors, a) the defendant is black, b) the victim is white, c) the victim is a white female, or d) if the defendant is poor.⁸

³ *Furman v. Georgia*, 408 U.S. 238 (1972).

⁴ *Gregg v. Georgia*, 428 U.S. 153 (1976).

⁵ Lindsey S. Vann, *History Repeats Itself: The Post-Furman Return to Arbitrariness in Capital Punishment*, 45 U. OF RICH L. REV. 1255, 1256 (2011).

⁶ See *infra* Section II.

⁷ U.S. Gov't Accountability Off., GGD-90-57, *Death Penalty Sentencing: Research Indicates Patterns of Racial Disparities*. Report to Senate and House Committees on the Judiciary 5 (1990).

⁸ Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L. J. 1835, 1836 (1994); Sheldon Ekland-Olson, *Structured Discretion, Racial Bias and the Death Penalty: The First Decade After Furman in Texas*, 69 SOC. SCI. Q. 853, 853 (1988); Linda Foley, *Florida After the Furman Decision: The Effect of Extralegal Factors on the Processing of Capital Offense Cases*, 5(4) BEHAV. SCI. & THE LAW, 457, 457-458 (1987); Samuel Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. R. 27, 105 (1984); Gary Kleck, *Racial Discrimination in Criminal Sentencing: A Critical Evaluation of the Evidence with Additional Evidence on the Death Penalty*, 46 AM. SOC. REV. 783, 798-799 (1981); Rory K. Little, *Why a Federal Death Penalty Moratorium?*, 33 CONN. L. REV. 791, 807 (2001).

Although these findings are consistent across studies, little work has been able to define and compare the effects of these four factors of local geographic and occupational culture across jurisdictions and certainly within a federal system that is ostensibly uniform and less subject to the variation and issues observed in state-by-state death penalty systems. While race effects are more salient than geographic effects, we generally know that the risk of a death sentence is higher in some states and regions than others and that charging and sentencing patterns in capital cases vary across urban, suburban and rural areas.⁹ Existing literature has demonstrated that public support for and state-level use of the death penalty is influenced by an interaction of local crime rates and political ideology,¹⁰ but the research has not yet been able to explain *why* those location effects exist or identify the driving mechanisms behind geographic disparities in capital punishment practices. Certainly, we may have intuitive or anecdotal hypotheses for these differences—why, for example, “suburban counties with lower murder rates than urban counties send more murderers to death row”—but empirical studies

⁹ Michael J. Songer & Isaac Unah, *The Effect of Race, Gender, and Location on Prosecutorial Decisions to Seek the Death Penalty in South Carolina*, 58 S. C. L. REV. 161, 178 (2006); Joint Legislative Audit and Review Commission of the Virginia General Assembly, Review of Virginia’s System of Capital Punishment, 4 (2000), <http://jlarc.virginia.gov/pdfs/reports/Rpt274.pdf>; AMERICAN CIVIL LIBERTIES UNION, *Scattering Justice: Geographic disparities of the Death Penalty*, <https://www.aclu.org/scattered-justice-geographic-disparities-death-penalty> (last visited February 21, 2016).

¹⁰ John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S CAL. L. REV. 465, 500 (1998-1999); see also David Jacobs & Stephanie L. Kent, *The Determinants of Executions Since 1951: How Politics, Protests, Public Opinion, And Social Divisions Shape Capital Punishment*, 54 SOC. PROBS. 297, 298 (2007).

accounting for exactly how these location-specific differences in capital case processing operate are nascent.¹¹

The present study examines a different disparity in capital litigation – the resources provided to indigent defendants – and in doing so expands our knowledge of location effects in the bulk of contemporary capital proceedings. We focus on federal cases at the midpoint of the modern federal death penalty and examine the role of local legal culture¹² and the subcultural elements of the courtroom workgroup¹³ that lead to widely differential allocations of defense resources and which, in turn, are closely tied to disparate sentencing at trial.¹⁴ More specifically, we advance a model of local legal culture that relies on composite variables capturing place-based punitiveness, which also reflect the socio-political climate in which federal courtroom workgroups (e.g., the judge, prosecutor, and panel defense attorney) exist.

By focusing on the federal capital process and within a common period, we are able to assess the extent to which there is arbitrariness (evidenced via the influence of

¹¹ AMERICAN CIVIL LIBERTIES UNION, *Scattering Justice: Geographic disparities of the Death Penalty*, <https://www.aclu.org/scattered-justice-geographic-disparities-death-penalty> (last visited February 21, 2016).

¹² Thomas W. Church, *Examining Local Legal Culture*, 3 Am B. Found. Res.J. 449 (1985); , 450 (1985); BRIAN OSTROM, CHARLES W. OSTROM, ROGER A. HANSON & MATTHEW KLEIMAN, TRIAL COURTS AS ORGANIZATIONS 46 (2007); Brian Ostrom, Roger Hanson, Charles Ostrom & Matthew Kleiman, *Court Cultures and their Consequences*, 20(1) COURT MANAGER, Spring 2005, at 22.

¹³ Jeffrey T. Ulmer & Brian Johnson, *Sentencing in Context: A Multilevel Analysis*, 42(1) CRIMINOLOGY 137, 166 (2004); Geoff Gallas, *Local Legal Culture: More Than Court Culture*, 20(1) COURT MANAGER 23, 24 (2005); DAVID W. NEUBAUER, AMERICA'S COURTS AND THE CRIMINAL JUSTICE SYSTEM 108 (Brooks/Cole, 9th ed. 2008); Stacy H. Haynes, Barry Ruback & Gretchen R. Cusick. *Courtroom Workgroups and Sentencing: The Effects of Similarity, Proximity, and Stability*, 56 CRIME & DELINQ. 126, 130 (2010).

¹⁴ Jon Gould & Lisa Greenman, Report to the Committee on Defender Services Judicial Conference of the United States – Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases 52 (2010), <http://www.uscourts.gov/uscourts/FederalCourts/.../FDPC2010.pdf> (last accessed February 21, 2016).

extralegal variables) in what should be a standardized, nationwide adjudication process across all ninety-four federal judicial districts. Further, using defense resources as the dependent variable, and incorporating multiple measures for location effects in regression analyses, we can more accurately detect the extralegal roles of culture, geography, and courtroom workgroup characteristics in capital litigation, particularly since the governing law is essentially uniform across federal district courts.

Our results suggest that a court's decision to grant defense funding in a federal capital trial turns on multiple extralegal variables reflective of local legal culture and court administration practices. With one significant exception – the type of charge filed – we find that defense resource allocations are not driven by the legally relevant case facts, such as the number of defendants, offenses, or victims.¹⁵ By contrast, our research links the level of defense resources to the a) social and political climate in which the local court exists; b) caseload and processing speed of judges in the applicable district; and c) background of the presiding judge. Even where our research finds a correlation between defense resources and the background and experience of the defense attorney, the relationship evaporates in regression. This finding, then, advances debate over the endogenous “chicken-and-egg” question of which courtroom actor most influences resource decisions – the defense attorney who requests court support or the judge who makes the decision. Inexperienced lawyers may fail to request additional (or even sufficient) defense resources, but our findings suggest that it is judges, operating within the social and political bounds corresponding to the district's local legal culture, that

¹⁵ See *infra* pp. 43-50.

choose to appoint these lawyers and set the expectations and normative practices of representation in the first place.

The result is a system of federal capital litigation that limits the resources that certain suspects receive for their defense based simply on where the case is brought. Even in a unitary legal system with common rules for the provision of defense resources, systematic geographic disparities exist that rest significantly on extralegal factors. When those resource-related disparities, in turn, are strongly correlated with the likelihood of a death sentences at trial, the integrity of the federal death penalty is subject to increased doubt.¹⁶

In the following six sections, we present our research and discuss the implications of the findings. In the next part, Section II, we describe prior research on the death penalty, highlighting work that has found geographic differences in charging and sentencing at both the state and federal level, while also addressing the limited conceptualization of “location effects.” In Section III, we provide background on federal capital litigation, including the procedures by which suspects are provided resources for their defense. We also describe prior research that sets up the question for the present inquiry. In Section IV, we present our methodology, explaining our dataset and hypotheses. The bulk of the paper is contained within Section V and Section VI, , where we present the empirical findings and discuss their implications and significance. We also try our hand at expanding the notion of local legal culture, particularly as it relates to capital litigation specifically and social science methodology more broadly. In Section VII, we conclude by delineating the limits and caveats of our work and suggest avenues

¹⁶ See *infra* Table Two.

for additional research. Notwithstanding the significance of the federal death penalty and the troubling implications of our findings, we do not wish to overstate our claims, given the limitations and specific time period of our data.

II. Previous Research on the Death Penalty and Local Legal Culture

For some time now, socio-legal research has established that capital prosecutions, sentencing, and even executions vary disproportionately based on extralegal criteria.¹⁷ Foremost among these is race, typically conditioned by socioeconomic status.¹⁸ Perhaps the most famous study on this subject was conducted in Georgia by the late David Baldus and colleagues, which was considered by the U.S. Supreme Court in *McCleskey v. Kemp*.¹⁹ Although the Court refused to halt McCleskey's execution in that case, not one of the justices in the 5-4 majority opinion contested Baldus, *et al.*'s finding that Georgia's capital system was more likely to charge and then sentence to death black defendants

¹⁷ We use this term as did Kautt, meaning that the "sources of variation are considered illegitimate because no act explicitly recognizes them as legitimate. Specifically, 'geographical location would have to be seen as illegitimate to the extent that it does not reflect differences in offenders explicitly recognized as legitimate.'" Douglas C. McDonald, & Kenneth E. Carlson, Bureau of Justice Statistics, *Sentencing in the Federal Courts: Does race matter? The transition to Sentencing Guidelines, 1986-90*, Report No. NCJ-145332, at 54 (1993); Paula M. Kautt, *Location, Location, Location: Interdistrict and Intercircuit Variation in Sentencing Outcomes for Federal Drug-Trafficking Offenses*, 19(4) JUST. Q. 633, 635 (2002).

¹⁸ William J. Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination under Post-Furman Capital Statutes*, 246(4) CRIME & DELINQ. 563, 575 (1980); Linda A. Foley & Richard S. Powell, *The Discretion of Prosecutors, Judges, and Juries in Capital Cases*, 7(2) CRIM. JUST. REV. 16, 16 (1982); Thomas Keil & Gennaro Vito, *Race and the Death Penalty in Kentucky Murder Trials: An Analysis of Post-Gregg Outcomes*, 7(1) JUST. Q. 189 527 (1990). *See generally* CHARLES S. LANIER, WILLIAM J. BOWERS & JAMES R. ACKER, *THE FUTURE OF AMERICA'S DEATH PENALTY: AN AGENDA FOR THE NEXT GENERATION OF CAPITAL PUNISHMENT RESEARCH* (2009); STEPHEN P. GARVEY, *BEYOND REPAIR? AMERICA'S DEATH PENALTY* (2002); Scott Phillips, *Status Disparities in the Capital of Capital Punishment*, 43(4) LAW AND SOC'Y. REV. 807, 808 (2009); STEPHEN B. BRIGHT, *COUNSEL FOR THE POOR: THE DEATH SENTENCE NOT FOR THE WORST CRIME BUT FOR THE WORST LAWYER*, 103 YALE LAW JOURNAL 1835, 1883 (1994).

¹⁹ *McCleskey v. Kemp*, 481 U.S. 279 (1987).

who killed white victims.²⁰ In fact, the Baldus study concluded that “defendants charged with killing white victims in Georgia were 4.3 times as likely to be sentenced to death as defendants charged with killing blacks.”²¹ The controversy surrounding the Court’s decision in *McCleskey* is beyond the scope of this paper,²² but the key race-related issues highlighted in the case were hardly limited to Georgia or even to the years immediately following *Furman* and *Gregg*.²³

These problems are further conditioned and aggravated by class and are generally more pronounced for defendants occupying the lowest rung of the socio-economic ladder, who may be “defended by lawyers who lack the skills, resources, and commitment to handle such serious matters.”²⁴ As the *New York Times* has editorialized, “capital punishment [in the United States is] meted out to those without the resources to defend themselves,” and “poor people . . . are more likely to be charged with capital offenses.”²⁵ Indeed, the provocative Stephen Bright has questioned whether the death penalty is

²⁰ See generally *McCleskey v. Kemp*, 481 U.S. 279 (1987).

²¹ *McCleskey v. Kemp*, 481 U.S. 279, 286 (1987). Race is therefore an extralegal “defendant risk factor” on three dimensions: 1) If the defendant is black; 2) if the victim is white, and 3) if the defendant is black and the victim is white.

²² David G. Savage, *How Did They Get It So Wrong?*, ABA JOURNAL (Jan. 1, 2009 6:30 AM CST), http://www.abajournal.com/magazine/article/how_did_they_get_it_so_wrong/ (last visited February 21, 2016); John Calvin Jeffries, Justice Lewis F. Powell: A Biography (2001).

²³ U.S. Govt Accountability Off., GGD-90-57, Death Penalty Sentencing: Research Indicates Patterns of Racial Disparities. Report to Senate and House Committees on the Judiciary 5 (1990); Sheldon Ekland-Olson, *Structured Discretion, Racial Bias and the Death Penalty: The First Decade After Furman in Texas*, 69 Soc. Sci. Q. 853, 853 (1988).

