

2007

## Pay Now, Execute Later: Why Counties Should Be Required to Post a Bond to Seek the Death Penalty

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### Repository Citation

Gershowitz, Adam M., "Pay Now, Execute Later: Why Counties Should Be Required to Post a Bond to Seek the Death Penalty" (2007). *Faculty Publications*. 1262.  
<https://scholarship.law.wm.edu/facpubs/1262>

## PAY NOW, EXECUTE LATER: WHY COUNTIES SHOULD BE REQUIRED TO POST A BOND TO SEEK THE DEATH PENALTY

*Adam M. Gershowitz* \*

Since reinstating the death penalty in 1976,<sup>1</sup> the Supreme Court of the United States has added layer upon layer of procedural regulations to capital cases in the hopes of making the death penalty less arbitrary.<sup>2</sup> Yet, while capital punishment is heavily regulated, it is practically undisputed that the regulation has been a failure.<sup>3</sup> Many scholars believe that death sentences are meted out just as arbitrarily today as they were thirty-five years ago when the Court imposed a nationwide suspension on capital punishment.<sup>4</sup>

With more than thirty years of failed regulation under its belt, it seems clear that the Supreme Court is not going to solve the arbitrariness problem and that scholars and activists must look elsewhere. An idea that is rarely considered is the possibility that state legislatures would have an incentive to reform the death

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1. See *Gregg v. Georgia*, 428 U.S. 153, 206–07 (1976).

2. Today, unlike typical criminal cases, death penalty trials are marked by “super due process” protections that give the impression of careful oversight. See Margaret Jane Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1143 (1983). Consider, for instance, RANDALL COYNE & LYN ENTZEROTH’S, *CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS* (3d ed. 2006) (1100-page textbook), and NINA RIVKIND & STEVEN F. SHATZ’S, *CASES AND MATERIALS ON THE DEATH PENALTY* (2d ed. 2005) (900 pages). Both textbooks focus on death penalty decisions of the Supreme Court of the United States.

3. See Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 360 (1995) (arguing that the Supreme Court’s death penalty law “creates an impression of enormous regulatory effort but achieves negligible regulatory effects”).

4. See, e.g., DAVID R. DOW, *EXECUTED ON A TECHNICALITY: LETHAL INJUSTICE ON AMERICA’S DEATH ROW*, at xxii–xxiii (2005).

penalty process themselves.<sup>5</sup> In this article, I argue that state legislatures, acting completely out of self-interest, could create a more fair and efficient death penalty system by requiring local county prosecutors, who handle most capital cases, to post a cash bond in order to seek the death penalty. In turn, legislatures could force counties to forfeit that bond if the capital prosecution is unsuccessful at trial or on appeal.

Allow me to take a step back to set the stage. Most death penalty cases are prosecuted at the county level, and there are great disparities between the counties. For example, while Texas is well known as the most frequent user of the death penalty,<sup>6</sup> capital cases are not initiated by the Texas Attorney General's office but instead by a handful of Texas's 254 counties.<sup>7</sup> While a majority of Texas counties have not sought a single death sentence during the last three decades,<sup>8</sup> Harris County—which includes the City of Houston—consistently has sought the death penalty more than a dozen times per year.<sup>9</sup> Similarly, a disproportionate number of capital prosecutions in the State of Pennsylvania are instigated by the Philadelphia County District Attorney;<sup>10</sup> most Illinois

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5. Professors Ron Wright and Doug Berman have long argued that scholars put too much emphasis on court-based solutions, while plausible legislative solutions are right under our noses. See, e.g., Douglas A. Berman, *Foreword: Addressing Capital Punishment Through Statutory Reform*, 63 OHIO ST. L.J. 1, 10 (2002) (lamenting that too much focus is placed on the Supreme Court and suggesting that we "turn to legislatures to find some hope within an otherwise discouraging story about the reform of capital systems"); Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 223 (2004) (arguing that indigent defense funding is more likely to improve if the reform comes from legislatures rather than the judiciary).

6. TRACY L. SNELL, U.S. DEPT OF JUSTICE, CAPITAL PUNISHMENT, 2005, at 1, 11 (2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp05.pdf> (collecting state death penalty statistics for 2005 and 2006).

7. See Mike Tolson, *A Deadly Distinction: Part II; Between Life and Death: Borderline Capital Cases Raise Questions of Justice*, HOUS. CHRON., Feb. 5, 2001, at A1.

8. See *id.* (explaining that between 1976 and 2000, 138 of Texas's 254 counties never sought the death penalty and that another 53 counties sought death only once).

9. See Mike Tolson & Steve Brewer, *Harris County Is a Pipeline to Death Row. A Four-Part Series Examines Why, and Explores Whether Justice Is Served; A Deadly Distinction*, HOUS. CHRON., Feb. 4, 2001, at A1; see also Eric Berger, *Olympics Bid Confronts Death Penalty; Boosters of 2012 Games in Houston Dismiss Capital Punishment as Issue*, HOUS. CHRON., May 28, 2000, at A37 ("Since the death penalty was re-instated in 1976, Harris County has sent more prisoners to their deaths—64—than all states except Texas and Virginia."). But cf. Lianne Hart, *Texas Is Sending Fewer to Death Row*, L.A. TIMES, Dec. 11, 2006, at A11 (discussing various reasons for decline in Texas's death penalty prosecutions in 2006).

10. See Tina Rosenberg, *The Deadliest D.A.*, N.Y. TIMES, July 16, 1995, § 6 (Magazine), at 22.

cases come from Chicago's Cook County;<sup>11</sup> and so the story goes throughout the country.<sup>12</sup>

By seeking the death penalty often, a handful of counties send a disproportionate number of defendants to death row. Moreover, as Professor James Liebman and his colleagues have found, those jurisdictions that use the death penalty more frequently tend to make more mistakes, thus leading to more appellate reversals.<sup>13</sup>

Given that counties have wide latitude to seek the death penalty (and sometimes use that latitude in marginal, or even inappropriate, cases), any solution to the arbitrariness problem must create an incentive for counties to choose their death penalty cases more carefully and more sparingly. State legislatures can create that incentive by requiring local county prosecutors to post a cash bond and transmit the money to the state treasury before filing capital charges.<sup>14</sup>

If the county prosecutors were successful in procuring a death sentence and preserving that sentence on appeal, then the bond would be returned to the county with interest. Thus, the county would suffer no penalty<sup>15</sup> for seeking the death penalty in truly heinous cases; those in which it was obvious that a jury would return a death sentence, and in which the prosecutors did not have to push the envelope and risk an appellate reversal in order to win a conviction. By contrast, if county prosecutors chose marginal cases in which juries refused to sentence the defendant to death, or if prosecutors had to pull out all of the stops to procure death sentences, leading to reversals on appeal, then the county

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11. Glenn L. Pierce & Michael L. Radelet, *Race, Region, and Death Sentencing in Illinois, 1988-1997*, 81 OR. L. REV. 39, 92 tbl.25 (2002) (studying the period between 1988 and 1997).

12. For a more detailed discussion, see Adam M. Gershowitz, *Imposing a Cap on Capital Punishment*, 72 MO. L. REV. (forthcoming 2007) (manuscript at 3-5, available at <http://ssrn.com/abstract=905332>).

13. JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM, PART II: WHY THERE IS SO MUCH ERROR IN CAPITAL CASES, AND WHAT CAN BE DONE ABOUT IT, 349-50 (2002), available at <http://www2.law.columbia.edu/brokensystem2/> ("[T]he more death verdicts per homicides a county imposes, the higher its capital-error rates are likely to rise. . . . Jurisdictions that reserve the death penalty for only the very worst offenses do the best job of avoiding serious, capital error and the risks and costs that go with it.")

14. The bond could reflect the significant amount of money the state—as opposed to the county government—normally shoulders in handling appeals of death sentences. See *infra* notes 118-22 and accompanying text.

15. Of course, the county would lose the ability to immediately use the bond money while the case is pending on appeal.

would forfeit the bond to the state. Facing the obligation to post a large sum of money *ex ante*, and the possibility of never having that money returned, county prosecutors would have an incentive to seek the death penalty in only the worst of the worst cases, and an incentive to try those cases in a manner that gives every benefit of the doubt to the defendant so that the death sentence will stand up on appeal.<sup>16</sup>

Requiring counties to post a bond would be a simple, yet stark, change from the current death penalty framework in most states. Currently, in most jurisdictions, counties initially fund the hefty costs of capital prosecutions, but they pass responsibility (and the bill) to state governments to handle most or even all of the very costly appellate and habeas corpus petitions<sup>17</sup> that capital petitioners file for years after trial.<sup>18</sup> Thus, under the current system, when counties choose their capital cases poorly, they are not forced to internalize the substantial post-trial costs associated with their errors.<sup>19</sup> Instead, the states are forced to foot a large part of the bill.

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16. Many counties currently spend large sums of money on capital prosecutions and appear not to be concerned about the reversals. See Robert M. Bohm, *The Economic Costs of Capital Punishment: Past, Present, and Future*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT 573, 576-82 (James R. Acker et al. eds., 2d ed. 2003) (discussing added pre-trial and trial expenses associated with capital cases); Russell Gold, *Counties Struggle With High Cost of Prosecuting Death-Penalty Cases*, WALL ST. J., Jan. 9, 2002, at B1 (recounting a 6.7% property tax increase to pay for death penalty trials arising out of the murder of James Byrd). Counties' behavior might change, however, if they were required to pay specified costs *ex ante*.