²⁴ Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L. J. 1835, 1836 (1994).

²⁵ *Countdown to an Execution*, New York Times (Sept. 16, 2015), http://www.nytimes.com/2015/09/16/opinion/countdown-to-an-execution-in-oklahoma.html?_r=0.

“reserved for the worst crime” or “the worst lawyer.”²⁶ For all the prior studies on state-level capital practices, there has been surprisingly little research about the federal death penalty.²⁷ One of the few studies comes from Cohen and Smith, who examined racial disparities in federal death sentences and describe a broad discontinuity in the federal capital system, one that applies to defendants regardless of their race.²⁸ As they note, the “geography of the federal death penalty is anything but uniform.”²⁹ Of the ninety-four federal district courts across the country, just six account for one-third of capital authorizations,³⁰ and more than half of capital cases come from fourteen federal districts.³¹ Rather than representing a uniform, national system, these geographic disparities suggest a similar patchwork of outcomes found in state capital sentencing, which prior research has linked to local social, political, and cultural forces.³²

²⁶ Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L. J. 1835, 1883 (1994).

²⁷ Raymond Paternoster, et al., *An Empirical Analysis of Maryland’s Death Sentencing System With Respect to the Influence of Race and Legal Jurisdiction: Final Report*, American Civil Liberties Union (2013), http://www.aclu-md.org/uploaded_files/0000/0376/md_death_penalty_race_study.pdf (last visited September 17, 2015); Michael J. Songer & Isaac Unah, *The Effect of Race, Gender, and Location on Prosecutorial Decisions to Seek the Death Penalty in South Carolina*, 58 S. C. L. REV. 161, 182 (2006); American Civil Liberties Union, *Scattering Justice: Geographic disparities of the Death Penalty*, <https://www.aclu.org/scattered-justice-geographic-disparities-death-penalty> (last visited February 21, 2016).

²⁸ G. Ben Cohen & Robert J. Smith, *The Racial Geography of the Federal Death Penalty*, 85 WASH. L. REV. 425, 429 (2010).

²⁹ G. Ben Cohen & Robert J. Smith, *The Racial Geography of the Federal Death Penalty*, 85 WASH. L. REV. 425, 429 (2010).

³⁰ That is, cases in which the Attorney General authorizes the local U.S. Attorney to seek the death penalty.

³¹ G. Ben Cohen & Robert J. Smith, *The Racial Geography of the Federal Death Penalty*, 85 WASH. L. REV. 425, 429 (2010).

³² Jeffrey T. Ulmer & Brian Johnson, *Sentencing in Context: A Multilevel Analysis*, 42(1) CRIMINOLOGY 137, 141 (2004); Jeffrey T. Ulmer & John Kramer, *Court Communities Under Sentencing Guidelines: Dilemmas of Formal Rationality and Sentencing Disparity*, 34 CRIMINOLOGY 383, 384 (1996).

If capital cases are disproportionately authorized in particular federal districts, actual death sentences are even more concentrated. Although two-thirds of federal districts have not had a death sentence, upwards of forty percent of capital sentences are meted out in seven federal districts.³³ Table One below compares the federal districts in which capital authorizations and sentences have been most concentrated, demonstrating that just four of them – Louisiana-Eastern (New Orleans), Missouri-Western (Kansas City), Texas-Eastern (Tyler and Texarkana), and Virginia-Eastern (Richmond and Northern Virginia) – fall into both categories.³⁴

Table One – Districts in Which Federal Capital Authorizations and Death Sentences are Most Concentrated

Federal District	Capital Authorizations (Districts together = 50% of cases)	Death Sentences (Districts together = 40% of cases)
California – Central	X	
District of Columbia	X	
Florida – Southern	X	
Louisiana – Eastern	X	X
Maryland	X	
Michigan – Eastern	X	
Missouri – Eastern	X	
Missouri – Western	X	X
New York – Eastern	X	
New York – Southern	X	
Puerto Rico	X	
Tennessee – Western	X	
Texas – Eastern	X	X
Texas – Northern		X

³³ G. Ben Cohen & Robert J. Smith, *The Racial Geography of the Federal Death Penalty*, 85 WASH. L. REV. 425, 426 (2010).

³⁴ *Id.*; see also Jon Gould & Lisa Greenman, Report to the Committee on Defender Services Judicial Conference of the United States – Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases ix; 10 (2010), <http://www.uscourts.gov/sites/default/files/fdpc2010.pdf> (last accessed February 21, 2016).

Texas – Western		X
Virginia – Eastern	X	X
Virginia – Western	X	

How is it that a majority of capital authorizations are concentrated in fourteen federal districts but most of those districts (10 of 14) are unlikely to sentence substantial numbers of defendants to death? Cohen and Smith report that the difference is not driven by the crime rate, because the “number of murders in a particular location bears little relationship to the number of defendants from that jurisdiction who are sentenced to death in the federal system.”³⁵ There are other possible explanations, including the willingness of the local U.S. Attorney to offer or accept a plea or the expertise of local prosecutors in trying capital cases.³⁶ Without additional data, Table One would appear to suggest that physical location is either a risk or protective factor when considering the likelihood of a death sentence. We present an alternative explanation, one that has received virtually no consideration in the literature on the federal death penalty – the quality and resources made available to the defendant’s legal team.³⁷ We posit that there are measurable differences in “local legal culture” across federal judicial districts and that

³⁵ G. Ben Cohen & Robert J. Smith, *The Racial Geography of the Federal Death Penalty*, 85 WASH. L. REV. 425, 431 (2010).

³⁶ Based on interviews with federal judges (interview notes).

³⁷ Phillips has done a remarkable job of documenting the effect of lawyer type on prosecutors’ capital charging decisions and jurors’ death sentencing in Harris County, Texas (Houston). Scott Phillips, *Legal Disparities in the Capital of Capital Punishment*, 99 J. OF CRIM. L. & CRIMINOLOGY 717, 755 (2009). As interesting as his findings are – showing that defendants who hired their own attorney were much less likely to be sentenced to death – they are limited to a single jurisdiction. *Id.* at 750. Moreover, as we explain in a later section, the cost of defending a federal capital case is so prohibitive that almost all defendants qualify for appointed counsel.

these varying customs or standards shape the normative practices and expectations for defense efforts across geographic space.

To the extent that researchers have considered the effect of differing geographic culture on court processes, much of the work has examined the norms of the “courtroom workgroup,” which generally refers to the working relationship between a local judge, prosecutor, and defense attorney.³⁸ Courtroom workgroup studies often prioritize the occupational nuances of how court cases are actually handled, as opposed to how they are presumed to proceed according to codified procedure.³⁹ In the U.S., the adversarial court system presumes a motivated prosecutor is battling head-to-head with a dedicated defense lawyer, with opposing parties vigorously working on behalf of their party’s interests.⁴⁰ However, research suggests that the difference between court processes “on the books” and those processes “in practice” is substantial, with the courtroom workgroup frequently being far from adversarial; the three courtroom agents generally know each other well and have personal and professional communications that are high in frequency, duration, intensity, and priority.⁴¹

³⁸ Thomas W. Church, *Examining Local Legal Culture*, 10 L. & SOC. INQUIRY 449, 470 (1985).

³⁹ Christi Metcalfe, *The Role Of Courtroom Workgroups In Felony Case Dispositions: An Analysis Of Workgroup Familiarity And Similarity*, 50 L. & SOC’Y REV. 637, 637 (2016); *see also* Gary D. LaFree, *Adversarial and Nonadversarial Justice: A Comparison of Guilty Pleas and Trials*, 23 CRIMINOLOGY 289 (1985).

⁴⁰ Christi Metcalfe, *The Role Of Courtroom Workgroups In Felony Case Dispositions: An Analysis Of Workgroup Familiarity And Similarity*, 50 L. & SOC’Y REV. 637, 638 (2016).

⁴¹ Geoff Gallas, *Local Legal Culture: More Than Court Culture*, 20 COURT MANAGER 23, 25 (2005); Thomas W. Church, *Examining Local Legal Culture*, 10 LAW & SOC. INQUIRY 449, 471 (1985); JAMES EISENSTEIN, ROY FLEMMING, & PETER NARDULLI, *THE CONTOURS OF JUSTICE: COMMUNITIES AND THEIR COURTS* 27–53 (1999); THOMAS W. CHURCH, JR., ALAN CARLSON, JO-LYNNE LEE & TERESA TANN, *JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS* _pg_ (1978).

The courtroom workgroup develops shared understandings and values, creating an occupational subculture specific to that court.⁴² Together, the members cooperate in case processing (as opposed to case “battling”), agree on expected levels of vigor and attention in particular cases, and come to accept a common range of penalties for sentencing and negotiation practices for plea-bargaining.⁴³ Rather than arduous opposition, the prosecutor and defense lawyer – with the cooperation and oversight of the presiding judge – create their own courtroom-specific culture that likely varies across different workgroups.⁴⁴ Through this lens, the courtroom workgroup can be understood as a unit that engages in case processing and that these units will differ between courts, and in this specific study, across federal judicial districts.

These ensuing shared norms, seen as specific to the courtroom workgroup, have been called “local legal culture,”⁴⁵ which reflects “the values and perceptions of the principal members of the court community and how they ought to behave and their beliefs about how they actually do behave in performing their duties.”⁴⁶ But the term, as commonly employed in existing literature, still focuses on productivity measures and the

⁴² Church *supra* note 36 at 470.

⁴³ Christi Metcalfe, *The Role Of Courtroom Workgroups In Felony Case Dispositions: An Analysis Of Workgroup Familiarity And Similarity*, 50 L. & SOC’Y REV. 637, 638 (2016)

⁴⁴ Kathleen Currul-Dykeman, *Domestic Violence Case Processing: A Matter of Local Legal Culture*, 17 CONTEMP. JUST. REV. 250, 251 (2014); Jeffrey Ulmer, Christopher Bader & Martha Gault, *Do Moral Communities Play a Role in Criminal Sentencing? Evidence from Pennsylvania*, 49(4) Sociological Quarterly 737, 739 (2008); Geoff Gallas, *Local Legal Culture: More Than Court Culture*, 20(1) Court Manager 23,25(2005).

⁴⁵ Thomas W. Church, *Examining Local Legal Culture*, 10 LAW & SOC. INQUIRY 449, 450 (1985)

⁴⁶ JAMES EISENSTEIN, ROY FLEMMING, & PETER NARDULLI, *THE CONTOURS OF JUSTICE: COMMUNITIES AND THEIR COURTS* 28 (1999).

quasi-bureaucratic character of the courtroom,⁴⁷ in part because the concept largely grew out of studies comparing case processing times for the purpose of understanding and improving court efficiency.⁴⁸

Legal culture, like any operationalization of culture, has diverse meanings. Laurence Friedman has distinguished between “internal” and “external” legal culture.⁴⁹ The former “refers to the ideas and practices of legal professionals,” whereas the latter “is the name given to the opinions, interests, and pressures brought to bear on law by wider social groups.”⁵⁰ Under these definitions, internal legal culture is similar to the courtroom workgroups described by Eisenstein, *et al.* and Church,⁵¹ but external legal culture is too broad a concept to explain geographic differences in death penalty practices.⁵²

Kritzer and Zemans provide a definition of “local legal culture” that lies between the internal-external culture dichotomy of Friedman.⁵³ To them, the concept:

reflects the complete set of norms and attitudes that govern the operation of a court system. Some of these norms are reflected in formal rules (e.g., time limits, discovery limits); others are the natural outgrowth of structural factors such as caseloads, numbers of players involved in the system, and

⁴⁷ Geoff Gallas, *Local Legal Culture: More Than Court Culture*, 20 COURT MANAGER 23, 24 (2005).

⁴⁸ See generally Thomas W. Church, *Examining Local Legal Culture*, 10 LAW & SOCIAL INQUIRY 449 (1985); THOMAS W. CHURCH, JR., ALAN CARLSON, JO-LYNNE LEE & TERESA TANN, *JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS* (1978).

⁴⁹ Laurence Friedman, *The Place of Legal Culture in the Sociology of Law* in LAW AND SOCIOLOGY 189 (Michael Freeman ed., 2006).

⁵⁰ David Nelken, *Thinking About Legal Culture*, 1 ASIAN J. OF LAW & SOC’Y 255, 262 (2014).

⁵¹ JAMES EISENSTEIN, ROY FLEMMING, & PETER NARDULLI, *THE CONTOURS OF JUSTICE: COMMUNITIES AND THEIR COURTS* 30, 52 (1999); Thomas W. Church, *Examining Local Legal Culture*, 10 LAW & SOC. INQUIRY 449, 470 (1985).

⁵² David Nelken, *Thinking About Legal Culture*, 2014 ASIAN J. OF LAW & SOC’Y 1, 262 (2014).