17. See Bohm, *supra* note 16, at 582 ("The post-trial stage generally is the most expensive part of the entire process.") (citing RAYMOND PATERNOSTER, CAPITAL PUNISHMENT IN AMERICA 212 (1991)).

18. See, e.g., OFFICE OF VICTIM ASSISTANCE, OFFICE OF THE ATT'Y GEN. OF ALA., A GUIDEBOOK TO ALABAMA'S DEATH PENALTY APPEALS PROCESS 6-7, available at <http://www.ago.state.al.us/documents/deathpenalty.pdf>; OFFICE OF THE VICTIMS' SERVS., OFFICE OF THE ATT'Y GEN. OF CAL., A VICTIM'S GUIDE TO THE CAPITAL CASE PROCESS 2 (2000), available at <http://ag.ca.gov/victimservices/pdf/deathpen.pdf>; POST CONVICTION LITIG. DIV., OFFICE OF THE ATT'Y GEN. OF TEX., CAPITAL PUNISHMENT APPELLATE GUIDEBOOK 2 (2006), available at [http://www.oag.state.tx.us/AG\\_Publications/pdfs/appellate2006.pdf](http://www.oag.state.tx.us/AG_Publications/pdfs/appellate2006.pdf) ("In federal court, the Attorney General represents both the State's and victim's interest."); VICTIM NOTIFICATION PROGRAM, OFFICE OF THE ATT'Y GEN. OF VA., THE APPELLATE PROCESS FOR A VIRGINIA CAPITAL MURDER CONVICTION 1, available at [http://oag.state.va.us/KEY\\_ISSUES/VICTIM\\_NOTIFICATION/capmurder.pdf](http://oag.state.va.us/KEY_ISSUES/VICTIM_NOTIFICATION/capmurder.pdf).

19. See James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2127 (2000) ("[T]he penalty for error by trial-level prosecutors and judges never requires them to bear the huge financial costs of the lengthy post-conviction process that the error imposed on state-level states' attorneys and judges.").

The virtue of the bond proposal is that it leaves discretion in the hands of local prosecutors to determine which capital cases they want to pursue while forcing them to take full responsibility for those decisions. By requiring counties to post (and risk forfeiting) a bond commensurate with the states' costs, state legislatures would be telling the counties to:

Go ahead and seek the death penalty as often as you like. If you are successful the state will cover the expensive appellate and postconviction costs. But if you are unsuccessful, then you will forfeit a cash bond to compensate the state for the expenses it paid with respect to your failed capital prosecutions.

Obviously, counties that make frequent use of the death penalty would lobby against any such proposal. Yet, the proposal should be appealing to state legislators on at least two levels. First, many legislators care about the racial, economic, and geographic arbitrariness of the death penalty and would welcome legislation that has a chance of curbing those unfortunate realities.<sup>20</sup> Second, and perhaps more significant in times of tight budgets, legislators frequently seek ways to find money that could be used for other projects. If the legislature were to set the cash bond for capital cases at \$300,000, and if the bond were forfeited in ten cases per year, then the state would have an additional \$3 million to spend on education, healthcare, or other projects. Thus, legislatures would be saving money for their states by charging counties for *failed* capital appeals, while at the same time remaining tough on crime by paying for the costs of *successful* capital appeals.

Part I of this article briefly reviews the Supreme Court's failed efforts to eliminate the arbitrary use of the death penalty. Part I also discusses how certain counties seek the death penalty dramatically more often than comparable jurisdictions and "overproduce" death by procuring many death sentences that are reversed on appeal and never result in executions.<sup>21</sup> Because states typi-

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20. Consider the tireless efforts of Texas State Senator Rodney Ellis, who has introduced legislation to establish an innocence commission in Texas and to provide better representation for indigent defendants. See Howard Witt, *Texas Urged to Probe Claims of Wrongful Executions*, CHI. TRIB., July 7, 2006, at 6 (discussing how Sen. Ellis introduced two bills to study past death penalty cases); Rodney Ellis & Hanna Liebman Dershowitz, *Gideon's Promise: The Texas Story*, CHAMPION, Apr. 2003, at 61 (discussing the Fair Defense Act, a bill also sponsored by Sen. Ellis).

21. See Liebman, *supra* note 19, at 2056-57 ("What most condemned men and women

cally handle the expensive appellate and postconviction petitions, these counties never fully internalize the costs of their failed death penalty prosecutions. Part II proposes that legislatures require counties to post a cash bond before seeking the death penalty, and that the bond be forfeited if a county's efforts to procure an execution fail. Part II additionally suggests two possible statutes that legislatures could adopt to implement the proposal—one that provides for total forfeiture of the bond in all failed prosecutions, and one that graduates the forfeiture amount depending on the stage in which the capital prosecution failed. Part III then discusses the incentives legislatures would have to enact this proposal. In particular, Part III discusses the high costs states pay for capital appeals. Part III also explains that, despite the need to be "tough on crime," legislatures have been reducing corrections funding in recent years to ensure that other government priorities are funded. Legislators who realize how much money failed county death penalty prosecutions are costing state taxpayers would have an incentive to put the onus on county prosecutors to assume the financial risks associated with their capital prosecutions.

## I. STILL ARBITRARY AFTER ALL THESE YEARS

### A. *The Court's Efforts to Regulate the Death Penalty*

The modern era of death penalty jurisprudence began in 1976 when the Supreme Court reinstated capital punishment. In *Gregg v. Georgia*,<sup>22</sup> the Supreme Court indicated that states could create a constitutional death penalty framework by providing "for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information."<sup>23</sup> In that connection, the Court has required that defendants be permitted to introduce any evidence that mitigates against a death sentence, even if such evidence is not contemplated by the gov-

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do after being sentenced to die is wait—for eleven years on average. And what most of them, in reality, are waiting *for* is not execution, but reversal of their capital judgments because of serious legal error.").

22. 428 U.S. 153 (1976).

23. *Id.* at 195.

erning statute.<sup>24</sup> Conversely, the Court also has devoted considerable attention to the aggravating circumstances that make defendants eligible for the death penalty by requiring that the aggravating circumstances be clearly defined,<sup>25</sup> by prohibiting the consideration of aggravating factors that are not disclosed to the defendant,<sup>26</sup> and by demanding that aggravating circumstances be found by the jury rather than a judge.<sup>27</sup>

In addition to dealing with the types of evidence presented to juries, the Court has heavily regulated the process of selecting capital juries. In a series of decisions, the Court tinkered with the standard for removing prospective jurors who are opposed to the death penalty.<sup>28</sup> It also set standards for removing jurors who would never impose the death penalty,<sup>29</sup> and it considered challenges that juries composed of death penalty supporters were inherently biased toward conviction.<sup>30</sup>

The Court also has devoted considerable attention to the adequacy of representation received by indigent defendants. In a long series of cases, the Court has attempted to define how much investigation competent counsel are required to undertake to be effective during the sentencing phase of capital trials.<sup>31</sup> It has also

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24. See *Lockett v. Ohio*, 438 U.S. 586, 608 (1978) (plurality opinion).

25. See *Maynard v. Cartwright*, 486 U.S. 356, 361–64 (1988); *Godfrey v. Georgia*, 446 U.S. 420, 427–33 (1980).

26. See *Gardner v. Florida*, 430 U.S. 349, 362 (1977) (“[The defendant] was denied due process of law when the death sentence was imposed . . . on the basis of information which he had no opportunity to deny or explain.”).

27. See *Ring v. Arizona*, 536 U.S. 584, 609 (2002).

28. See *Wainwright v. Witt*, 469 U.S. 412, 419 (1985) (noting that a juror need not harbor “unmistakably clear” bias against the death penalty to be excluded); *Adams v. Texas*, 448 U.S. 38, 45 (1980) (finding it impermissible to exclude a juror “based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties”); *Witherspoon v. Illinois*, 391 U.S. 510, 521–22 (1968) (holding that juror cannot be excluded “simply because they voiced general objections to the death penalty”).

29. See *Morgan v. Illinois*, 504 U.S. 719, 728 (1992) (“[A] juror who in no case would vote for capital punishment, regardless of his or her instructions, is not an impartial juror and must be removed for cause.”).

30. See *Lockhart v. McCree*, 476 U.S. 162, 178, 183–84 (1986) (rejecting the challenge); *Witherspoon*, 391 U.S. at 517–18 (refusing to adopt a “*per se* constitutional rule” that would reverse convictions when potential jurors who opposed the death penalty were excluded from the jury).

31. See *Rompilla v. Beard*, 545 U.S. 374, 383–86 (2005) (finding ineffective assistance of counsel for failing to examine the court file from the defendant’s prior conviction, which contained mitigating material); *Wiggins v. Smith*, 539 U.S. 510, 524–26 (2003) (finding ineffective assistance of counsel where counsel conducted an inadequate investigation “result[ing] from inattention, not reasoned strategic judgment” that failed to discover power-

sought to carve out an area of presumptively valid representation based on lawyers' strategic choices at trial.<sup>32</sup>

In the substantive realm, the Court has forbidden the execution of juveniles,<sup>33</sup> the mentally retarded,<sup>34</sup> certain rapists,<sup>35</sup> and certain felony murders.<sup>36</sup> Yet, even these seemingly simple substantive restrictions on capital punishment have spawned complicated new areas of death penalty jurisprudence. While it is usually clear whether a defendant was under eighteen years of age at the time of his crime, it is not always clear whether a defendant was mentally retarded. And in that connection, the Supreme Court has opened the door to a maze of litigation about who is in fact mentally retarded.<sup>37</sup>

Put simply, the Court has created a large body of procedural regulations to govern the death penalty, providing capital petitioners with numerous theories to appeal their sentences.<sup>38</sup> Yet, as explained below, the Court's efforts have been a failure.<sup>39</sup>

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ful mitigating evidence); *Williams v. Taylor*, 529 U.S. 362, 395–96 (2000) (finding ineffective counsel where counsel's failure to introduce "voluminous" mitigating evidence was "not justified by a tactical decision"); *Strickland v. Washington*, 466 U.S. 668, 687–96 (1984) (setting a two part test standard for ineffective assistance of counsel claims).