⁵³ Herbert M. Kritzer & Frances K. Zemans, *Local Legal Culture and the Control of Litigation*, 27 LAW & SOC’Y REV. 535, 538 (1993).

the like; and still others are not traceable to formal procedure or structure but simply reflect a perception of “how we do things here.”⁵⁴

This description matches that of Sullivan, Warren and Westbrook who, in examining debtors’ behavior, defined legal culture as “systematic and persistent variation in local legal practices as a consequence of a complex of perceptions and expectations shared by many practitioners and officials.”⁵⁵

More recent scholarship has offered empirical and conceptual bridges between local legal culture and death penalty sentencing outcomes. Kovarsky analyzes state-level concentrations of the death penalty over a twenty-year period, finding that the geographic concentration of the death penalty is unrelated to the distribution of homicides.⁵⁶

Kovarsky argues that there is a combination of “extreme bureaucratic path dependence” and multiple sites of local discretion exercised by courtroom stakeholders that drive capital prosecutions and sentencing.⁵⁷ Fleury-Steiner, *et al.* specifically account for both race and place effects in their examination of “localisms” and “zones of racial exclusion” that, in turn, influence death sentences in Maricopa County, Arizona.⁵⁸

⁵⁴ Herbert M. Kritzer & Frances K. Zemans, *Local Legal Culture and the Control of Litigation*, 27 *LAW & SOC’Y REV.* 535, 538 (1993).

⁵⁵ Teresa A. Sullivan, Elizabeth Warren, & Jay Lawrence Westbrook, *The Persistence of Local Legal Culture: Twenty Years of Evidence From the Federal Bankruptcy Courts*, 17 *HAR. J. L. & PUB. POL’Y* 801, 802 (1994).

⁵⁶ Lee Kovarsky, *The Local Concentration of Capital Punishment*, 14 *UNIV. OF MARYLAND FRANCIS KING CAREY SCHOOL OF LAW* 1 (2016) (*working draft – forthcoming*), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2738958.

⁵⁷ Lee Kovarsky, “The Local Concentration of Capital Punishment” (2016) (*working draft – forthcoming*).

⁵⁸ Benjamin Fleury-Steiner, Paul Kaplan & Jamie Longazel, *Racist Localisms and the Enduring Cultural Life of America’s Death Penalty: Lessons from Maricopa County, Arizona*, 66 *STUDIES IN LAW, POLITICS, AND SOCIETY* 63, 71 (2015).

If some scholars have been able to describe local legal culture, socio-legal studies still lacks a broad understanding of the influence of extralegal and cultural forces on sentencing decisions and other case outcomes. In the discrepancy between law on the books and law in action, there is little guidance on how best to account for extralegal factors less obvious than race and class. As Songer and Unah noted in their study, “researchers have not sufficiently tested the effect of geography and local political culture on prosecutorial charging decisions.”⁵⁹ The same is true for jury verdicts, sentencing, or judges’ procedural decisions.⁶⁰ Much of the reason is that the concept is under theorized in the literature. Certainly, it is plausible that elected prosecutors or judges would be influenced by the “norms and attitudes toward criminal punishment” in the surrounding community and that, despite being courtroom agents, they are not immune from state, county, and court-specific cultures and normative understandings.⁶¹

Local legal culture may be under-theorized for a simple logistical reason: the unavailability of data. We find that existing scholarship examining local legal culture often emphasize courtroom productivity measures, in part [or perhaps] because those data are readily available, quantitative in nature, and readily translatable into a practitioner-oriented problem. The study of culture differs from a study of courtroom workgroup productivity, and cultural studies from any disciplinary vantage point involve working

⁵⁹ Michael J. Songer & Isaac Unah, *The Effect of Race, Gender, and Location on Prosecutorial Decisions to Seek the Death Penalty in South Carolina*, 58 S. C. L. REV. 161, 178 (2006).

⁶⁰ John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. Cal. L. Rev. 465, 467 (1998–1999).

⁶¹ Michael J. Songer & Isaac Unah, *The Effect of Race, Gender, and Location on Prosecutorial Decisions to Seek the Death Penalty in South Carolina*, 58 S. C. L. REV. 161, 178 (2006).

from a qualitative, ethnographic, and/or mixed methods paradigm, which may be methodologically and logistically challenging to some scholars.⁶² For these and other reasons, it is understandably difficult to obtain access to those judges, prosecutors, and defense attorneys whose occupational culture we aim to better understand.

This study recognizes that courtroom workgroups and the people that enter federal courts do not exist in a vacuum. Despite a federal process that is ostensibly consistent and standardized across the country, there are social and political differences that vary across space and can be understood as constituting elements of local legal culture. Indeed, it would be unreasonable to believe that the federal courtroom workgroup in—for the sake of example—Birmingham, Alabama, will not differ from a workgroup in New York City on variables related to social, political, and cultural climate. Whereas federal law and case procedures are written on the books in a way that is independent of geography, the existing but nascent body of research on local and regional culture could benefit from a more nuanced understanding of these subtle yet institutionally embedded extralegal variables that may significantly sway a decision regarding life or death. One of the challenges, then—and the purpose of our study—is to determine what those untraceable influences might be and model their effects. Relying on a combination of quantitative (both frequentist and Bayesian statistics) and qualitative methods, this study examines the relationship between local legal culture and resource allocation for capital cases at the federal level.

III. The Federal Death Penalty Process

⁶² See generally, Thomas W. Church, *Examining Local Legal Culture*, 10 LAW & SOC. INQUIRY 449, 487 (1985).

In order to contextualize the methods and data sections that follow, we offer a brief description of the process for authorizing and defending federal capital cases. The federal death penalty goes back to before the first Congress, yet, as one author explains, “the current generation of [the federal death penalty has] been in business” for only the last twenty years.⁶³ During that time, the number of death-eligible federal capital defendants surged.⁶⁴ Whereas there were only twenty-six such defendants in 1993, the number jumped to sixty-three in 1994 and to an annual number upwards of 150 in every subsequent year through the end of the decade.⁶⁵ However, the Attorney General has consistently sought the death penalty in fewer than half of cases eligible for a capital prosecution.⁶⁶

The funnel of federal capital cases narrows further if one compares the number of capital-authorized cases that go to trial versus those that result in a guilty plea. In the twenty years from 1989 to 2009, the Department of Justice (DOJ) authorized capital prosecutions against 465 defendants, yet only 262 of them, or about half, were tried.⁶⁷

⁶³ Rory Little, *THE FEDERAL DEATH PENALTY: HISTORY AND SOME THOUGHTS ABOUT THE DEPARTMENT OF JUSTICE'S ROLE*, 3 *FORDHAM URBAN LAW JOURNAL* 347, 350 (1998). For a historical reference, see HUGO ADAM BEDAU, *THE DEATH PENALTY IN AMERICA* 3 (OXFORD UNIVERSITY PRESS) (1982).

⁶⁴ Jon Gould & Lisa Greenman, *Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases*, *USCOURTS.GOV* 4 (2010), <http://www.uscourts.gov/sites/default/files/fdpc2010.pdf> (last visited Feb. 21, 2016).

⁶⁵ *Id.*

⁶⁶ Jon Gould & Lisa Greenman, *Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases*, *USCOURTS.GOV* 85 (2010), <http://www.uscourts.gov/sites/default/files/fdpc2010.pdf> (last visited Feb. 21, 2016).

⁶⁷ Jon Gould & Lisa Greenman, *Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases*, *USCOURTS.GOV* ix, 7–8 (2010), <http://www.uscourts.gov/sites/default/files/fdpc2010.pdf> (last visited Feb. 21, 2016).

Many of the rest pled guilty and accepted a sentence of life in prison or even a term of years.⁶⁸ Just sixty-eight defendants were sentenced to death at trial.⁶⁹ That figure represents 26% of defendants tried for capital murder, 15% of defendants authorized by DOJ for a capital prosecution, and a mere 2% of defendants who allegedly committed a capital-eligible crime.⁷⁰

A. Federal Capital Defense

Outside of capital defense circles, little is known about the process of appointing and supporting attorneys who represent federal capital defendants. Under 18 U.S.C. § 3005, defendants charged with a federal capital-eligible crime are entitled to two attorneys, at least one of whom is required to be “learned in the law applicable to capital cases.”⁷¹ In practice, because federal capital litigation is so extensive and expensive, virtually all defendants qualify for the appointment of government-provided attorneys under federal law.⁷² In some federal districts, the local federal public defender’s office

⁶⁸ Jon Gould & Lisa Greenman, *Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases*, USCOURTS.GOV 10, 12 (2010), <http://www.uscourts.gov/sites/default/files/fdpc2010.pdf> (last visited Feb. 21, 2016).

⁶⁹ Even that number includes two defendants sentenced to death by jurors but whose sentences the trial judge on a motion for a new trial overturned Jon Gould & Lisa Greenman, *Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases*, USCOURTS.GOV 10 (2010), <http://www.uscourts.gov/sites/default/files/fdpc2010.pdf> (last visited Feb. 21, 2016).

⁷⁰ Jon Gould & Lisa Greenman, *Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases*, USCOURTS.GOV 12 (2010), <http://www.uscourts.gov/sites/default/files/fdpc2010.pdf> (last visited Feb. 21, 2016).

⁷¹ 18 U.S.C. § 3005 (1994).

⁷² See 18 U.S.C 3599 (2008) [statute providing counsel to indigent defendants in federal capital cases].

provides representation, but most capital defendants are appointed a “panel attorney.”⁷³ These lawyers, who are in private practice, have agreed to take capital cases, for which they are selected and paid by the presiding judge, who also determines the financial resources that will be made available for the panel attorney’s defense efforts.⁷⁴

Panel attorneys must submit vouchers for their time and that of any assistants or experts they employ in the case, with judges reviewing the bills and either approving or revising the amounts and services.⁷⁵ Some courts now employ case budgeting attorneys, who serve as intermediaries between counsel and the court and also assist lawyers in creating a budget at the start of the representation, which judges can then approve.⁷⁶ The judge is the arbiter in a variety of capacities; whether the attorney simply wishes to employ a paralegal or investigator or needs to engage a forensic psychologist, ballistics expert, or jury consultant for an aspect of the case, the categorical request and financial amount must be presented to and approved by the judge.⁷⁷

⁷³ Not only can capital cases overwhelm the caseload of a federal defender’s office (FDO), but an FDO may have a conflict of interest with a co-defendant or not employ lawyers who qualify for capital representation. *Id. supra* note 72.

⁷⁴ Jon Gould & Lisa Greenman, *Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases*, USCOURTS.GOV 17–18 (2010), <http://www.uscourts.gov/sites/default/files/fdpc2010.pdf> (last visited Feb. 21, 2016).

⁷⁵ Jon Gould & Lisa Greenman, *Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases*, USCOURTS.GOV 59, 70 (2010), <http://www.uscourts.gov/sites/default/files/fdpc2010.pdf> (last visited Feb. 21, 2016).

⁷⁶ Jon Gould & Lisa Greenman, *Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases*, USCOURTS.GOV 69–70 (2010), <http://www.uscourts.gov/sites/default/files/fdpc2010.pdf> (last visited Feb. 21, 2016).

⁷⁷ Jon Gould & Lisa Greenman, *Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases*, USCOURTS.GOV 69 (2010), <http://www.uscourts.gov/sites/default/files/fdpc2010.pdf> (last visited Feb. 21, 2016)

The defense of death penalty cases is significantly more expensive than for non-capital cases, and this applies to both state and federal proceedings.⁷⁸ Examining cases from 1998-2004, the period during which the federal death penalty was most prevalent, federal defendants received a median \$44,809 in attorney time and expert services to defend themselves in cases that were capital-eligible but for which the Department of Justice did not seek the death penalty.⁷⁹ By contrast, when the DOJ authorized a case for capital prosecution, defense resources averaged \$200,933 in cases completed by plea and \$465,602 for those resolved by trial.⁸⁰ These differences are hardly surprising. By virtue of the possible penalty at stake, capital cases warrant greater attorney time and investigative effort. Moreover, a capital case actually involves two trials.⁸¹ In the first, the parties litigate the guilt or innocence of the defendant. Only if the defendant is convicted of a capital charge does the trial move to the penalty or sentencing phase, in which the prosecution seeks to explain why the defendant should be sentenced to death while the defense presents mitigating evidence to convince jurors to deliver a sentence of life without the possibility of release.⁸²

⁷⁸ While an exhaustive state-by-state overview is beyond the scope of this paper, in Maryland alone, John Roman, and other scholars at the Urban Institute, found that among 1,000+ capital eligible cases, the total cost of prosecuting averaged 1.9 million dollars more than a case in which the death penalty was not sought (Roman, *et al.*, 2008); *See also Id. supra* note 77.

⁷⁹ Jon Gould & Lisa Greenman, *Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases*, USCOURTS.GOV 84 (2010), <http://www.uscourts.gov/sites/default/files/fdpc2010.pdf> (last visited Feb. 21, 2016).

⁸⁰ Jon Gould & Lisa Greenman, *Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases*, USCOURTS.GOV 25 (2010), <http://www.uscourts.gov/sites/default/files/fdpc2010.pdf> (last visited Feb. 21, 2016).

⁸¹ *Id.*

⁸² Jon Gould & Lisa Greenman, *Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases*, USCOURTS.GOV 77 (2010), <http://www.uscourts.gov/sites/default/files/fdpc2010.pdf>

B. Disparities in Defense Resources

To our knowledge, there have been only two national studies that have examined the cost and quality of capital defense resources in the post-Federal Death Penalty Act (FDPA) era. Both studies were commissioned by the Committee on Defender Services of the Judicial Conference of the United States.⁸³ Although that second study was intended as an evaluation project, it reached two conclusions that were both troubling and relevant for the present study. Examining the attorney time and expert resources provided to federal capital defendants at trial, the study found considerable regional differences in the level of funds afforded defendants.⁸⁴ Particular federal districts, including those in Georgia, Texas and North Carolina, were likely to provide lower levels of defense support, while those in places like Connecticut, California, and the District of Columbia afforded capital defendants greater defense resources.⁸⁵ Moreover, the level of support was correlated with case outcomes and was statistically unrelated to the bulk of the

(last visited Feb. 21, 2016). See generally United States Department of Justice, *The Federal Death Penalty System: Supplementary Data, Analysis and Revised Protocols for Capital Case Review* (Jun. 6, 2001), <https://www.justice.gov/archive/dag/pubdoc/deathpenaltystudy.htm>.