32. See *Burger v. Kemp*, 483 U.S. 776, 794–95 (1987) (finding that counsel's trial strategy was "supported by reasonable professional judgment"); *Darden v. Wainwright*, 477 U.S. 168, 184–87 (1986) (relying on counsel's reasonable choices).

33. See *Roper v. Simmons*, 543 U.S. 551, 578 (2005) ("The Eight and Fourteenth Amendments forbid the imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.").

34. See *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) ("[D]eath is not a suitable punishment for a mentally retarded criminal.").

35. See *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (forbidding the death penalty for the rape of adult women stating "a sentence of death is grossly disproportionate and excessive punishment for the crime of rape").

36. See *Enmund v. Florida*, 458 U.S. 782, 797–98 (1982) (concluding that the death penalty is inappropriate for one who aids and abets a felony murder).

37. Compare Stephen B. Brauerman, Comment, *Balancing the Burden: The Constitutional Justification for Requiring the Government to Prove the Absence of Mental Retardation Before Imposing the Death Penalty*, 54 AM. U. L. REV. 401, 403 (2004) (arguing that "the Constitution requires the government to prove the absence of mental retardation" in order for the death penalty to be imposed), with Bill Lockyer & Taylor S. Carey, *Capital Punishment and the Mentally Retarded: Implementing Atkins*, 15 STAN. L. & POL'Y REV. 329, 340 (2004) (intimating that defendants should bear the burden of proof).

38. At the same time that the Court has created a variety of procedural rules that capital petitioners can invoke, the Court has made it very difficult for petitioners to successfully exercise those procedural guarantees and receive a ruling on the merits of their cases. Indeed, even before Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No 109-132, 110 Stat. 1214 (codified as amended in scattered sections and titles of U.S.C.), which drastically restricted the availability of habeas corpus, see *id.* §§ 101–108, the Supreme Court had streamlined the availability of ha-

### B. *Arbitrariness Continues*

Three decades after the Supreme Court reinstated capital punishment and adopted a complicated series of procedures to regulate it, critics still find much to criticize about the American death penalty system. Critics seize on the fact that in the thirty years since *Gregg*, 123 individuals have been exonerated and freed from death rows across the country.<sup>40</sup> Many of these individuals were exonerated not as a result of judicial inquiries but because journalism students or other activists brought their cases to public light.<sup>41</sup> Scholars explain that the dozens of death penalty decisions laid down by the Court have done little or nothing to protect the innocent from being convicted or to provide an avenue for the wrongfully convicted to exonerate themselves on appeal.<sup>42</sup> To the contrary, the Court's fractured 1993 decision in *Herrera v. Collins*<sup>43</sup> forbade freestanding claims of actual innocence from being brought in habeas corpus petitions and appeared to authorize the execution of actually innocent defendants who could not demonstrate a cognizable constitutional violation

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beas corpus in both capital and non-capital cases. See Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 5-6 (1997) (explaining that during the 1980s and 1990s the Supreme Court succeeded in narrowing the availability of habeas corpus long before Congress passed AEDPA). The Court has made it very difficult for petitioners who failed to raise issues in state court to have those issues reviewed on the merits in federal court. See *Wainwright v. Sykes*, 433 U.S. 72, 87, 90-91 (1977) (imposing a "cause-and-prejudice" test for procedural default in federal court). The Court also has adopted a complicated (and largely insurmountable) test for applying new rules of criminal procedure to individuals whose convictions are final. See *Teague v. Lane*, 489 U.S. 288, 311-316 (1989) (holding that habeas petitioners cannot benefit from new rules of criminal procedure except if the new rule prescribes the ability to criminalize conduct or if the new rule is a watershed rule of criminal procedure).

39. For a compelling criticism of the Court's efforts to reduce arbitrariness, see Scott W. Howe, *The Failed Case for Eighth Amendment Regulation of the Capital-Sentencing Trial*, 146 U. PA. L. REV. 795 (1998).

40. Henry Weinstein, *North Carolina to Weigh Claims of Innocence*, L.A. TIMES, Aug. 4, 2006 at 18; Death Penalty Information Center, *Innocence and the Death Penalty*, <http://www.deathpenaltyinfo.org/article.php?did=412&scid=6> (last visited Apr. 10, 2007) (compiling death penalty exoneration statistics).

41. See, e.g., Pam Belluck, *Class of Sleuths to Rescue on Death Row*, N.Y. TIMES, Feb. 5, 1999, at A16 (discussing research by Northwestern University journalism students that led to the exoneration of deathrow inmate); Don Terry, *DNA Tests and a Confession Set Three on the Path to Freedom in 1978 Murders*, N.Y. TIMES, June 15, 1996, at A6 (same).

42. See George C. Thomas III et al., *Is It Ever Too Late for Innocence? Finality, Efficiency, and Claims of Innocence*, 64 U. PITT. L. REV. 263, 267 (2003) ("It appears that the Supreme Court has neglected the most important 'do-no-harm' value of the criminal justice system: to separate the innocent from the guilty.").

43. 506 U.S. 390 (1993).

such as ineffective assistance of counsel or prosecutorial misconduct.<sup>44</sup>

While innocence has been a call to arms, Professor David Dow has observed recently—and correctly—that innocence is primarily a distraction from the more prevalent flaws that continue to pervade the death penalty system.<sup>45</sup> Most notable is the continuing problem of racial discrimination in capital punishment. Although the days of white mobs lynching black citizens are long since gone,<sup>46</sup> racial discrimination remains pervasive, and death rows continue to be filled with a disproportionate number of minority offenders.<sup>47</sup> In numerous studies, Professor David Baldus and other scholars have documented the continued widespread racial discrimination in capital sentencing throughout the country.<sup>48</sup> The Court's procedural regulation of the death penalty has done little to reduce the racial discrimination problem over the last thirty years. Indeed, when an equal protection challenge based on Professor Baldus's data reached the Court in 1987, the Court specifically rejected it out-of-hand.<sup>49</sup>

Another systematic problem which predates the *Gregg* decision and which still exists today is the inadequate representation afforded to indigent capital defendants. Although the Supreme

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44. See *id.* at 400 ("Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding."). For criticism of *Herrera*, see Susan Bandes, *Simple Murder: A Comment on the Legality of Executing the Innocent*, 44 *BUFF. L. REV.* 501 (1996).

45. See David R. Dow, Op-Ed, *The End of Innocence*, *N.Y. TIMES*, June 16, 2006, at A31 ("Innocence is a distraction . . . [Abolitionists] ought to focus on the far more pervasive problem: that the machinery of death in America is lawless, and in carrying out death sentences, we violate our legal principles nearly all of the time."); see also Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 *J. CRIM. L. & CRIMINOLOGY* 587, 623 (2005).

46. See JAMES R. MCGOVERN, *ANATOMY OF A LYNCHING: THE KILLING OF CLAUDE NEAL* 1–15 (1982) (providing an historical overview of lynching in the United States).

47. See, e.g., John M. Baer, *Faulkner, Mumia in Mix; State Senate Hearing Set on Moratorium for Death Penalty*, *PHILA. DAILY NEWS*, Feb. 21, 2000, at 7 (stating that 111 of the 126 death row inmates from Philadelphia are African-American or Hispanic).

48. See, e.g., DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY* 401 (1990) (describing the results of a long-term study showing that a defendant's odds of being sentenced to death were 4.3 times higher if the victim was white); David C. Baldus, et al., *Racial Discrimination in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 *CORNELL L. REV.* 1638, 1661 (1998) (explaining that in 96% of the states where there have been reviews of race and the death penalty, there was a pattern of either race-of-victim or race-of-defendant discrimination or both).

49. See *McCleskey v. Kemp*, 481 U.S. 279, 297–99 (1987).

Court has recently imposed slightly more rigorous review on ineffective assistance of counsel claims,<sup>50</sup> few would dispute that poor capital defendants are often represented by appointed lawyers who are unqualified or overworked.<sup>51</sup> Thus, the poor are far more likely to be sentenced to death than those who can afford their own counsel.<sup>52</sup>

Another troubling problem continues to be the geographic arbitrariness associated with the imposition of capital punishment. A handful of states produce most of the nation's death sentences, and an even smaller number of states are responsible for most of the actual executions. Between 1973 and 2004, southern states accounted for more than 60% of the nation's death sentences and more than 82% of its executions.<sup>53</sup> Among the southern states, Texas and Virginia accounted for 43% of the nation's executions.<sup>54</sup> By contrast, northeastern states accounted for only about six percent of the country's death sentences and well under one percent of its executions.<sup>55</sup>

The disparities, however, are not simply regional. As noted above, there are Texas counties that never seek the death pen-

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50. See Donald A. Dripps, *Ineffective Litigation of Ineffective Assistance Claims: Some Uncomfortable Reflections on Massaro v. United States*, 42 BRANDEIS L.J. 793, 804 (2004) ("A majority of the Court seems to have serious concerns about the ineffective assistance problem. Two recent decisions have taken a surprisingly rigorous view of the *Strickland* test.") (citing *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000)).

51. See 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, 1857-66 (1994) (lamenting the abysmal representation provided to many capital defendants); see also Vivian Berger, *The Chiropractor as Brain Surgeon: Defense Lawyering in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 245, 249 (1990) (stating that capital defendants frequently "are represented by the incompetent or inexperienced"); Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433, 489-94 (1993) (discussing the unavailability of lawyers qualified to represent capital defendants); Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 397-98 (1995) (stating that a lack of funding discourages qualified counsel from taking appointments in death penalty cases).

52. See Bright, *supra* note 51, at 1883 (summarizing the argument that the death penalty is often imposed "not upon those who commit the worst crimes, but upon those who have the misfortune to be assigned the worst lawyers.").

53. See Gershowitz, *supra* note 12, at 24-25.

54. See THOMAS P. BONCZAR & TRACY L. SNELL, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT, 2004, at 16 (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp04.pdf>.

55. See Gershowitz, *supra* note 12, at 24-25. Even more startling, of the northern states, Pennsylvania accounted for more than 83% of the region's death sentences and all of its executions. See *id.* at 25.

alty, even as Harris County, home to Houston, sentenced more than 200 people to death between 1976 and 2000.<sup>56</sup> In Pennsylvania, Philadelphia County has sent well over 100 individuals to death row, while comparably sized Pittsburgh has sent very few.<sup>57</sup> Similar disparities have been documented between Cincinnati and Columbus, Ohio; New York City and upstate New York; Memphis and Nashville, Tennessee; and the Baltimore suburbs and Baltimore City.<sup>58</sup>

By discussing arbitrariness problems associated with innocence, race, class, and geography, I do not mean to suggest that the judiciary is absent from the supervision of capital punishment. To the contrary, the judiciary exercises vigorous oversight to ensure compliance with the procedural protections laid down by the Supreme Court over the last three decades. Professor James Liebman and his colleagues have found that a staggering sixty-eight percent of capital trials conducted between 1973 and 1995 were reversed on appeal.<sup>59</sup> As Professor Liebman explained, death sentences are "overproduced;" up to six death sentences are handed down for each execution that is actually carried out.<sup>60</sup> Nevertheless, appellate review has not made a dent in the core arbitrariness problems associated with the death penalty: the innocent are still sentenced to death; being poor drastically increases the odds of execution; racial discrimination still pervades the system; and the likelihood of being sentenced to death often depends on which side of the county line the defendant committed his crime. Ultimately, the Court's strict supervision of capital punishment has resulted in petitioners spending tremendous

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56. See Tolson, *supra* note 7.

57. See Gershowitz, *supra* note 12, at 28-29; see also Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 HARV. C.R.-C.L. L. REV. 339, 344 n.21 (2006) (explaining that Philadelphia represents thirteen percent of the state population but over half of the death row inmates); William C. Smith, *A Tale of Two Cities*, LEGAL INTELLIGENCER, Jan. 15, 1997, at 1 ("[The] Philadelphia D.A.'s office is much more aggressive in seeking the death penalty.").

58. See Gershowitz, *supra* note 12, at 27-30 (discussing the disparities in greater detail).

59. James S. Liebman et al., *A Broken System: Error Rates in Capital Cases, 1973-1995*, at 4-5 (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Group, Paper No. 15, 2000), available at <http://ssrn.com/abstract=232712> (concluding that courts found reversible error in sixty-eight percent of death sentences that were fully reviewed on the merits).

60. See Liebman, *supra* note 19, at 2048.

time wrangling their way through procedural hurdles, while courts spend very little time on the actual merits of the cases.<sup>61</sup>

## II. REQUIRING COUNTY PROSECUTORS TO POST A BOND

Given that the Court's efforts to reduce the arbitrariness of the death penalty, through procedural regulations and a handful of substantive restrictions, have proved to be a failure, it is time to consider another approach. Because many academics tend to be court-focused,<sup>62</sup> they devote little attention to the prospect of legislatures, rather than the judiciary, imposing restrictions that could improve the functioning of the death penalty.<sup>63</sup>

There are a number of ways state legislatures could try to clean up the death penalty mess. States could restrict the number<sup>64</sup> or types<sup>65</sup> of cases that are statutorily eligible for the death penalty, impose a higher burden of proof in capital cases,<sup>66</sup> or provide greater avenues for post-trial review.<sup>67</sup> Yet, while these proposals may have some merit, no state legislatures have taken the bait. Perhaps the explanation for the lack of interest is that the proposals are not politically viable; each might be a political earthquake that would place unpopular obstacles in the way of execu-

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61. See Steiker & Steiker, *supra* note 3, at 429 (calling the Court's death penalty jurisprudence a "façade" that serves more to make "the public at large more comfortable with the death penalty" than with providing actual protection to defendants).

62. I tend to be guilty of this as well. In a recent article, I suggested that the Court could fix the arbitrariness problem if it would scrap its current jurisprudence and instead cap death penalty prosecutions for each jurisdiction at the national average. See Gershowitz, *supra* note 12, at 7.

63. See Berman, *supra* note 5, at 10 (noting that "we now may be able to turn to legislatures to find some hope" for reform).

64. Cf. Gershowitz, *supra* note 12, at 7 (suggesting that the Supreme Court cap death penalty prosecutions at the national average).

65. See LIEBMAN ET AL., *supra* note 13, at 394–95 (raising the possibility of limiting the death penalty to crimes of the magnitude of September 11th and the Oklahoma City bombing).

66. See, e.g., Craig M. Bradley, *A (Genuinely) Modest Proposal Concerning the Death Penalty*, 72 IND. L.J. 25, 27 (1996); Margery Malkin Koosed, *Averting Mistaken Executions by Adopting the Model Penal Code's Exclusion of Death in the Presence of Lingering Doubt*, 21 N. ILL. U. L. REV. 41, 111–12 (2001); Hon. Leonard B. Sand & Danielle L. Rose, *Proof Beyond All Possible Doubt: Is There a Need for a Higher Burden of Proof When the Sentence May Be Death?*, 78 CHI.-KENT L. REV. 1359, 1361 (2003); Elizabeth R. Jungman, Note, *Beyond All Doubt*, 91 GEO. L.J. 1065, 1089–91 (2003).

67. See Richard A. Rosen, *Reflections on Innocence*, 2006 WIS. L. REV. 237, 285 ("Another potential solution is to create procedures that would treat postconviction claims of innocence separately from other claims.").

tions without creating any immediately noticeable benefits. In place of these less palatable approaches, I offer a more modest proposal: the requirement that prosecutors post a bond before seeking the death penalty.

In most criminal cases, states delegate prosecutorial responsibility to the counties. Thus, it is the county prosecutor who rises in open court to say, "The State is ready to proceed, Your Honor." I do not propose to change that arrangement in capital cases, but simply to have the states impose a monetary restriction on the counties. In recognition of the fact that states often have to shoulder high costs to defend the counties' death sentences on appeal, and that many of those death sentences do not survive on appeal, state legislatures should require county prosecutors to post a bond to cover the states' appellate costs.

The rationale for requiring county prosecutors to post a bond is comparable to the reason society requires criminal defendants to post bond. Judges force defendants to post bond to encourage them to show up for trial.<sup>68</sup> In essence, defendants must post bond because society does not trust them to act properly without the prospect of losing money hanging over their heads. The same logic easily could apply to county prosecutors. If prosecutors want to seek the death penalty, society should not prevent them, but it should create an incentive to guarantee they will behave properly by bringing only meritorious cases and litigating them in a manner that is extremely unlikely to result in reversal on appeal. Below, I offer two types of bond statutes that state legislatures could adopt.

#### A. *The All-Or-Nothing Approach*

The first proposal is what could be called the "all-or-nothing" approach. In every capital case, county prosecutors could be required to post a bond by sending a predetermined sum of money to the state treasury. If the defendant is executed, the state would promptly return the entire bond, plus interest, to the county. If the jury refuses to hand down a death sentence, or if the death sentence is reversed on appeal,<sup>69</sup> then the county would forfeit

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68. See Daniel Richman, *United States v. Salerno: The Constitutionality of Regulatory Detention*, in *CRIMINAL PROCEDURE STORIES* 414 (Carol S. Steiker ed. 2006).

69. At first blush, observers might worry that appellate lawyers in the attorney gen-

the entire bond, plus all accrued interest, to the state.<sup>70</sup> While called an “all-or-nothing” proposal, there would have to be two exceptions for situations beyond counties’ control. First, a county should be entitled to a refund of its bond, plus interest, in the event that the governor or state pardon board grants an inmate clemency<sup>71</sup> for a reason other than prosecutorial misconduct.<sup>72</sup> Second, if the inmate dies prematurely in prison before his appeals have run their course—a process which currently takes an average of more than ten years<sup>73</sup>—the county should be entitled to a refund of its bond, plus interest, based on the presumption that the death sentence would have been carried out.<sup>74</sup>

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eral’s office would have an incentive to “throw” death penalty appeals because reversals would result in more money being brought into state, rather than county, coffers. This possibility is highly unlikely, however, because litigators, whether trial or appellate and whether state or county employees, want to win, particularly in capital cases. Prevailing on a capital appeal is personally satisfying to lawyers in the attorney general’s office and helps to enhance their reputations, thus giving them a chance to climb the ladder to a higher position. See, e.g., Norman Lefstein, *Reform of Defense Representation in Capital Cases: The Indiana Experience and Its Implications for the Nation*, 29 IND. L. REV. 495, 511 (1996) (“[A] prosecutor does not want to risk losing [capital cases] because that generates negative publicity and is seen as a ‘knock on the prosecutor.’”).