⁸³See, e.g., James R. Spencer, Robin Cauthron & Nancy Edmunds, *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* (1998), http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/Standards/National/federal_judicial_conference_recommendations.authcheckdam.pdf (last visited Dec. 14, 2015); Jon Gould & Lisa Greenman, *Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases*, USCOURTS.GOV 51 (2010), <http://www.uscourts.gov/sites/default/files/fdpc2010.pdf> (last visited Feb. 21, 2016).

⁸⁴Jon Gould & Lisa Greenman, *Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases*, USCOURTS.GOV 51 (2010), <http://www.uscourts.gov/sites/default/files/fdpc2010.pdf> (last visited Feb. 21, 2016).

⁸⁵Jon Gould & Lisa Greenman, *Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases*, USCOURTS.GOV 51–52 (2010), <http://www.uscourts.gov/sites/default/files/fdpc2010.pdf> (last visited Feb. 21, 2016).

legally relevant facts of the case.⁸⁶ As Table Two below indicates, defendants whose approved funds were below the 30th percentile of support (~ \$320,000) were twice as likely to be sentenced to death as those with higher levels of support.⁸⁷

Table Two: Correlation between Defense Resources & Sentencing Outcome
(statistically significant at .05 level)

Total Trial Cost	Sentenced to Death	Other Outcomes	Total Cases
Lowest Resourced Cases (< 30 th percentile)	44 percent	56 percent	18
All Other Cases (> 30 th percentile)	19 percent	81 percent	43

These correlations should serve as a serious warning for those concerned about the fairness of the federal death penalty. Certainly, on their face, the correlations in Table Two suggest that defendants denied attorney time and expert resources are at greater risk of being sentenced to death. However, the field presently lacks sufficient data to move from correlational to causal analysis—that is, to conclude definitively that cost reliably predicts case outcome in capital trials. To draw this conclusion, of course, researchers must account for both potential antecedent and intervening causes, such as the strength of the evidence available to prosecutors or the demographics or backgrounds of jurors. Neither we nor, to our knowledge, others possess these data, and this point is revisited in the limitations section of the paper.

⁸⁶Jon Gould & Lisa Greenman, *Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases*, USCOURTS.GOV 47 (2010), <http://www.uscourts.gov/sites/default/files/fdpc2010.pdf> (last visited Feb. 21, 2016).

⁸⁷ *Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases*, USCOURTS.GOV 44 (2010), <http://www.uscourts.gov/sites/default/files/fdpc2010.pdf> (last visited Feb. 21, 2016).

However, it is possible to assess the determinants of a defendant's resources at trial, those factors that influence how much attorney time and expert assistance a suspect will receive when defending himself against a death sentence. In this respect, we can analyze whether those bases reflect legally relevant variables—for example, case complexity or a larger number of victims, each of which would suggest higher cost defense—or extralegal factors that should have no role predicting the level of a constitutionally-protected service, for example, the race of the defendant or victim, or the background of the judge. After all, capital defense is safeguarded by the Sixth Amendment,⁸⁸ Supreme Court precedent,⁸⁹ and federal statute.⁹⁰ The notion that defense resources would turn on extralegal or cultural factors is antithetical to these legal norms and the legitimacy of the federal criminal justice system itself, especially because the federal courts are considered a unitary legal system in which the prevailing law, processes, and standards are presumed to be common.⁹¹ Indeed, “the FDPA, the underlying congressional intent regarding federal sentencing, and the Attorney General’s capital case protocols, all indicate a policy of at least rough uniformity in the administration of the federal death penalty.”⁹²

⁸⁸ Bright *supra* note 8 at 1836.

⁸⁹ See, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 342–345 (1963) (holding that the Sixth Amendment’s guarantee of counsel is fundamental and essential right in a criminal case); *Strickland v. Washington*, 466 U.S. 668, 686–687 (1984) (establishing that the Sixth Amendment guarantees a criminal defendant to reasonably effective assistance of counsel).

⁹⁰ 18 U.S.C. § 3005 (1994); 18 U.S.C. § 3599 (2008).

⁹¹ RORY LITTLE, *THE FEDERAL DEATH PENALTY: HISTORY AND SOME THOUGHTS ABOUT THE DEPARTMENT OF JUSTICE’S ROLE*, 3 FORDHAM URBAN LAW JOURNAL 347, 350 (1998).

⁹² RORY LITTLE, *THE FEDERAL DEATH PENALTY: HISTORY AND SOME THOUGHTS ABOUT THE DEPARTMENT OF JUSTICE’S ROLE*, 3 FORDHAM URBAN LAW JOURNAL 347, 452 (1998).

In the remainder of this article, we analyze the decision to grant defense resources in federal capital trials, seeking, first, to determine whether the dividing line of low cost cases identified in Table Two is truly relevant and, if so, to explain why certain cases are lower cost whereas others fall above the 30th percentile. As explained in the next section, ours is an empirical inquiry, involving cross-tabular, correlational, and regression analysis.

IV. Data and Methods

Data on defense costs are available for federal defendants represented by panel lawyers.⁹³ Since these attorneys must file vouchers for their time and the expenses of their investigators and experts, the courts are able to track the resources provided and approved for the defense in these cases.⁹⁴ Such data are unavailable for cases involving public defenders, who do not track or bill for their time, or for privately-retained attorneys, who need not share their expenses with the court.⁹⁵ However, because 80% of all federal capital defendants have been represented by a panel attorney, information from panel cases is informative for understanding the vast majority of federal capital cases defended during this time period.⁹⁶

⁹³ The federal Defender Services Office maintains an electronic voucher and payment system for panel attorneys. <http://www.uscourts.gov/services-forms/defender-services> (last visited March 27, 2017).

⁹⁴ Jon Gould & Lisa Greenman, *Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases*, USCOURTS.GOV 119 (2010), <http://www.uscourts.gov/sites/default/files/fdpc2010.pdf> (last visited Feb. 21, 2016).

⁹⁵ See Report of the Ad Hoc Committee to Review the Criminal Justice Act. Forthcoming 2017.

⁹⁶ Jon Gould & Lisa Greenman, *Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases*, USCOURTS.GOV 19 (2010), <http://www.uscourts.gov/sites/default/files/fdpc2010.pdf> (last visited Feb. 21, 2016).

We were able to obtain defense cost data for federal capital cases from 1998-2004.⁹⁷ During this period, 214 defendants were charged with a death-eligible crime and were appointed a panel attorney.⁹⁸ The Department of Justice sought the death penalty for half of the defendants (n = 95).⁹⁹ As noted in Figure One, our focus is on the sixty-two defendants who went to trial;¹⁰⁰ unlike unauthorized cases and pleas, defendants in these cases faced the real prospect of a death sentence. Although we could not select the years of available data, the period from 1998 to 2004 is an appropriate range, capturing the modern federal death penalty at its apex.¹⁰¹ Whatever procedures the federal courts used for the appointment and compensation of panel attorneys, these measures would have been both implemented and routinized by the years we now examine. For that matter, the hourly rate permitted panel attorneys was consistent across the years studied.¹⁰²

⁹⁷ This information was provided to us on a confidential basis.

⁹⁸ In addition, DOJ authorized another 24 capital cases that were handled at least in part by a Federal Public Defender. Again, because cost data are unavailable for the work done by federal public defenders, these cases are excluded from the analysis. *See also* Jon Gould & Lisa Greenman, Report to the Committee on Defender Services Judicial Conference of the United States – Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases 19 (2010), <http://www.uscourts.gov/uscourts/FederalCourts/.../FDPC2010.pdf> (last accessed February 21, 2016).

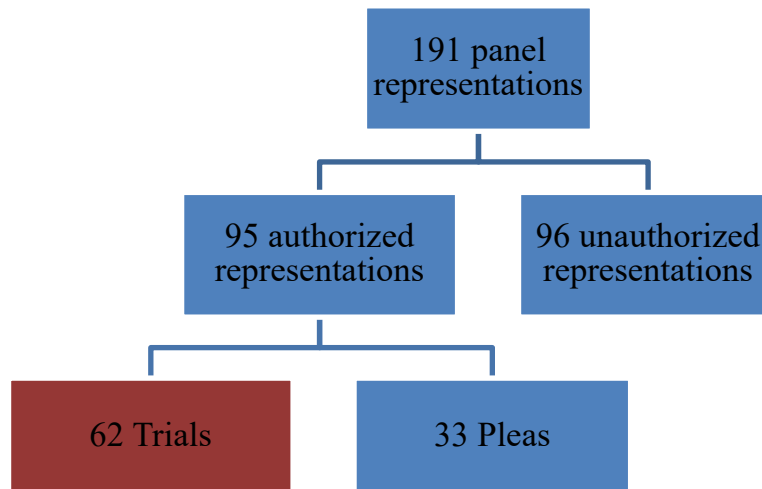
⁹⁹ *See infra* Figure One.

¹⁰⁰ Jon Gould & Lisa Greenman, *Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases*, USCOURTS.GOV 19 (2010), <http://www.uscourts.gov/sites/default/files/fdpc2010.pdf> (last visited Feb. 21, 2016).

¹⁰¹ Jon Gould & Lisa Greenman, Report to the Committee on Defender Services Judicial Conference of the United States – Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases 17 (2010), <http://www.uscourts.gov/uscourts/FederalCourts/.../FDPC2010.pdf> (last accessed February 21, 2016).

¹⁰² United States Courts. ND. “Appointment of Counsel: The Defender Services Program.” *Available at:* <http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel.aspx> (last accessed February 21, 2016).

Figure One: Distribution of Capital-Eligible Cases, 1998-2004



A. Dependent Variable

Our dependent variable of interest is case cost, or the level of monetary resources provided to federal capital defendants who were tried. This figure is a combination of the time that defense lawyers dedicated to their clients' cases as well as the amount of investigative and expert services that lawyers employed as part of the defense. Case cost data are imperfect correlates for attorney effort or expert time, as the total expenses are affected by both the number of hours that each individual dedicated to the defense and his/her hourly rate. However, at least in federal capital cases, attorneys' hourly rates are set at a maximum amount, \$125 at the time in question.¹⁰³ Attorneys may bill at a lower hourly rate – which some junior lawyers did – but none may bill higher than the hourly cap.¹⁰⁴ A separate analysis, which includes attorneys' hours worked, shows the attorneys'

¹⁰³ United States Courts. ND. "Appointment of Counsel: The Defender Services Program." Available at: <http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel.aspx> (last accessed February 21, 2016).

¹⁰⁴ United States Courts. ND. "Appointment of Counsel: The Defender Services Program." Available at: <http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel.aspx> (last accessed February 21, 2016).

bills were an approximate match for their hours worked,¹⁰⁵ giving us confidence that the case cost data are not skewed by differential hourly rates. (No table shown.) Moreover, expert services consistently constituted one-third of total defense costs across cases, suggesting that we were seeing a common phenomenon and not one affected by pockets of especially expensive or bargain expert rates.¹⁰⁶ As such, the integrity of the case cost data was verified.

A preliminary review of descriptive statistics shows significant variation in the level of defense resources provided to federal capital defendants. Within the 62 cases that proceeded to trial during the period of this study, the median level of defense funds was \$465,602.¹⁰⁷ But, as Table Three indicates, the maximum amount was \$1,788,246, whereas the lowest level was \$67,366.¹⁰⁸ The discrepancy between the median and mean suggests that the latter is upwardly skewed by expensive outlier cases, whereas the bulk of cases have costs much closer to the median. Cost drivers and the mechanisms behind these differences are discussed in the Findings section.

¹⁰⁵ Nor should this be surprising given that the hourly rate was capped at \$125, an extremely low figure given the stakes of a capital representation. Indeed, by 2010, the maximum hourly rate for capital cases was \$178/hour. Jon Gould & Lisa Greenman, Report to the Committee on Defender Services Judicial Conference of the United States – Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases 48 (2010), <http://www.uscourts.gov/uscourts/FederalCourts/.../FDPC2010.pdf> (last accessed February 21, 2016).

¹⁰⁶ In fact, informal conversations with federal capital defense lawyers suggest that there is a “national market” for expert services, as defense teams often seek to rely on a few known and trusted experts when their clients’ lives are at stake.

¹⁰⁷ See *infra* Table Three.

¹⁰⁸ *Id.*

Table Three – Total Cost for Defense Representation in Federal Capital Cases, Panel Attorneys in Trials, 1998-2004

Cases	Median	Mean	High	Low
Trials	\$465,602	\$620,932	\$1,788,246	\$67,366

B. Independent Variables

We collected and tested six categories of independent variables against defense resources, each representing different hypotheses for why federal capital defendants received the amounts and services provided to defend themselves. These categories included Case Facts, Local Culture, Judge’s Background, Defense Attorneys’ Experience, Court Performance, and Defendant/Victim Demographics.