70. Observers also might contend that forcing small counties to post a large cash bond ex ante would deter them from seeking the death penalty in meritorious cases. There is some risk of this, but examples abound of small counties prosecuting egregious capital cases in the face of huge costs. See Gold, *supra* note 16; see also *infra* Part II.C. If high trial costs do not deter counties from seeking the death penalty in the occasional egregious case, the requirement to post an additional cash bond likely would not deter them either. Instead, the proposal is aimed at deterring jurisdictions that seek the death penalty in numerous marginal cases where the cost of posting multiple cash bonds would be a greater deterrent.

71. With the exception of Illinois, grants of clemency have been rare events in capital cases in the last few decades. See, e.g., AUSTIN SARAT, *MERCY ON TRIAL: WHAT IT MEANS TO STOP AN EXECUTION* 33 (2005) (“Today capital clemency is an endangered species.”).

72. The classic case of prosecutorial misconduct would be the failure to turn over exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Other examples include using peremptory challenges based on race or gender, suborning perjury, coercing witnesses, fabricating evidence, and making false statements to the jury. See JIM DWYER ET AL., *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* 172–82 (2000) (discussing various instances of prosecutorial misconduct).

73. See BONCZAR & SNELL, *supra* note 54, at 11 & tbl.11.

74. This presumption runs counter, at least in part, to the abatement doctrine, whereby the record of a defendant who dies before his initial appeal has been resolved is wiped clean. See *Durham v. United States*, 401 U.S. 481, 483 (1971) (per curiam) (“[D]eath pending direct review of a criminal conviction abates not only the appeal but also all proceedings had in the prosecution from its inception.”). The death of former Enron Chairman Ken Lay following his conviction has renewed discussion of the appropriateness of the abatement doctrine. See Kristin Hays, *Prosecutors Drop Lay Appeal; Government Withdraws Notice to Challenge Ruling Clearing Record*, HOUS. CHRON., Nov. 21, 2006, at Bus. 1.

The all-or-nothing approach has the virtue of being a fairly simple bright-line rule. Counties would have to decide at the outset whether they believe they will be successful at trial and on appeal. If the prosecutors think there is some risk of an acquittal, a life sentence, or an appellate reversal, then they would have to weigh whether seeking the death penalty is worth the financial risk of losing the bond.

An additional benefit of the all-or-nothing approach would be to promote truth-in-charging. Today, prosecutors occasionally seek the death penalty in the hopes of encouraging the defendant to plead guilty to a charge carrying a lengthy prison sentence.<sup>75</sup> Critics have long railed against this practice as too heavy-handed,<sup>76</sup> and they have proposed policies encouraging prosecutors to file charges only for those crimes for which they truly believe they can secure convictions.<sup>77</sup> While plea bargaining is likely to remain alive and well in run-of-the-mill criminal cases, imposing a bond requirement in capital cases would greatly restrict the most heavy-handed bargaining.

Relatedly, critics have also asserted that prosecutors who do not actually desire a death sentence sometimes seek the death penalty because a death-qualified jury<sup>78</sup> is more likely to convict

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75. See *North Carolina v. Alford*, 400 U.S. 25, 39 (1970) (upholding a guilty plea by a defendant who claimed to be innocent and who only pled guilty to avoid the death penalty); MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES 163 (1992) (quoting defendant who plead guilty to avoid the death penalty as saying that prosecutors "told me if I pleaded guilty, I'd only get maybe a couple of years. If I didn't, I'd go to the chair for sure."); EMILY WILSON, ET AL., TENNESSEE'S DEATH PENALTY: COSTS AND CONSEQUENCES, 13 (July 2004), available at <http://www.comptroller.state.tn.us/orea/reports/deathpenalty.pdf> ("[S]urveys and interviews indicate that [other prosecutors] use the death penalty as a 'bargaining chip' to secure plea bargains for lesser sentences."); Liebman, *supra* note 19, at 2097 ("[Capital punishment] provides the best plea-bargaining leverage imaginable."). For an empirical assessment, see Ilyana Kuziemko, *Does the Threat of the Death Penalty Affect Plea Bargaining in Murder Cases? Evidence From New York's 1995 Reinstatement of Capital Punishment*, 8 AM. L. & ECON. REV. 116, 140 (2006) ("The findings here suggest that the threat of the death penalty leads more defendants to plead guilty to their original arraignment charges.").

76. See Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61 LAW & CONTEMP. PROBS., Autumn 1998, at 125, 142-43 ("It seems that innocent defendants will almost always risk additional years of their lives in order to seek vindication rather than accept disgrace coupled with a long term of imprisonment, but some will not go so far as to risk death.").

77. See, e.g., Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 873-78 (1995) (proposing to financially reward prosecutors for obtaining convictions on the same charge pursued at the outset of the case).

78. See *supra* notes 28-30 and accompanying text.

the defendant of the underlying murder charge.<sup>79</sup> If prosecutors do currently use this tactic, the requirement of posting and possibly forfeiting a bond likely would put an end to it.

In addition to encouraging prosecutors to choose their death penalty cases more carefully and more sparingly, the bond requirement would also encourage prosecutors to try cases with greater caution and to give all close calls to the defendant, so as to avoid a reversal on appeal. Under the current system, prosecutors who procure death sentences are rewarded with good publicity, promotions, and perhaps even with judicial office.<sup>80</sup> By contrast, those same prosecutors suffer little stigma when death sentences are reversed on appeal because many years have gone by (at which point the prosecutor may not even work in the office any longer) and the public's attention has moved on to new death penalty cases.<sup>81</sup> Moreover, when capital cases are reversed, prosecutors often are able to lay the blame on the judiciary rather than the prosecutor's office. Thus, prosecutors who push the envelope at trial to procure a death sentence are rarely called on the carpet to account for appellate reversals.<sup>82</sup>

Requiring counties to forfeit a cash bond following reversals likely would stigmatize the prosecutors who handled the case at trial. Following reversal of a death sentence, local newspapers and television stations almost certainly would run stories indicating that the reversal will cost the county a large cash bond plus numerous years of compounded interest. If the costly reversal were to lead to public criticism of the prosecutors who handled

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79. See Richard Salgado, Note, *Tribunals Organized to Convict: Searching for a Lesser Evil in the Capital Juror Death Qualification Process in United States v. Green*, 2005 B.Y.U. L. REV. 519, 520–21; Rosenberg, *supra* note 10 (quoting prosecutor as saying that “[e]veryone who’s ever prosecuted a murder case wants a death-qualified jury”).

80. See Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 776 (1995) (“A common route to the bench is through a prosecutor’s office, where trying high-profile capital cases can result in publicity and name recognition for a prosecutor with judicial ambitions.”).

81. See Liebman, *supra* note 19, at 2119–29.

82. See *id.* at 2127 (“[E]ven in the rare event that there is someone back home who can be, and who is, singled out for a reversal penalty five or ten years after the fact, the penalty comes nowhere near canceling out the amortized rewards from generating the mistaken death sentence in the first place.”). To the contrary, prosecutors that cut corners and commit misconduct are sometimes rewarded. See Ken Armstrong & Maurice Possley, *Break Rules, Be Promoted*, CHI. TRIB., Jan. 14, 1999, at 1 (explaining how prosecutors rebuked by an appellate court were promoted to supervisory positions and later elected judges).

the case,<sup>83</sup> future capital prosecutors would have a strong incentive not just to win their capital cases, but also to ensure that defendants have the fairest possible trial and have the benefit of all close calls so that there will not be an appellate reversal.

The prospect of forfeiting a large bond also would motivate county prosecutors to advocate improvement of the abysmal state of representation provided to indigent defendants. As Stephen Bright remarked over a decade ago, it is often the defendant with the worst lawyer, rather than the one who committed the worst crime, who receives the death penalty.<sup>84</sup> Yet, under the current system, all that most prosecutors do about the inadequacy of representation is privately lament the problem.<sup>85</sup> County prosecutors have little incentive to push for better representation for defendants because complaining about the lawyers a judge has appointed<sup>86</sup> almost certainly would hurt a prosecutor's working re-

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83. Unfortunately, at present, reversals often do not lead to shaming of the trial prosecutor because courts tend to omit prosecutors' names from their opinions, thus shielding them from embarrassment. See Armstrong & Possley, *supra* note 82 ("Appellate courts rarely name prosecutors or defense attorneys in their opinions, even when a lawyer is found to have acted abominably."). While this practice is unlikely to change, investigative reporters would have greater incentive to dig up the prosecutors' names when counties have posted a bond because the story could focus not only on the appellate reversal but also the large cash bond the county would forfeit.

84. See Bright, *supra* note 51, at 1836.

85. Consider the case of Calvin Burdine, whose capital conviction was reversed because his lawyer slept through trial. On remand, the trial judge refused to appoint Burdine's very competent appellate lawyer to handle the retrial. The refusal outraged the local newspaper and prompted a federal judge to order the state trial judge to explain her actions. Yet, the Attorney General's Office did not oppose the judge's actions, saying, "That's between the judge and Mr. Burdine's lawyers." Henry Weinstein, *Attorney in 'Sleeping Lawyer' Case Hits Roadblock in Texas*, L.A. TIMES, July 21, 2002, at 28; Henry Weinstein, *U.S., State Jurists Tangle in Next Phase of Sleeping-Lawyer Saga*, L.A. TIMES, Sept. 29, 2002, at 30. For other examples, see Dirk Johnson, *Shoddy Defense by Lawyers Puts Innocents on Death Row*, N.Y. TIMES, Feb. 5, 2000, at A1 (explaining that Chicago Mayor Richard M. Daley supported a moratorium on executions because when he prosecuted death penalty cases as a Cook County state's attorney, "the defense lawyers in some of those cases were incompetent"); Laura LaFay, *Virginia's Poor Receive Justice on the Cheap: Rock-Bottom Pay for Court-Appointed Lawyers Undermines System, Lawyer Says*, VIRGINIAN-PILOT, Feb. 15, 1998, at A1 (quoting prosecutor as saying that litigating against inexperienced and inadequate lawyers "doesn't give me any satisfaction as a prosecutor, and I don't think it serves justice").