1. Case Facts

We started with legally relevant factors – the facts of the case – which might be said to comprise the “null hypothesis.” That is, if federal capital defense is consistent with the constitutional, statutory, and common law principles that protect due process and equal protection, we would expect differences in defense resources to reflect the varying complexities of the case facts, all of which would be legally-relevant variables. For example, a case that involves multiple co-defendants would require greater investigation and preparation (which translates into higher defense resources and case cost), as would a case in which a defendant is charged with multiple crimes along with murder. Mass murders, too, carry an increased emotional impact, which the defense must be prepared to counter at trial.

Complex cases, therefore, are hypothesized to drive case cost upward. Given available data, we were able collect and code six variables that reflect case complexity.

These include the number of defendants, victims, and offenses; the type of crime charged; the prosecution's allegation of future dangerousness; and the victim's relative blamelessness. The first three of these variables should be fairly self-explanatory in reflecting case complexity. Put plainly, the more facts involved in a case, the broader investigation needed and the greater defense resources required.

The fourth variable separates cases with more complex charges, specifically those involving a continuing criminal enterprise (CCE), racketeer influenced corrupt organization (RICO), or terrorism – all of which constitute either compound liability or multi-defendant cases.¹⁰⁹ These more complicated charges stand in contrast to many other federal capital cases, involving murders committed on federal lands or in federal facilities or where a victim was transported across state lines. Although no federal capital case is easy to defend, CCE, RICO, and terrorism cases typically involve multiple locations and witnesses that require additional time and personnel to investigate.¹¹⁰

We also tracked whether DOJ alleged the defendant's future dangerousness, a claim that prosecutors sometimes invoke as an "aggravating circumstance" to justify a death sentence.¹¹¹ To be sure, the prosecution may be wrong about the defendant's future

¹⁰⁹ Susan W. Brenner, *RICO, CCE, and Other Complex Crimes: The Transformation of American Criminal Law?*, 2 Wm. & Mary Bill Rts. J. 239, 241 (1993).

¹¹⁰ Jon Gould & Lisa Greenman, Report to the Committee on Defender Services Judicial Conference of the United States – Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases 38 (2010), <http://www.uscourts.gov/uscourts/FederalCourts/.../FDPC2010.pdf> (last accessed February 21, 2016).

¹¹¹ See 18 U.S.C. § 3592 (discussing aggravating circumstances).

dangerousness if acquitted or sentenced to life in prison,¹¹² but without access to the defendants' full criminal histories or a variable to assess the emotional impact of the crimes charged, we used future dangerousness as a substitute measure for the extra effort that the defense team must undertake to challenge the prosecution's argument for execution.

Finally, the sixth component of case complexity is a dichotomous variable distinguishing those crimes in which the targeted victim had no prior criminal association connected to the case. Here, our intention was to separate those crimes involving especially sympathetic victims from those in which the victim's death may have been connected to his or her involvement in criminal activity. This was done to account for the presence of many cases in which the victim and defendant were known acquaintances or involved in a similar trade or enterprise (e.g. organized crime or drug-related operation). Although we recognize that capital defense lawyers routinely must soften the jury's impression of their clients, some cases take more effort than others. Cases of the so-called "blameless victim" are among the most resource-intensive.¹¹³

Our justification for these measures of case complexity lies, in part, in the initial cross-tab examinations that highlighted statistically significant relationships between

¹¹² Mark D. Cunningham, Thomas J. Reidy, & Jon R. Sorenson, *Assertions of 'Future Dangerousness' at Federal Capital Sentencing: Rates and Correlates of Subsequent Prison Misconduct and Violence*, 32 *Law and Hum. Behav.* 46, 50 (2007).

¹¹³ Jon Gould & Lisa Greenman, Report to the Committee on Defender Services Judicial Conference of the United States – Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases 48 (2010), <http://www.uscourts.gov/uscourts/FederalCourts/.../FDPC2010.pdf> (last accessed February 21, 2016).

increased case cost and the case complexity measures of interest. Although it is possible that in a given case one of the complexity measures might be negatively correlated with case costs (as, for example, if multiple co-defendants testified against one defendant), our empirical assessments and previous literature connect our case complexity measures with increased case cost.¹¹⁴ Conceptually, we believe that in the unique context of capital authorized federal cases, our measures of case complexity are valid as they prolong and expand the steps needed to successfully defend a case. Ideally, we would have included other factors reflecting complex case facts, including the defendant's intellectual disability, the strength of the prosecution's case, and the witnesses available to the defense, among others. However, much of these data were either unavailable or problematic.¹¹⁵ As a result, our analysis of case complexity is confined to the six variables discussed above; Case Facts, Local Culture, Judge's Background, Defense Attorneys' Experience, Court Performance, and Defendant/Victim Demographics.

2. Local Legal Culture

It is challenging to model variation in a multifaceted and abstract concept like legal culture. Here, our operationalization of local legal culture entails the direction and degree of punitiveness, which incorporates measures of due process and crime control motives. Herbert Packer first articulated these dueling motives, which reflect, on one

¹¹⁴ Jon Gould & Lisa Greenman, Report to the Committee on Defender Services Judicial Conference of the United States – Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases 37-38 (2010), <http://www.uscourts.gov/uscourts/FederalCourts/.../FDPC2010.pdf> (last accessed February 21, 2016).

¹¹⁵ For example, no independent measure exists for a defendant's mental ability, the only marker being whether the defense employed a psychologist or psychiatrist and sought to litigate the question at trial. But, that then conflates independent and dependent variables, which would confound the analysis.

hand, procedural safeguards to prevent government overreach and, on the other hand, enhanced powers to speedily punish the guilty.¹¹⁶ We see these concepts debated regularly when officials talk about preventing wrongful convictions or vindicating victims, and they are evident also in debates about the appropriate level of defense representation.¹¹⁷ Whenever people say that “a criminal defendant is entitled to an adequate but not an extravagant defense” – and we have heard these very words from judges – they are implicitly reflecting their preferred balance between due process and crime control, at least with respect to defense representation.¹¹⁸ These motives and competing objectives can be measured, and we find that they vary across space (e.g., federal judicial districts).

Past research on punitiveness offers a few possible measures for local variation, including regionally variant cultures of honor¹¹⁹; political party affiliation and measures of empathy¹²⁰; conservative values among a given jurisdiction and the proportion of

¹¹⁶ Herbert Packer, *The Limits of the Criminal Sanction* _pg_ (1968).

¹¹⁷ 351 U.S. 12 (1956) Craig Bowman, *Indigent’s Right to an Adequate Defense Expert and Investigational Assistance in Criminal Proceedings*, 55 Cornell L. Rev. 632 (1970) Available at: <http://scholarship.law.cornell.edu/clr/vol55/iss4/8> //. See also Fred W. Bennett, *Toward Eliminating Bargain Basement Justice: Providing Indigent Defendants with Expert Services and an Adequate Defense*, 58 Law & Contemp. Probs. 95, 95-98 (1995).

¹¹⁸ Interview data provided on a confidential basis.

¹¹⁹ Dov Cohen, Richard E. Nisbett, Brian F. Bowdle & Norbert Schwarz, *Insult, Aggression, and the Southern Culture of Honor: An ‘Experimental* 70(5) J. of Personality and Soc. Psychol. 945, 946 (1996).

¹²⁰ James Unnever, Francis T. Cullen & Bonnie S. Fisher, *Empathy and Public Support for Capital Punishment*, 28(1) J. of Crime and Just. 1, 4-7 (2005).

Republican seats in the jurisdiction's corresponding legislature¹²¹; and religiosity.¹²²

Ulmer & Johnson conducted a series of hypothesis tests, one of which examined whether counties with more conservative political electorates will exhibit more severe sentencing.¹²³ Their data did not support a connection between county-level political climate and sentencing outcomes. Here, we were able to collect three variables reflective of local punitiveness, including a) whether the death penalty existed at the state level; b) voters' support for the 2008 Republican presidential candidate among the counties clustered within each federal judicial district; and c) whether the federal judicial district was located in the South (4th, 5th, and 11th federal circuits).¹²⁴ Previous studies have found that all three of these variables are associated with increased capital sentences at the state level.¹²⁵ Given that members of federal courtroom workgroups live and work in these

¹²¹ David Jacobs & Jason T. Carmichael, *The Political Sociology of the Death Penalty: A Pooled Time-Series Analysis*, 67(1) *Am. S. Rev.* 109, 117-118 (2002).

¹²² James D. Unnever & Francis T. Cullen, *White Perceptions of Whether African Americans and Hispanics are Prone to Violence and Support for the Death Penalty*, 49(4) *J. of Res. in Crime and Delinq.* 519, 530 (2014).

¹²³ Jeffrey T. Ulmer & Brian Johnson, *Sentencing in Context: A Multilevel Analysis*, 42(1) *Criminology* 137, 141 (2004).

¹²⁴ We tried modeling this construct multiple ways, accounting for the fact that the 4th and 5th circuits had policies at the time to limit defense costs. But, rather than being limited to two circuits, the variable had the most explanatory power when accounting for the 4th, 5th, and 11th circuits.

¹²⁵ Raymond Paternoster, *Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74(3) *J. of Crim. L. and Criminology* 754, 779 (1983); Gary Kleck, *Racial Discrimination in Criminal Sentencing: A Critical Evaluation of the Evidence with Additional Evidence on the Death Penalty*, 46 *Am. Soc. Rev.* 783, 794 (1981); G. Ben Cohen & Robert J. Smith, *The Racial Geography of the Federal Death Penalty*, 85 *Wash. L. Rev.* 425, 433 (2010); John H. Beck, Donald D. Hackney, John Hackney & Matthew Q. McPherson, *Regional Differences in Chapter 13 Filings: Southern Legal Culture or Religion?*, 72(2) *Rev. of Soc. Econ.* 186, 203 (2013); James D. Unnever & Francis T. Cullen, *White Perceptions of Whether African Americans and Hispanics are Prone to Violence and Support for the Death Penalty*, 49(4) *J. of Res. in Crime and Delinq.* 519, 531 (2014).

same areas, they would hardly seem immune to the socio-political cultures of their surrounding locales.

3. Judges' Backgrounds

There is considerable research suggesting that a judge's background affects the substance of her rulings.¹²⁶ Here, we were able to collect three variables reflective of a judge's background, reputation, and style. First, we coded the party affiliation of the president who appointed the judge, which serves as a marker for the likely ideological bounds of the judge.¹²⁷ Second, we noted whether the judge had previously served as a federal prosecutor, a variable reflective of her experience in federal criminal law and presumed pro-law enforcement and crime control orientation. Third, we coded whether the judge had graduated from a nationally prestigious law school.¹²⁸ This last measure helps us in modeling a judge's acculturation to national legal norms and best practices.

¹²⁶ Stuart S. Nagel, *Judicial Backgrounds and Criminal Cases*, 53 J. of Crim. L., Criminology & Police Sci. 333, 339 (1962); Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decision-making in the Federal Appellate Courts*, 114 The Yale L. J. 1759, 1786 (2005); Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86(1) Wash. U. L. Rev. 1117, 1156 (2008); David Abrams, Marianna Bertran & Sendhil Mullainathan, *Do Judges Vary in Their Treatment of Race?*, 41(2) J. of Legal Stud. 347, 377 (2012); Jonathan P. Kastellec, *Racial Diversity and Judicial Influence on Appellate Courts*, 57(1) Am. J. of Pol. Sci. 167, 179 (2013). See generally Kitty Calavita, *Invitation to Law & Society: An Introduction to the Study of Real Law* (2010); Antonin Scalia, *Interpreting Constitutional Texts in Arguing About Law* (Aileen Kavanagh & John Oberdiek eds., 2009).

¹²⁷ We are well aware of the limits of this variable alone to predict a judge's ideology, particularly at the district court level. Michael W. Giles, Virginia A. Hettinger, & Todd Peppers, *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54 Pol. Res. Q. 623, 624-627 (2001); Cass R. Sunstein, David Schkade, Lisa M. Ellman & Andres Sawicki, *Are Judges Political? An Empirical Analysis of the Federal Judiciary* _pg_ (2006). However, there is broad consensus that a president's political affiliation restricts the range of ideologies that would be considered acceptable among individuals for appointment to the federal bench. Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of US Supreme Court Justices*, 83(2) The Am. Pol. Sci. Rev. 557, _pg_ (1989); Albert Yoon, *Pensions, Politics, and Judicial Tenure: An Empirical Study of Federal Judges, 1869-2002*, 8(1) Am. L. and Econ. Rev. 143, 148 (2006).

¹²⁸ Using a dichotomous variable distinguishing between the 15 highest ranked law schools as measured by U.S. News and World Report.

Imperfect as this variable may be,¹²⁹ we have heard from multiple lawyers who complain of parochial judicial attitudes, which they contrast with judges who look to “national standards” for legal practice.