86. On the manners in which unqualified attorneys are appointed by judges to handle capital cases, see Randall Coyne & Lyn Entzeroth, *Report Regarding Implementation of the American Bar Association's Recommendations and Resolutions Concerning the Death Penalty and Calling for a Moratorium on Executions*, 4 GEO. J. ON FIGHTING POVERTY 3, 14 (1996); Paul Duggan, *George W. Bush: The Record in Texas; Attorneys' Ineptitude Doesn't Halt Executions*, WASH. POST, May 12, 2000, at A1.

lationship with that judge.<sup>87</sup> While the harm of sticking their necks out is great, the benefit of fighting for better representation for indigent defendants, at present, is minimal; appellate courts infrequently reverse capital convictions based on ineffective assistance of counsel,<sup>88</sup> and even when such reversals occur, it is not the prosecutors who are held responsible.

The prospect of forfeiting a bond could change the current state of affairs and lead prosecutors to advocate better indigent defense representation. If the reversal of *any* death sentence required the county to forfeit the large bond it posted, and if prosecutors were held politically responsible for the forfeiture, they would have an incentive to ensure that defendants are adequately represented at trial. Thus, prosecutors might not stand by quietly while local judges appoint unqualified cronies, and they might not sit idly while drunk or sleeping lawyers provide terrible representation to defendants during trial.<sup>89</sup> To the contrary, the elected District Attorney (and her subordinates) might advocate for defendants to receive qualified, conscious, and sober counsel before trials begin. Accordingly, if an appointed lawyer's incompetence became apparent during trial, prosecutors could move for a mistrial, rather than face the prospect of a successful ineffective assistance of counsel claim that would lead to forfeiture of the county's bond.<sup>90</sup> Put simply, the prospect of a cash penalty that might result in the

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87. See Mary Flood, *What Price Justice? Gary Graham Case Fueled Debate over Appointed Attorneys*, HOUS. CHRON., July 1, 2000, at A1 ("Until five years ago, often the only requirement for an appointment to a capital murder case was a lawyer's close relationship—either through friendship or campaign contributions—to the judge.").

88. See *supra* notes 31–32 and accompanying text; see also Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 284 (1997) (noting the difficulty of making successful ineffective assistance of counsel challenges).

89. Consider the case of Joe Frank Cannon who repeatedly was appointed to handle capital cases in Harris County, Texas, even though he had ten separate clients sentenced to death and reportedly fell asleep during a number of their trials. See Paul M. Barrett, *On the Defense: Lawyer's Fast Work on Death Cases Raises Doubts About System*, WALL ST. J., Sept. 7, 1994, at A1; see also John Makeig, *Asleep on the Job? Slaying Trial Boring, Lawyer Says*, HOUS. CHRON., Aug. 14, 1992, at A35 (retained lawyer in capital case conceded he was sleeping because the trial was boring); Henry Weinstein, *A Sleeping Lawyer and a Ticket to Death Row*, L.A. TIMES, July 15, 2000, at A1 (discussing performance of capital defense attorney in case where "prosecutors acknowledge that sleeping occurred but say that should not bar the execution."). If Harris County had faced the possibility of forfeiting a substantial bond for reversal of a death sentence, prosecutors likely would have opposed the appointment of poor quality lawyers to numerous capital cases.

90. A prosecutor's mistrial motion premised on the grounds that the *defendant* is being treated unfairly would certainly amount to manifest necessity, and double jeopardy would not bar re prosecution. See *United States v. Dinitz*, 424 U.S. 600, 610–12 (1976).

elected District Attorney being held politically accountable if the death sentence were reversed could lead prosecutors to be more proactive in seeking quality representation for indigent defendants.<sup>91</sup>

In adopting the all-or-nothing approach, the most difficult issue for state legislatures to resolve would be the amount of the bond. As noted, it would make sense for state legislatures to set the bond at the average amount the state spends to protect a death sentence on appeal. Some states may have this figure readily available, but even those without the information could procure it by retaining a statistician or economist to analyze the costs. Once an appropriate amount for the bond is determined, legislatures could draft a statute along the lines set forth here:

a. Preamble

1. Whereas the death penalty is a fitting and appropriate punishment for perpetrators of heinous crimes, and
2. Whereas local prosecutors should retain discretion to determine which cases merit capital prosecutions, and
3. Whereas the costs of imposing the death penalty are substantial, and
4. Whereas the state shoulders all of the appellate costs to ensure that death sentences are in fact carried out, the following procedures shall be required to ensure the death penalty will be applied in a fair, non-arbitrary manner that will be upheld on appeal.

b. *Requirement to Post a Bond*: In any case in which county prosecutors determine that the death penalty is merited, the county must remit a bond of X dollars to the state treasury before filing capital charges. The bond will be held in an individual interest-bearing account and will accrue interest at the prime rate as published by the Board of Governors of the Federal Reserve System.

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91. On this point, consider recent events from Harris County, Texas, where long-time District Attorney Chuck Rosenthal stepped back into the courtroom to personally prosecute a high-profile capital murder of a police officer. Perhaps because Rosenthal was personally involved and his reputation on the line, the prosecution took the unusual step of pressing for the defendant to receive the best possible appointed lawyer. See Deborah Wrigley, *Judge Clears Courtroom to Have One-On-One Talk With Accused Cop Killer*, KTRK NEWS, Nov. 28, 2006, <http://abclocal.go.com/ktrk/story?section=local&id=4804766>.

- c. *Recovery of Bond Following Execution:* If a death sentence is imposed following trial, and if that death sentence is not reversed or overturned on appeal or in a habeas corpus petition, the full bond amount, plus interest, shall be returned to the county within 30 days following the execution.
- d. *Consequences of Failed Prosecution:*
  1. *Failed Prosecution or Appeal:* Except as provided in sections d(2) and d(3), if the capital prosecution does not result in an execution, the full bond plus all accrued interest will be forfeited to the state.
  2. *Commutation:* In the event that the death sentence is commuted by the Governor for reasons other than prosecutorial misconduct, the full bond amount shall be returned to the county, plus interest, within 30 days following the commutation.
    - A. For purposes of section d(2), prosecutorial misconduct shall be deemed not to have occurred unless the Governor specifically provides in writing that prosecutorial misconduct was a motivating factor for the commutation.
    - B. In the event there is any dispute between the state and the county about whether the commutation was due to prosecutorial misconduct, the dispute shall be resolved by the Attorney General of the State within 30 days following the commutation.
  3. *Death:* In the event that the death-sentenced individual dies prior to the exhaustion of his appeals, the full bond amount, plus interest, shall be returned to the county within 30 days following the prisoner's death.

#### B. *The Graduated Approach*

The second proposal is what could be called a "graduated" bond forfeiture. As with the all-or-nothing approach, counties would be required to post a bond before seeking the death penalty. If the county prosecutors succeeded in procuring a death sentence and preserving the sentence through the appellate process, then the state would return the bond amount, plus interest, to the county following the execution. If the county failed to win a death sen-

tence or if the sentence were reversed on appeal, then the county would forfeit *part* of the bond. The amount of the forfeiture would depend on the stage of the process where the death sentence was lost.

For example, if the county sought the death penalty and the jury refused to return a death sentence, the state might provide for the return of 75% of the bond amount, plus the interest accrued on that amount. Returning such a substantial amount of the bond would reflect the fact that the case ended quickly and the state was not forced to expend any money to defend a death sentence on appeal. Such a large refund would signal to prosecutors that they need not abandon the death penalty in all difficult cases because, even if they are unsuccessful some of the time, the county would not lose an overwhelming amount of money. Nevertheless, the risk of losing 25% of the bond amount should deter prosecutors from seeking the death penalty in non-meritorious cases.

Under a graduated approach, the percentage of the bond refunded to the county would diminish as the capital case progressed through the appellate process. Therefore, if a jury handed down a death sentence, and the state were forced to defend that sentence on appeal, the County would forfeit 50% of the bond if the death sentence were reversed during the direct appeal process. If the death sentence were reversed during the collateral postconviction review process (which follows direct appeals), the county would forfeit 75% of the bond amount. Finally, if any court overturned the death sentence due to prosecutorial misconduct, the county would forfeit 100% of the bond amount, regardless of when in the process the reversal occurred.<sup>92</sup>

As with the all-or-nothing approach, a few exceptions would be warranted for the graduated approach. Once again, the county would be entitled to a full refund of the bond, plus interest, if the prisoner's death sentence were commuted for reasons other than prosecutorial misconduct, or if the prisoner died prior to the exhaustion of his appeals. Additionally, the legislature might want to add an exception allowing the county to fully recover the bond, plus interest, if the death sentence were reversed due to a water-

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92. Sadly, prosecutorial misconduct, primarily in the form of suppressing exculpatory evidence, accounts for almost 20% of reversals at the state and federal postconviction stage. See LIEBMAN ET AL., *supra* note 13, at 41.

shed change in substantive criminal doctrine.<sup>93</sup> In this respect, if the prosecutor made an error at trial that was simply unforeseeable, then she should not be blamed and the full bond amount should be refunded to the county.