4. Defense Attorneys’ Experiences

The Gould and Greenman study linked the level of defense funds in capital trials to the experience of the defenses lawyers involved.¹³⁰ There, the research team recruited a panel of distinguished lawyers experienced in federal capital litigation and asked them to assess the level of experience of the lawyers represented in the dataset.¹³¹ Further, because the expert panel also was acquainted with many of the cases, researchers asked them to assess whether the attorneys had first been recommended for appointment by the local federal public defender or the Administrative Office of the United States, as required by federal statute.¹³²

We have borrowed those same assessments for the present study and have added a third variable that reflects an attorney’s years of legal experience following graduation from law school. Hence, our three variables for defense representation include an

¹²⁹ The most compelling variable would ask judges to identify the norms or standards they seek to follow, but the expense and feasibility of such a survey are prohibitive. Instead, we borrow from prior research on regional accents, which finds that young people unconsciously adopt or eschew regional accents in their late teens or early twenties, which “is usually the time we come to some sort of decision about who we are” (Gupta, ND). Similarly, a budding lawyer who chooses to attend a nationally prestigious law school is at least subconsciously identifying with national legal norms and practices.

¹³⁰ Jon Gould & Lisa Greenman, REPORT TO THE COMMITTEE ON DEFENDER SERVICES, JUDICIAL CONFERENCE OF THE UNITED STATES, Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases 24–26 (2010), <http://www.uscourts.gov/sites/default/files/fdpc2010.pdf> (last visited Feb. 21, 2016).

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objective measure of years of experience, subjective evaluations of legal competence by distinguished peers, and an estimate for whether knowledgeable actors had recommended the attorneys for appointment. Based on the prior work of Gould and Greenman, we predict that cases in which lawyers who have a long career, are well-respected by their peers and who were recommended by knowledgeable actors will have higher defense resources.¹³³ That is, experienced and respected capital defense lawyers will be more likely to advocate zealously for the resources needed for an effective defense and will feel less bound by a local legal culture that might accept a lower level of effort.

5. Court Performance

Median felony disposition time and the number of felony filings per judge are used independently to model court performance and how busy the courts are within each federal judicial district. These variables help control for “backlog effects,” or the possibility that fewer resources are allocated to capital cases because the courtroom workgroup and other legal actors are burdened with heavy caseloads and, thus, do not spend significant time on any criminal case. Alternatively, a culture of rapid case processing (e.g. a “rocket docket” effect) may be operating across all criminal cases if felony disposition times are short, independent of felony filings per judge.¹³⁴ In these districts, it would not be surprising if defense resources were reduced across all criminal

¹³³ Jon Gould & Lisa Greenman, REPORT TO THE COMMITTEE ON DEFENDER SERVICES, JUDICIAL CONFERENCE OF THE UNITED STATES, Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases 64, 66–68 (2010), <http://www.uscourts.gov/sites/default/files/fdpc2010.pdf> (last visited Feb. 21, 2016).

¹³⁴ Carrie E. Johnson, *Rocket Dockets: Reducing Delay in Federal Civil Litigation*, 85 CAL. L. REV. 225, 227 (1997); Tracy Bach, *To Expediency and Beyond: Vermont’s Rocket Docket*, 4 J. APP. PRAC. & PROCESS 277, 280 (2002).

cases, not just capital representations. To account for these possibilities, we pulled data from Federal Court Management Statistics, maintained by the Administrative Office of the U.S. Courts, reflecting caseloads and case processing times.¹³⁵ The number of pending cases per judge, criminal felony filings per judge, and the median times for both felony and civil disposition were averaged across a five-year period to allow for a cross-sectional comparison across all federal judicial districts.

6. Defendant/Victim Demographics

Finally, we included dichotomous variables for race and ethnicity to verify whether prior findings that link race to capital sentences also prove true for defense resources.¹³⁶ To simplify the analysis (and to be consistent with those prior findings), we included three dichotomous variables: whether the defendant is black,¹³⁷ whether any victim was white, and whether any victim was white and the defendant non-white. Because two of these variables are, by definition, collinear, we tested them separately.

C. Quantile Regression and the Distribution of High-” and Low-Cost Cases

Initially, we estimated the effects of the independent variables on total defense cost, asking whether local punitive culture (or the other independent factors noted above)

¹³⁵ See generally U.S. COURTS, FEDERAL COURT MANAGEMENT STATISTICS, <http://www.uscourts.gov/statistics-reports/analysis-reports/federal-court-management-statistics>.

¹³⁶ CHARLES S. LANIER, WILLIAM J. BOWERS & JAMES R. ACKER, THE FUTURE OF AMERICA’S DEATH PENALTY: AN AGENDA FOR THE NEXT GENERATION OF CAPITAL PUNISHMENT RESEARCH _pg_ (2009); Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117, 1155 (2008); U.S. GOV’T ACCOUNTABILITY OFF., GGD-90-57, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERNS OF RACIAL DISPARITIES 5 (1990).

¹³⁷ African Americans constituted a substantial majority of defendants in the dataset, compared to just 24 percent of whites and 14 percent of Hispanics. The comparison of African-American defendants to other races/ethnicities was statistically more powerful than other constructions (i.e., white vs. non-white defendants, etc.). We followed this same approach for the other two race variables.

is associated with the total level of defense resources provided in federal capital trials. None of these variables had a statically significant effect. However, in graphing total defense cost, we noticed two plateaus in the distribution, one high and the other low. We thus explored the feasibility of a quantile regression, assessing whether the explanatory variables have different magnitudes of effect across the range of total case cost.¹³⁸

Quantile regression allows us to examine a question that linear regression cannot: does local punitive culture have a different effect on low-cost cases versus high-cost cases? In other words, does the effect of local punitive culture (and other hypothesized predictors) vary throughout the *distribution* of total case cost? As is the convention, quantile regression is used to delineate cut points—a case-cost floor and/or ceiling—to understand what range of cases may be most affected by our hypothesized explanatory variables.¹³⁹ For this analysis we employ decile quantile regression, examining the relationship between the explanatory variables at each decile (or 1/10th) of the case-cost distribution (in dollars).

Quantile regression was appropriate and suggested two powerful divisions in the data—the 80th and 30th deciles of the case-cost distribution.¹⁴⁰ These deciles were selected on the conventional basis of observing the variation in the magnitudes of the coefficient estimates at each decile of the dependent variable's distribution. The 30th and

¹³⁸ See generally Roger Koenker & Kevin F. Hallock, *Quantile Regression*, 15 J. OF ECON. PERSPECTIVES 143 (2001); LINGXIN HAO & DANIEL Q. NAIMAN, QUANTILE REGRESSION (2007).

¹³⁹ The quantile regression estimation equation is: $y_{\text{TotalCaseCost}} = \beta_0^{(p)} + \beta_1^{(p)} \text{Local Legal Culture} + \beta_2^{(p)} \text{JudgeTenure} + \beta_3^{(p)} \text{AttorneyQuality} + \beta_k^{(p)} \dots (\text{controls}) + \varepsilon_i^{(p)}$ where super-script (p) indicates that coefficient estimates will vary at each specified quantile level (p). In this study, we employed decile quantile regression, examining the relationship between the explanatory variables at each decile of the case-cost distribution.

¹⁴⁰ Respectively, these cut points were \$891,266 and \$313,859.

80th decile of the case-cost distribution showed significant magnitude and/or directional changes in the relationship between the independent variables in our model and the case-cost outcome. This gives us confidence that they are important for understanding which cases are most likely to be affected by the allocation of defense resources. These cut points make conceptual sense as well, reflecting what might be understood as “ceilings” and “floors” in the data, and matching what we noticed in the graph of total defense cost. That is, representations over the 80th percentile might be understood as “high-cost cases,” whereas those under the 30th percentile could be considered “low-cost.”

We went beyond quantile regression to better understand what factors predicted high-cost representations. In a logistic regression using the 80th percentile as the dependent variable—that is, predicting whether defense costs would be above or below the upper quintile—the results were surprisingly straightforward, suggesting that the complexity of case facts helped explain the highest-cost cases. (No table shown.) This is as we might expect: the most complex fact patterns require the greatest defense effort, both in terms of time and personnel involved, and, thus, are likely to account for the bulk of the most expensive representations.

D. Hypotheses for Lower-Cost Cases

However, the division between low-cost and all other capital representations was much more complicated, turning both on local legal culture and many of the other independent variables described above. We approached this puzzle systematically, utilizing eight hypotheses to explore why defense resources would fall below the 30th percentile—below the floor—in federal capital trials.

We began with a null hypothesis, H_0 , which focused on legally relevant factors, primarily the complexity of case facts. Here, we hypothesized that cases with the least complicated facts would be associated with defense resources below the 30th percentile. Again, this is a fairly straight-forward prediction: as case facts become more complex, defense attorneys and their staff must spend more time—and bill additional time—investigating the facts, and they may need to hire additional experts as well.

From there, our hypotheses looked to other elements of the case as reflected in the independent variables we collected:

H1: Cases in judicial districts with more punitive local legal cultures will be more likely to fall below the 30th percentile for defense resources. Just as members of the public in more punitive areas may seek strict and swift punishment, we hypothesize that judges and other members of the courtroom working group in these districts may be reluctant to tolerate or permit an extensive defense.

H2: Cases in which the presiding judge was appointed by a Republican president, previously served as a federal prosecutor, and graduated from a less prestigious law school will be more likely to be below the 30th percentile for defense resources. Here, we expect that judges with more a conservative orientation, who previously sought criminal convictions, and who may not have been acculturated to national norms of defense representation will be reluctant to grant substantial resources to the defense.

H3: Cases in which the defense lawyers have considerable legal experience, are recognized by their peers as highly qualified, and were recommended for appointment by the federal public defender or the Administrative Office of the

Courts are more likely to be above the 30th percentile for defense resources.

Following on Bright's argument that the death penalty is reserved for defendants with "the worst lawyer," this hypothesis assumes that defense lawyers with stronger credentials will spend more time preparing a defense and solicit more expert assistance to represent their clients.¹⁴¹

H4: Faster felony disposition time will be associated with an increased likelihood that cases fall below the 30th percentile for defense resources. As may be true of all criminal defendants in so-called "rocket dockets," we hypothesize that defendants charged in faster districts will face heightened pressure to move the case along, which in turn may limit defense effort.

H5: Increases in felony filings per judge will be associated with the case falling below the 30th percentile for defense resources. Similar to the hypothesis immediately above, we expect that judges overwhelmed with felony filings will be reluctant to grant defense teams additional investigative resources or preparation time, which could slow down the movement of the case and, in turn, further clog the judge's docket.

H6: Being an African-American defendant will be associated with fewer defense resources. Just as prior research finds that African-American defendants face a greater risk of a death sentence, we expect that a similar phenomenon will prove true for defense resources.

¹⁴¹ Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L. J. 1835, 1883 (1994).

H7: The presence of a white victim will result in defense resources that fall below the 30th percentile. Cases in which a victim is white are associated with greater public outcry and pressure to speed the case along to a conviction and sentence.¹⁴² In turn, we hypothesize that defendants in these cases are likely to see their available resources fall below the 30th percentile. A corollary to this hypothesis presumes that the effect will be greatest when the victim is white and the defendant is not. Researchers have postulated for decades that the criminal justice system assigns greater value to white than black life.¹⁴³

V. Analysis and Findings

We tested these hypotheses initially using bivariate analysis to examine the relationships between the respective independent variables and low defense resources (as represented by the 30th percentile of the defense cost distribution). Table Four below presents the results from cross-tabular and correlational analyses. Overall, six of our seven hypotheses found preliminary support in these tests, as did one aspect of the null hypothesis.

Beginning with the null hypothesis—that low-cost defense is explained by “simpler” case facts—just one of the six possible independent variables showed statistical significance. Whereas low defense resources do not appear connected to the number of defendants, victims or offenses in a case, the potential future dangerousness of the defendant, or a victim who was involved in criminal activity, there is an initial link

¹⁴² Chris Greer, “News Media, Victims and Crime” in Pamela Davies, Peter Francis and Chris Greer, eds., *Victims, Crime and Society* (2007).

¹⁴³ DAVID BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, JR., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS _pg_ (1990).

between the complexity of the charge and the resources provided to the defense.

Defendants charged with a continuing criminal enterprise, terrorism, or RICO were likely to receive higher defense resources, whereas individuals facing other capital charges were three times as likely to be in the low-cost category.

This last finding makes intuitive sense, in that complex charges require more thorough investigation, including witnesses who may reside in other districts or even outside the U.S. However, it is instructive that none of the other variables reflecting the null hypothesis showed significant statistical promise. This is in sharp contrast to the high-cost cases, where the most complex facts required the greatest defense effort and thus cost the most to defend. By contrast, the lowest-cost representations are not concentrated among cases with the least complex facts, at least insofar as complexity is measured by the number of defendants, victims, or offenses involved or the nature of the victim or defendant. To the extent that the null hypothesis has explanatory power—that legally cognizable factors explain lower-cost capital defense—it seems limited to the complexity of the charge.