Like the all-or-nothing approach, the graduated forfeiture would provide counties with an incentive to pursue only the strongest capital cases. If a case looks like a long-shot, the graduated approach would encourage prosecutors not to seek the death penalty at the outset, or at least to plea bargain before trial begins.

The graduated approach also would encourage prosecutors to consider bargaining with the defendant during the appellate or habeas corpus process—a practice that is largely unheard of today.<sup>94</sup> For instance, if the county prevails in the first series of appeals but comes to see its position as weak and fears that the death sentence will not be preserved all the way through the lengthy appellate process, the county might reach a compromise with the defendant whereby a life sentence is imposed. Thus, the state is spared the unnecessary expense of further appeals and the county is allowed to recover a portion of its bond amount.

Finally, a graduated bond forfeiture approach might encourage the revival of the now rare use of executive clemency. Under the current system, governors and pardon boards are reluctant to take responsibility for granting clemency because it is politically unpopular to stop an execution.<sup>95</sup> And if governors do commute a death sentence, they typically do so after millions of dollars have been expended on the lengthy appeals process.<sup>96</sup> Under the

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93. This would be a twist on the Supreme Court's retroactivity doctrine under *Teague v. Lane*, 489 U.S. 288 (1989), which ordinarily forbids petitioners from benefiting from new rules of procedure, but makes an exception for "watershed rules of criminal procedure." *Id.* at 311. Of course, just as it is nearly impossible for a habeas petitioner to prevail under the *Teague* doctrine, it likewise would be very difficult for a county to prevail either. On the significance and impossibility of surmounting the *Teague* doctrine, see Stephen F. Smith, *Activism As Restraint: Lessons from Criminal Procedure*, 80 TEX. L. REV. 1057, 1074–77 (2002).

94. See Anup Malani, *Habeas Settlements*, 92 VA. L. REV. 1, 38–39 (2006) (advocating that prosecutors and defendants settle cases that are pending on habeas corpus petitions).

95. See Adam M. Gershowitz, *The Diffusion of Responsibility in Capital Clemency*, 17 J.L. & POL. 669, 671–72 (2001).

96. Capital prisoners rarely receive clemency before their appeals have been exhausted (or nearly exhausted), although it does happen occasionally when governors make blanket commutations at the end of their terms. See Daniel T. Kobil, *Do the Paperwork or Die: Clemency, Ohio Style?*, 52 OHIO ST. L.J. 655, 656–59 (1991) (discussing clemencies

graduated bond forfeiture approach (as well as the all-or-nothing approach), county governments would have an incentive in weaker cases to lobby the governor to commute death sentences that could possibly be reversed on appeal. In other words, because counties would receive a refund of the entire bond amount, plus interest, if the governor commutes a death sentence, they would have a financial incentive to lobby for commutations if they feared that the death sentence might be reversed on appeal. If counties successfully lobbied to commute death sentences that had a fair chance of being reversed on appeal, the result would be a system where *less* time and money is devoted to capital appeals because the commutation would eliminate the need for further litigation.

Taking all of these considerations into account, a state legislature interested in the graduated approach could enact legislation modeled on the following draft statute:

a. Preamble

1. Whereas the death penalty is a fitting and appropriate punishment for perpetrators of heinous crimes, and
2. Whereas local prosecutors should retain discretion to determine which cases merit capital prosecutions, and
3. Whereas the costs of imposing the death penalty are substantial, and
4. Whereas the state shoulders all of the appellate costs to ensure that death sentences are in fact carried out, the following procedures shall be required to ensure the death penalty will be applied in a fair, non-arbitrary manner that will be upheld on appeal.

b. Requirement to Post a Bond: In any case in which county prosecutors determine that the death penalty is merited, the county must remit a bond of X dollars to the State treasury before filing capital charges. The bond will be held in an individual interest-bearing account and will accrue interest at the prime rate as published by the Board of Governors of the Federal Reserve System.

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awarded by Ohio Governor Richard Celeste at the end of his second term); SARAT, *supra* note 71, at 1-32 (discussing Governor George Ryan's commutations in Illinois).

c. **Recovery of Bond Following Execution:** If a death sentence is imposed following trial, and if that death sentence is not reversed or overturned on appeal or in a habeas corpus petition, the full bond amount, plus interest, shall be returned to the county within 30 days following the execution.

d. **Consequences of Failed Prosecution:** In the event that a capital prosecution does not result in execution, the bond posted by the county shall be returned to the county in the proportions set forth as follows:

1. **Prior to Jury Selection:** In the event that a county has already posted a bond but states in writing, prior to the beginning of jury selection, that it no longer intends to seek the death penalty, the full bond amount, plus interest, shall be returned to the county within 30 days of the county's written notification.

2. **Mistrial:** In the event that the trial ends in a mistrial for reasons other than prosecutorial misconduct as specified in section d(6)(A), the full bond amount, plus interest, shall be returned to the county within 30 days of the mistrial.

3. **Acquittal or Life Sentence:** In the event that the trial ends in an acquittal or the imposition of a sentence other than death, 75% of the bond amount, plus interest on that portion only, shall be returned to the county within 30 days of the verdict.

4. **Reversed on Direct Appeal:** Except as provided in section d(6), if a death sentence is imposed following trial but the death sentence is reversed during the direct appeal process to the state's intermediate court of appeals, the state supreme court or the Supreme Court of the United States, 50% of the bond amount, plus interest on that portion only, shall be returned to the county within 30 days of the termination of the direct appeal process.

5. **Reversed on Collateral Appeal:** Except as provided in section d(6), if a death sentence is imposed following trial, but the death sentence is reversed during the collateral appeals process, which shall include state and federal habeas corpus actions, 25% of the bond amount, plus interest on that portion only, shall be returned to the county

within 30 days of the termination of the collateral appeal process.

6. **Prosecutorial Misconduct:** In the event of a mistrial or the reversal of a death sentence due to a specific finding of prosecutorial misconduct as specified in section d(6)(A), the county shall forfeit the full bond amount, plus all accrued interest.

A. Prosecutorial misconduct shall include the failure to turn over exculpatory evidence as required by *Brady v. Maryland*, 373 U.S. 83 (1963), the unlawful exercise of peremptory challenges based on race or gender, suborning perjury, knowingly using false testimony, coercing witnesses, or fabricating evidence.

B. In the event there is any dispute between the county and the state as to whether the reversal of a death sentence was due to prosecutorial misconduct, the dispute shall be resolved by the Attorney General of the State within 30 days following the termination of the appeals process.

7. **Commutation:** In the event that the death sentence is commuted by the Governor for reasons other than prosecutorial misconduct as specified in section d(7)(A), the full bond amount shall be returned to the county, with interest, within 30 days following the commutation.

A. For purposes of section d(7) only, prosecutorial misconduct shall be presumed not to have occurred unless the Governor specifically states in writing that prosecutorial misconduct was a motivating factor for the commutation.

B. In the event there is any ambiguity about whether the commutation was due to prosecutorial misconduct, the dispute shall be resolved by the Attorney General of the State within 30 days following the commutation.

8. **Death:** In the event that the death-sentenced individual dies prior to the exhaustion of his appeals, the full bond amount, plus interest, shall be returned to the county within 30 days following the prisoner's death.

### C. *Solving the Small County Problem*

The purpose of forcing county prosecutors to post a bond prior to seeking the death penalty is to change the behavior of medium- and large-sized counties that overproduce death sentences. The goal is to make them face the full financial consequences of their decisions and to deter them from seeking the death penalty in marginal cases. The proposal is not intended to deter the use of capital punishment in appropriate cases. Yet, critics could argue that the proposal would place an impossible financial burden on small counties, thus making the death penalty so expensive that only wealthy counties could utilize it.<sup>97</sup> While I share this concern, I offer two reasons why it is not particularly worrisome.

First, it is already rare for small counties to seek the death penalty because they are unwilling to shoulder the tremendous pretrial and trial costs of capital cases.<sup>98</sup> And when truly egregious cases do come along, small counties are sometimes willing to seek the death penalty, even knowing full well that it will cause serious financial problems for the county.<sup>99</sup> For example, consider the vicious murder of James Byrd, who was dragged to his death in Jasper County, Texas.<sup>100</sup> Although prosecutors knew

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97. See Steve Brewer, *A Deadly Distinction; County has Budget to Prosecute with a Vengeance; District Attorney's Office Focuses on Capital Cases, and Commissioners Court Backs up the Approach*, HOUS. CHRON., Feb. 4, 2001, at A28 ("One of the reasons Harris County tries so many capital murder cases is simple economics—we can afford to," said state District Judge Michael McSpadden.).

98. See, e.g., WASH. STATE BAR ASS'N, FINAL REPORT OF THE DEATH PENALTY SUBCOMMITTEE OF THE COMMITTEE ON PUBLIC DEFENSE 33 (2006), available at, <http://www.wsba.org/lawyers/groups/finalreport.pdf> ("Several smaller [Washington] counties face difficult financial circumstances and prosecutors in those counties may be concerned by the significant impacts the costs of a death penalty case would have on the county's financial condition."); Robert Bryce, *Trial's High Costs Tax Jasper Coffers*, CHRISTIAN SCI. MONITOR, Feb. 25, 1999, at 2 ("[I]n recent years, several [small] Texas counties have not pursued the death penalty because of the high costs involved."); Tolson, *supra* note 7 (showing that between 1976 and 2000, 138 of Texas's 254 counties never sought the death penalty and that another 53 counties sought death only once during that period).