Table Four: Bivariate Correlations or Cross-Tabulations for Factors Associated with Low-Cost Cases (< 30th percentile of defense cost distribution)

Category	Variable	Low Cost	Other Cases	P Values
Case Facts	Number of defendants	.04	---	.75
	Number of victims	-.154	---	.23
	Number of offenses	-.178	---	.16
	CCE/RICO/Terrorism	21%	60%	.005
	Future Dangerousness	63%	70%	.60
	Uninvolved Victim	55%	40%	.33
Local Culture	State w/ Death Penalty	95%	72%	.04
	GOP vote > 50%	72%	36%	.009
	South (4 th , 5 th , 11 th circuit)	74%	30%	.001

Court Performance	Criminal filings per judge	.466	---	.001
	Felony disposition time	-.434	---	.001
Judge Factors	Former Federal Prosecutor	6%	32%	.03
	Top 15 Law School Grad	6%	48%	.003
	Appointed by Republican President	65%	28%	.23
Defense Attorney	Distinguished experience	47%	76%	.02
	Recommended for Appointment	29%	69%	.006
	Years of practice	-.154	---	.33
Race	Black Defendant	79%	47%	.01
	White Victim	37%	49%	.38
	White Victim w/ Non-White Defendant	32%	19%	.26

Our other hypotheses showed greater promise in the cross-tabular and correlational analyses. Our primary hypothesis of interest—punitive legal culture—appears strongly predictive in bivariate testing. Here, the three independent variables suggest that capital defendants face a greater likelihood of a lower-cost defense when tried in conservative areas, especially the South, which have greater attachment to the death penalty. As we posited earlier, conservative, more punitive areas are likely to value crime control over due process. It is not surprising, then, that capital defendants—individuals tried for the most serious and often most heinous crimes—receive fewer resources to defend themselves and protect their liberties in those judicial districts in which the courtroom workgroups operate within and among these prevailing views.

The overall speed and workload of the courts were also linked to defense resources. As hypothesized, defendants tried in courts with higher caseloads and faster disposition times received the fewest resources for their defense. These findings could be indicative of a “rocket docket” effect, in which defense effort is limited as cases are pushed through the system. Or, with a heightened caseload in these districts, judges might

be reluctant to grant defendants additional time and resources to investigate matters as additional filings pile up. Indeed, it is possible that caseload and processing speed are related, with greater filings forcing quicker disposition time. Of course, this is another way of saying that defendants tried in jurisdictions with higher caseloads and faster disposition times receive shorter attention to their cases, and it is hardly a jump in logic to imagine that the pressure to speed up case processing creates a culture in which defense teams are encouraged—or must accept the expectation—to devote less time and effort to the representation.

The experience and reputation of defense attorneys were also associated with the court's allocation of resources their clients' defense. As hypothesized, defense lawyers lacking "illustrious" experience in capital representation were likely to have mounted the least costly defenses, as were lawyers whose appointment to the case was not the result of a recommendation from the local federal public defender or the Office of Defender Services. However, a lawyer's total years of practice were not associated with defense resources at trial. These results support the notion that capital defense is a specialized field, one in which those possessing focused and distinguished experience are able to devote greater time to cases and/or secure additional expert assistance in investigating cases and representing their clients.

Similarly, the background of the presiding judge was related to defense resources, although not necessarily as we predicted. We hypothesized that a judge's ideology would affect his willingness to approve defense funds, although this relationship failed to reach statistical significance in the bivariate tests. Of course, this finding may reflect a limitation in our data, as we were forced to employ a blunt variable that coded the

partisan affiliation of the judge's appointing president rather than other measures that might have assessed the judge's past voting or contribution patterns. That said, the bivariate relationships suggest a relationship between defense resources and the ranking of the judge's law school as well as the judge's past service as a federal prosecutor. Judges who attended a prestigious law school were much less likely to have been involved in lower-cost cases, as were judges who had previously served as federal prosecutors.

We predicted that both of these variables would connect to defense resources, although we had the direction of the latter relationship wrong. It turns out that judges who previously served as federal prosecutors were unlikely to be involved in low-cost cases. Rather than limiting defense resources, perhaps these judges recall the multiple resources that they had at their disposal to litigate cases as federal prosecutors and may support and even encourage capital defense lawyers to conduct thorough investigations and engage relevant experts.

Finally, only part of our hypotheses about the relationship of the defendant's and victim's races proved valid. As the bivariate relationships indicate, the victim's race, whether on its own or in relationship to that of the defendant, was not statistically connected to defense cost. However, the race of the defendant was statistically significant, as African Americans were almost 1.7 times more likely than other defendants to receive a lower-cost defense. This result is consistent with other research on the death penalty, which finds African Americans are at greater risk of worse

treatment and outcomes¹⁴⁴ and also in line with scholars who contend that individuals holding less social power—as measured by race, gender and socio-economic standing—may receive fewer government resources and legal protections than those “valued” more highly.¹⁴⁵ Indeed, the recent rise of the Black Lives Matter movement is a reminder that, historically and presently, African Americans have been treated by the criminal justice system as though they were less important than whites.¹⁴⁶ If so, it would follow that, all things being equal, the defense resources devoted to a capital case when the defendant is black would be lower than when the defendant is white.

We also employed regression analysis to determine whether the bivariate relationships hold up in multivariate testing. Given the small number of cases in our sample, we used factor analysis to reduce the number of independent variables, creating single variables that represented local culture, judge’s background, and defense attorneys’ experience and reputation.¹⁴⁷ Along with these, we included existing variables reflective of the complexity of the charge, median felony disposition time, felony caseload, race of the defendant and that of the victim.

Given our unconventionally small sample size ($n < 100$), we turned to Bayesian estimation to explore the statistical relationships between the independent variables and

¹⁴⁴ David Baldus, George Woodworth & Charles A. Pulaski, Jr., Equal Justice and the Death Penalty: A Legal and Empirical Analysis _pg_ (1990 William J. Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination under Post-Furman Capital Statutes*, 246(4) *Crime & Delinquency* 563, 625 (1980).

¹⁴⁵ Donald Black, *The Behavior of Law* 21 (1976).

¹⁴⁶ Nicole D. Porter, *Expanding Public Safety in the Era of Black Lives Matter*, 70 *U. Miami L. Rev.* 533, 548 (2015-2016). See generally Juliet Hooker, *Black Lives Matter and the Paradoxes of U.S. Black Politics: From Democratic Sacrifice to Democratic Repair*, 44 *Political Theory* 448 (2016).

¹⁴⁷ Raymond Cattell, *The Scientific Use of Factor Analysis in the Behavioral and Life Sciences* (1978).

low defense resources.¹⁴⁸ Mirroring the results of the bivariate analysis, two independent variables were statistically significant at a confidence level of 95% and in the same direction as hypothesized. As Table Five below indicates, cases involving less-complex charges and those tried by judges with packed dockets were likely to receive the lowest level of defense support. The first of these results may be of comfort to the courts, reflecting as it does a legally cognizable explanation for the provisioning of defense resources. Yet, even if complex charges are unlikely to render a low-cost defense, the converse need not necessarily be true, for even a so-called “simple” charge can necessitate extensive defense effort. But at least as we hypothesized, defendants charged with the most complex charges were unlikely to be at the lowest level of defense resources.

Still, four other variables were within or at the cusp of statistical significance in the regression¹⁴⁹ and raise questions about the distribution of defense resources. As we hypothesized, defense resources were at the lowest level when cases were tried in a more

¹⁴⁸ The conventional approach to estimating regression models with a binary dependent variable is the multivariate logit model. However, logit models rely on maximum-likelihood estimation (MLE). MLE is based on large-sample theory and it often performs poorly with small samples. Bayesian regression models are known to perform more reliably with small samples, and thus we rely on Bayesian estimation procedures here. More specifically, we employed a Bayesian estimator in Mplus using the Markov Chain Monte Carlo algorithm. Simulation research has shown this estimator performs well with small samples relative to other estimation procedures. Tihomir Asparouhov & Bengt Muthén, *Bayesian analysis of latent variable models using Mplus*, Version 4, 24 <http://www.statmodel.com/download/BayesAdvantages18.pdf> (last visited February 21, 2016). Table Five, then, presents standardized regression coefficients based on Bayesian estimates for the model.

¹⁴⁹ In saying this, we recognize that we are including some variables whose p values were between .05 and .1. We do not mean to over claim. But, because these relationships are close to .05 even with a small sample, because those p values are based on a one-tailed distribution, and because the regression results mirror those of the bivariate relationships that more than met statistical significance, we feel comfortable making these claims. Roger Wasserstein and Nicole Lazar, “The ASA’s statement on p-values: context, process, and purpose.” 70 *American Statistician* 129 (2016).

punitive local culture, by a judge educated at a less prestigious law school, in a court with a faster docket, and when the defendant was African American.

In fact, only two independent variables did not perform in the regression as they had in the bivariate tests. Because other research has linked victim's race to capital sentencing, we included the variable in the regression even though it had performed marginally at best in the cross-tabs on defense costs.¹⁵⁰ The prior research proved prescient, as the variable showed strong significance in the regression. Here, cases in which none of the victims were white received the lowest level of defense resources. At the same time, the composite variable for defense team experience dropped from statistical significance in the regression. When controlling for the other variables in the Bayesian estimation, a defendant's level of resources did not turn on the level of experience or professional reputation of his lawyers.

**Table Five: Standardized Bayesian Estimation of Defense Resources
(DV = 30% Threshold. N =64)**

Variable	Estimate	Standard Deviation	P (one-tailed)
Local Culture Factor	.012	.082	.05
Judge Factor	-.011	.087	.07
Attorney Factor	.005	.067	.46
Complex Charge	-.481	.201	.02
Felony Filings/Judge	.471	.184	.01
Felony Disposition Time	-.103	.073	.06
Defendant Black	.094	.075	.08
Any Victim White	-.123	.071	.02

VI. Discussion

¹⁵⁰ Because there were not sufficient cases in each category of the variable, we could not test the relationship between the race of the victim and defendant in the regression.

This last finding—that the level of resources a defendant received at a capital trial was not explained by the experience or reputation of the defense attorneys—seems, at first, surprising. However, we must revisit the bivariate relationships to understand what it means. The regression results *do not* suggest that a lawyer’s experience and professional esteem are unrelated to the level of defense resources his client receives at trial, for the cross-tabs in Table Four show that lower-cost defenses are concentrated among defendants whose lawyers were neither recommended for appointment nor considered especially qualified by their colleagues. However, this relationship is not causal, as the statistical significance drops precipitously in the regression equation. It would seem, then, that at least one of the other independent variables explains the correlation between attorney experience and defense cost. Or, put more simply, one or more of the independent variables determines the type of attorney appointed, which is then correlated with the level of resources the client receives.

This explanation makes intuitive sense given that attorney experience and reputation are linked to the other independent variables in separate bivariate tests. As Table Six below indicates, these relationships follow the same patterns as those found for defense resources, with experienced and esteemed lawyers less likely to be appointed in conservative or punitive jurisdictions, by judges appointed by Republican presidents who did not attend the most prestigious law schools, and in judicial districts with heavy felony caseloads disposed of quickly. That African American defendants were least likely to

receive top-quality lawyers is unfortunately consistent with a host of other research on the death penalty.¹⁵¹

Table Six – Bivariate Relationships Between Attorney Experience and Recommendation and Other Independent Variables

Variable	Lawyer Experience	Lawyer Not	P Value	Lawyer Recommend	Lawyer Not	P Value
State has Death Penalty	73%	90%	.13	69%	88%	.1
GOP vote > 50%	33%	70%	.01	17%	75%	.01
South	34%	65%	.02	16%	71%	.01
Judge appointed by Repub. President	40%	75%	.01	45%	65%	.14
Judge former Federal Prosecutor	30%	15%	.21	31%	22%	.45
Judge Top 15 Law School Grad	46%	15%	.02	48%	17%	.02
Felony Filings Per Judge	-.395	----	.01	-.355	---	.01
Felony Disposition Time	.251	----	.06	.537	---	.01
Defendant is Black	49%	75%	.05	50%	79%	.02
White Victim	41%	50%	.52	38%	46%	.53
Complex Charge	54%	35%	.17	56%	38%	.16

Together, the bivariate and regression results paint a larger picture in which the forces that affect the type of attorney appointed in capital cases also influence the level of representation that a defendant receives in a capital trial. In specific districts—those in more punitive areas, presided over by judges educated at less prestigious law schools, where the criminal dockets are busy or judges are willing to process cases hurriedly—

¹⁵¹ Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale Law Journal 1835, 1839 (1994); David Baldus, George Woodworth & Charles A. Pulaski, Jr., *Equal Justice and the Death Penalty: A Legal and Empirical Analysis* _pg_ (1990 William J. Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination under Post-Furman Capital Statutes*, 246(4) *Crime & Delinquency* 563, 629 (1980).

capital defendants are unlikely to receive the most capable or experienced lawyers, and defense effort, in turn, is likely to fall below the thirtieth percentile of resources. That African Americans disproportionately bear this brunt, whether as defendants or in cases in which the victims are predominantly racial minorities, is all-too-familiar in the history of American capital punishment.

Why would this be so? There have been hints at explanations from federal practitioners. Shortly before he left the federal bench, Judge John Gleeson from the Eastern District of New York (Brooklyn) testified that “there are too many districts in which panel attorneys virtually never seek funding for investigations or experts. As I understand the problem from speaking to defenders and panel attorneys around the country . . . it is a cultural understanding that they simply won’t be sought.”¹⁵² Other judges and lawyers have told us informally that they believe there are “capital defense deserts” across the federal districts in which “the local culture just doesn’t support the same level of practice as elsewhere.”¹⁵³

To be sure, “capital defense deserts” may be as reflective of lawyers who do not seek resources as judges who do not grant them.¹⁵⁴ Our intent is less to pinpoint individual responsibility as it is to establish that those deserts exist—that local legal culture, even in a unified federal system, influences the level of representation a capital defendant will receive. To explore this point, we shared the results from Tables Four, Five, and Six with a

¹⁵² John Gleeson, “Testimony to the Ad Hoc Committee to Review the Criminal Justice Act Program,” 9 (2016), <https://cjastudy.fd.org/sites/default/files/hearing-archives/miami-florida/pdf/johngleesonmiamiwritten-testimony-done.pdf> (last accessed February 21, 2016).

¹⁵³ Based on confidential interviews.

¹⁵⁴ Lisa R. Pruitt & Beth A. Colgan, *Justice Deserts: Spatial Inequality and Local Funding of Indigent Defense*, 52 *Ariz. L. Rev.* 219, 283 (2010).

panel of federal defense lawyers and judges to gauge their interpretation. The group numbered seven lawyers and five judges, each of whom had significant experience in federal capital cases and who agreed to speak with us on the condition of anonymity. None of the participants was told of the others' involvement, and we did not share responses in order to avoid bias. We do not claim that the group is representative of federal practitioners or judges, though the twelve come from diverse geographic areas and, in our judgment, are thoughtful on the subject. Our intent in speaking with them was to test the plausibility of our interpretation of the quantitative data, especially in light of Judge Gleeson's testimony and the other scattered but informal reports we had heard.

Collectively, the group not only supported our potential explanation but, with the protection of anonymity, was willing to go beyond Gleeson's account. As one lawyer explained, "Of course, this is about culture." He continued:

How many times have we heard judges talk about providing a Chevrolet but not a Cadillac defense to defendants? That perspective affects so much of a capital case. I've seen judges – who come from conservative state courts where it's assembly line justice – reach the federal bench but bring those same attitudes with them. They appoint lawyers to cases who are reluctant to challenge them or ask for multiple experts. The judges push the cases along, which is what they did in state court. It's no wonder that these cases have lower payments. That's a defense in name only.¹⁵⁵

Others chimed in with similar explanations. One federal judge said, "We know there are different geographic cultures in litigation."

"My colleagues in New York and Los Angeles repeatedly describe a 'harder hitting' private bar in civil matters. Why wouldn't we expect these differences to extend to criminal cases? . . . Is it a chicken or an egg? I'm not sure. But, whether the judge appoints a lawyer with whom he is more

¹⁵⁵ Authors' interview/research notes.

comfortable, or lawyers just gravitate to places where they fit better, I'm not surprised."¹⁵⁶

We do not offer these responses as definitive evidence of their wide support or as absolute proof that the accounts explain our data. But, they do lend greater credence to a unifying theory of local legal culture to explain the disparate level of defense resources in federal capital trials. Even in a small sample of cases, the regression results identified multiple factors as predictive of lower-cost defense, and many of those variables hold together under a theory of divergent legal culture.

Yet, even if the results are not indicative of a larger culture explanation, they do show that a single practice within a unitary court system is implemented with tremendous variation, both in terms of geography and other factors not delineated by law. This is not the same thing as saying that the provision of defense resources in federal capital cases is arbitrary. Actually, our results show systemic and systematic differences in defense resources, variation that can be linked to specific, identifiable influences in a closed legal system. It is worth remembering that the federal death penalty is authorized under a single chapter of the United States code, and it is litigated through a common set of procedures. Whereas states vary considerably in authorizing the death penalty and appointing and compensating defense lawyers,¹⁵⁷ federal courts are ostensibly bound by a common set of statutes and practices.¹⁵⁸ Federal law does not mean one thing in Oregon and another thing in Louisiana, for example. Even if we accept some inevitable variation

¹⁵⁶ Authors' interview/research notes.

¹⁵⁷ David Baldus, Charles Pulaski, Jr. and George Woodworth, "Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts." 15 *Stetson* 133 (1985-86).

¹⁵⁸ Rolando del Carmen, *Criminal Procedure: Law and Practice* (2010).

in circuit practices, it is not clear why in capital cases – a matter clearly evoking the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution – there should be such great variation in the level of defense afforded capital defendants, especially when those under an identifiable floor of support are at greater risk of being sentenced to death.

To be sure, the connection between defense resources and capital sentencing is correlative, not causal. But, with few exceptions, none of the independent causes identified in this study are legally cognizable in setting the level of defense representation at a capital trial. Under the Criminal Justice Act and clarifying Guide to Judiciary Policy, judges are instructed to authorize attorney and expert time for indigent defendants facing capital charges.¹⁵⁹ Nowhere in those rules are judges called to differentiate based on the caseloads they face, the political climate of the states in which they work, or even more, the race of the defendant or the victim before them. Indeed, there is only one independent variable in the regression that would be a legally acceptable factor in setting defense resources—the complexity of the capital charge. Here, at least, the results are as we might expect—defendants charged with more serious charges are unlikely to fall into the lowest category of defense resources.

There is a ready analogy among our findings to past research on the effect of the Federal Sentencing Guidelines.¹⁶⁰ In those studies, scholars found significant geographic

¹⁵⁹ See 18 U.S.C. § 3006A; United States Courts. ND. “Appointment of Counsel: The Defender Services Program.” Available at: <http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel.aspx>.

¹⁶⁰ In 1984, Congress passed the Sentencing Reform Act, creating the U.S. Sentencing Commission, which in turn issued federal sentencing guidelines. The guidelines sought to standardize federal sentences by promulgating matrixes combining offense levels, defendants’ criminal histories and a narrow set of adjustments. Following the Supreme Court’s decisions in *Blakely v. Washington* (2004) and *U.S. v. Booker* (2005), the guidelines are now voluntary.

disparities in sentencing patterns even when the Guidelines were in effect and presumably prescribed a narrow and consistent range of sentences for a given set of crimes committed by defendants with similar criminal histories. To some researchers, geographic variation itself was proof of an unstated but powerful extralegal standard at play,¹⁶¹ while others examined geographic differences in particular sentencing practices, which they said could reflect “local implementation strategies at odds with national strategy.”¹⁶²

Admittedly, as one scholar notes, the “sentencing guidelines [were] premised on the view that criminals do have some claim to equal treatment,” but the findings in our study are different in two important respects.¹⁶³ First, they concern the ability of a defendant to put on an effective defense—which, by definition, is the very time in the criminal justice process in which the defendant is presumed to be an innocent suspect, not a guilty criminal. Second, although some of the sentencing research addressed differential effects of the guidelines,¹⁶⁴ our work addresses the likely *sources* of differential defense resources, sources that are, themselves, largely extralegal.

In a broader socio-legal context, this study highlights an assumption in some legal pluralism literature. Whereas conventional legal pluralism scholarship highlights the

¹⁶¹ Paula M. Kautt, *Location, Location, Location: Interdistrict and Intercircuit Variation in Sentencing Outcomes for Federal Drug-Trafficking Offenses*, 19(4) *Justice Quarterly* 633, 663 (2002).

¹⁶² Stephanos Bibas, *Regulating Local Variation in Federal Sentencing*, 58 *Stanford Law Review* 137, 138 (2005).

¹⁶³ Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 *Stanford Law Review* 85, 116 (2005).

¹⁶⁴

effects of inter-jurisdictional overlap (*between*-group differences), and the effects of multiple legal and law-like systems on social behavior,¹⁶⁵ we find *within*-group differences at a common-jurisdictional level. Rather than comparing between distinctive death penalty processes in a federalist system (e.g., state-specific versus federal death penalty administrations), we examine how processes vary within a single system that is assumed to be uniform and consistent across space and across courtroom workgroup actors and agents. Thus, unlike Cover—who prefers the “messy federalism” of differing state and federal court practices¹⁶⁶—our findings are more in keeping with Garland’s conclusions about legal pluralism.¹⁶⁷ To be sure, Garland was discussing the lawlessness of lynchings in the early twentieth century, whereas we have examined a formal legal process nearly a century later, but there are parallels in Garland’s account that “community norms and the rules of state law competed for” control.¹⁶⁸ In Garland’s study, vigilante practices “were not . . . liable to be sanctioned” because, while “violat[ing] the letter of state law,” they did not contradict “group norms” of the local community.¹⁶⁹ In our work, the presumed consistency of a unitary federal system gives

¹⁶⁵ David M. Engel, *Legal Pluralism in an American Community: Perspectives on a Civil Trial Court*, 5(3) *American Bar Foundation Research Journal* 425, 426-431 (1980).

¹⁶⁶ Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22(4) *William & Mary Law Review* 639, 682 (1981).

¹⁶⁷ David Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth Century America*, 39(4) *Law & Society Review* 793, 810 (2005).

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¹⁶⁹ David Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth Century America*, 39(4) *Law & Society Review* 793, 23 (2005).

way to a “messier” picture¹⁷⁰ “of conflicting powers and multiple authorities”¹⁷¹ that create place-specific differences in life-or-death matters.

We are not prepared in an article of this scope to address the constitutional implications of our results for, among other things, our intent is not prescriptive. For now, we seek to address the influence of local legal culture in the provision of defense resources and that effect on federal capital litigation as a whole. Relying on the findings from both the frequentist and Bayesian analyses, we find that much of the decision to limit defense resources is explained by extralegal factors including the attributes of the judge, the geographic placement of the federal judicial district and its surrounding punitive legal culture, and the nature of caseloads and case processing times in the district. Only the complexity of the underlying charge presents an explanation in line with the null hypothesis, although even here none of the other variables reflecting case facts proved either correlative or causative.

VII. Limitations & Conclusion

There are multiple reasons to be modest in our claims. Econometric modeling for this kind of data is challenging, due in part to the low statistical power of estimating logistic regressions on a sample size of 62 cases where only 19 cases fall within the low-cost category of interest. Furthermore, the absence of data on the strength of evidence in these cases serves to reinforce the reminder that our findings are merely correlative and not reflective of causal processes. Quantile and logistic regression on a sample size

¹⁷⁰ Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22(4) *William & Mary Law Review* 639, 682 (1981).

¹⁷¹ David Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth Century America*, 39(4) *Law & Society Review* 793, 23 (2005).

smaller than 100 should be interpreted with extreme caution, which is why we exhausted all possible avenues for supplementing and corroborating findings stemming from this portion of the analysis. Our Bayesian estimates (which are more fitting for small N studies) supported a strong relationship between our independent variables and case cost, but still, these findings are far from decisive on the question of whether and to what extent the federal death penalty is problematically administered. Even with the expert interviews of federal judges and lawyers, we prefer to frame our results not as decisive findings but as exploratory red flags that underscore important follow-up questions regarding the integrity of the federal death penalty's administration.

Elements of local punitive culture and subcultural behaviors of the courtroom workgroup may be operating earlier in the litigation process before the Attorney General decides to authorize a capital prosecution. Yet, while the Attorney General considers the preferences of the local United States Attorney in seeking death, the formal decision to authorize any federal capital-eligible case is made in Washington D.C. and not in the physical space or among the actors of the courtroom workgroups across the 94 federal judicial districts.¹⁷² For that matter, even if there was a local cultural effect in the authorization process, one can imagine it operating independently of the decision to provide defense resources at trial—especially since the former decision is governed by prosecutors and the provision of resources is in the hands of judges.

A final caveat to our results concerns the time period and type of defense represented in our dataset. Our findings are based upon the universe of all federal capital-authorized cases that went to trial during 1998-2004 in which a panel attorney was

¹⁷² Little *supra* note 63 at 350.

appointed under the Criminal Justice Act. Although the large majority of federal capital defendants were represented by these panel attorneys and not by public defenders or private attorneys, it is possible—indeed probable—that defendants in those other cases received a different level of resources, especially since federal public defenders have their own budgets and do not need to secure court approval for expert assistance. For that matter, it is possible that federal capital practice has changed in the years following our data. But at the mid-point of the modern death penalty, when federal capital prosecutions were at their height, our data suggest that there were significant, systematic differences in the level of defense support provided capital defendants that cannot be explained by legally-cognizable facts.

Local legal culture and the specific qualities pertaining to the courtroom workgroup are under-specified concepts in the body of empirical literature surrounding capital punishment. Whereas prior research has identified regional differences in capital case outcomes, we have sought to operationalize local legal culture and apply it to an earlier stage of the capital process – the resources made available to indigent defendants.

In an environment in which the death penalty is presumably applied more consistently across the federal system, we find a high degree of variation in defense resources, a variation that turns as much on subcultural expectations, attitudes, and actual practices as it does on legally cognizable case facts. When those systemic and systematic differences are also correlated with the most serious case outcomes—death sentences—we believe there is cause for concern. But, even if we read our results narrowly, we find that the local punitive culture, the background of the presiding judge, the caseload and speed of the court's docket, and the race of the defendant influence the type of lawyer

appointed and the level of resources defendants receive to defend themselves. That these factors are extralegal, that they are linked to the lowest-level of defense resources, and that they stand between a defendant and his opportunity to defend against a death sentence, means that the consequences are real and quite troubling.

We welcome further research into these questions, including the variants of legal culture that influence court outcomes and the relationship between defense resources and case outcomes. Ultimately, these questions present a larger, structural conflict embedded in federalism—whether it is possible to administer a uniform and unbiased federal death penalty system when courtroom actors cannot be kept in vacuum-sealed courthouses but instead are embedded in the cultural practices of their local areas and districts. That question falls beyond the scope of this study. However, statistical methods paired with innovations in how we theorize about subcultural processes can help advance our understanding of the extent to which extralegal forces exist within a purportedly uniform system where both life and liberty are at stake.

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