99. Dartmouth economist Katherine Baicker has determined that counties that seek the death penalty have a higher tax rate than counties that do not utilize the death penalty. See Katherine Baicker, *The Budgetary Repercussions of Capital Convictions* 15 (Nat'l Bureau of Econ. Research, Working Paper No. 8382, 2001), available at, <http://www.nber.org/papers/w8382>.

100. For accounts of the Byrd case, see JOYCE KING, *HATE CRIME: THE STORY OF A DRAGGING IN JASPER, TEXAS* (2002); DINA TEMPLE-RASTON, *A DEATH IN TEXAS: A STORY OF RACE, MURDER AND A SMALL TOWN'S STRUGGLE FOR REDEMPTION* (2003). In the twenty-five years before the Byrd case, Jasper County sent only one defendant to death row. See Tolson & Brewer, *supra* note 9.

that seeking the death penalty would be a financial crunch for the small county of about 35,000 people,<sup>101</sup> they charged three defendants with capital murder and spent more than \$1 million seeking the death penalty.<sup>102</sup> Indeed, the county actually raised property taxes to pay for the trial.<sup>103</sup> If prosecutors felt so strongly that the death penalty outweighed the huge financial costs, it is unlikely that they would have been deterred by the additional costs of posting a bond.<sup>104</sup>

Second, when a truly heinous case arises, counties that are financially unable to post a bond to seek the death penalty could apply to the state government for supplemental funding. On occasion, state governments provide counties with discretionary funds to assist with the unusually high costs of certain criminal cases.<sup>105</sup> Consider the example of another small Texas jurisdiction, Polk County, which has a population of 46,000.<sup>106</sup> Polk County has been trying for decades to execute John Paul Penry for a brutal rape and murder.<sup>107</sup> Due to Supreme Court rulings, Penry has been granted two retrials, which have cost Polk County exorbitant sums of money. To help defray the costs of the third trial, the State of Texas provided Polk County with \$100,000.<sup>108</sup>

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101. See U.S. CENSUS BUREAU, STATE AND COUNTY QUICKFACTS, <http://quickfacts.census.gov/qfd/states/48/48241.html> (last visited Apr. 10, 2007).

102. See Gold, *supra* note 16.

103. See *id.* (explaining that the Byrd case forced "a 6.7% increase in [local] property taxes over two years to pay for the trial").

104. See Richard Stewart, *Three Indicted by Grand Jury in Jasper Case; Charges of Capital Murder Face Whites in Black's Dragging Death*, HOUS. CHRON., July 7, 1998, at A1 (quoting Jasper County District Attorney as saying that the trial costs could be \$1 million and that "Obviously, there will have to be an increase in taxes . . . . We'll do what we have to do."). There are similar situations in other small counties. See, e.g., Barbara A. Serrano, *A Cop-Killing Trial—At All Costs—Million-Dollar Prosecution Could Bring Okanogan County to its Knees Financially*, SEATTLE TIMES, Mar. 31, 1999, at A1 (explaining that Okanogan County, Washington sought the death penalty for a cop-killer even though the costs required a freeze on hiring, raises, and procurement, because, according to the chairman of the County Board of Commissioners, "[w]e have to put every bit we can into this trial.").

105. Serrano, *supra* note 104 (stating that as of 1999, "[t]wenty-nine states have created special accounts or teams of public defenders to assist counties in trying capital cases against indigents").

106. See U.S. CENSUS BUREAU, STATE AND COUNTY QUICKFACTS, <http://quickfacts.census.gov/qfd/states/48/48373.html> (last visited Apr. 10, 2007).

107. For background on the crime, see *Penry v. Lynaugh*, 492 U.S. 302, 307–13 (1989).

108. See Gold, *supra* note 16; cf. WASH. STATE BAR ASS'N, *supra* note 98, at 33 (describing the Extraordinary Criminal Justice Costs Act of 1999, which allows Washington counties to apply for reimbursement of certain costs in first-degree murder cases).

If states are occasionally willing to assist small counties with the hefty trial costs of capital cases, they also likely would help small counties to post bonds in unusually egregious cases. Of course, this scenario carries the risk of the exception swallowing the rule. The purpose of requiring counties to post (and possibly forfeit) a cash bond to seek the death penalty is to force them to internalize the steep financial costs of unsuccessful death penalty appeals. If counties are regularly permitted to use state money to post the bonds, then they will not internalize those costs and will be unlikely to change their behavior.

While this scenario is problematic, it would be unlikely to occur very often. States have only a relatively small amount of discretionary money to assist counties with capital cases.<sup>109</sup> And while state legislatures might be convinced to assist a small (or even a large) county with the costs of posting a bond in a James Byrd-type case, legislatures likely would be unwilling to provide *ex ante* funding for multiple such cases in a given year.

### III. INCENTIVES FOR STATE LEGISLATURES

The final significant question to address is whether state legislatures would have any interest in requiring counties to post and risk forfeiting a bond to seek the death penalty. There are two reasons why the answer might be yes. First, the available data indicates that states spend large sums of money to defend counties' death penalty verdicts on appeal. In recent years, there are increasing examples of states bucking the "tough on crime" trend to reduce corrections spending in favor of funding other budget priorities. Second, legislators from smaller counties that rarely use the death penalty have an added incentive to require a bond in capital cases because they are currently spending their tax dollars to subsidize the capital appeals of larger counties.

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109. See, e.g., WASH. STATE BAR ASS'N, *supra* note 98, at 33 (explaining that Washington State's Extraordinary Criminal Justice Costs Act of 1999, which provides state funding to counties, "has not been fully funded and its funding has steadily declined").

### A. Appeals Are the Most Expensive Aspect of Capital Cases

A number of studies have found capital punishment to be a more expensive process than life imprisonment. For instance, a North Carolina study estimated the costs of an execution to be \$2.16 million more than the cost of imprisoning an individual for life.<sup>110</sup> A Texas study conducted in the early 1990s estimated that the death penalty cost \$2.3 million per case prosecuted in the state, about three times the cost of imprisoning someone for forty years.<sup>111</sup> Commentators have estimated that large states such as California and Florida could save tens of millions of dollars per year by eliminating capital punishment.<sup>112</sup>

Significantly, the bulk of the costs associated with capital cases are not the trials themselves, but the appeals.<sup>113</sup> Because of complicated rules and multiple stages of review in capital cases, appellate costs are far greater than costs in non-capital cases.<sup>114</sup> For instance, a 2003 study of Kansas found that the appellate costs associated with death penalty cases were more than twenty times the costs in non-capital cases.<sup>115</sup> A North Carolina study found the appellate and postconviction costs in capital cases to be about

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110. See PHILIP J. COOK ET AL., *THE COSTS OF PROCESSING MURDER CASES IN NORTH CAROLINA* 78 (1993), available at <http://www-pps.aas.duke.edu/people/faculty/cook/comnc.pdf>.

111. See Christy Hoppe, *Executions Cost Texas Millions: Study Finds It's Cheaper to Jail Killers for Life*, DALLAS MORNING NEWS, Mar. 8, 1992, at 1A.

112. See e.g., S.V. Date, *The High Price of Killing Killers: Death Penalty Prosecutions Cost Taxpayers Millions Annually*, PALM BEACH POST, Jan. 4, 2000, at 1A (explaining that Florida spends \$51 million per year to enforce the death penalty); Rone Tempest, *Death Row Often Means a Long Life: California Condemns Many Murderers, but Few Are Ever Executed*, L.A. TIMES, Mar. 6, 2005, at 1 (“[M]aintaining the California death penalty system costs taxpayers more than \$114 million a year beyond the cost of simply keeping the convicts locked up for life and not counting the millions more in court costs needed to prosecute capital cases and hold post-conviction hearings in state and federal courts.”).

113. See Bohm, *supra* note 16, at 582 (“The posttrial stage generally is the most expensive part of the entire process.”); Liebman, *supra* note 19, at 2139 (describing as “silly” that we “pay a few thousands dollars per capital trial, then millions of dollars per post-trial review”); *Death Penalty Cases Costly, Legislators Told*, PHILA. INQUIRER, Mar. 30, 1995, at B3 (reporting Pennsylvania Attorney General’s assertion that “the cost of defending death penalty appeals [in the state] could reach \$1 million per case”).

114. See COOK ET AL., *supra* note 110, at 64 (“[W]e estimate that death cases are 45 percent more costly on direct appeal than life cases, on average.”).

115. See LEGISLATIVE POST AUDIT COMM., LEGISLATURE OF KAN., *COSTS INCURRED FOR DEATH PENALTY CASES: A K-GOAL AUDIT OF THE DEPARTMENT OF CORRECTIONS ii* (2003) [hereinafter KAN. DEATH PENALTY COSTS], available at [http://www.klegislature.org/postaudit/audits\\_perform/04pa03a.pdf](http://www.klegislature.org/postaudit/audits_perform/04pa03a.pdf) (“At just over \$400,000, the projected appeal-related costs for the death penalty cases in our sample was more than 20 times the projected cost for cases in which the death penalty wasn’t sought.”).

four times as great as trial costs.<sup>116</sup> A capital defense lawyer in California explained over a decade ago that each death penalty case costs between \$3.5 and \$4.5 million in postconviction costs, far in excess of the \$1 to \$1.2 million in trial costs.<sup>117</sup>

More interesting than the sheer size of appellate and postconviction costs is who pays for them. Typically, it is *states* that spend millions of dollars to defend counties' death penalty verdicts following trial.<sup>118</sup> In most instances, it is the state attorney general's office, rather than county prosecutors, which handle appeals and habeas corpus petitions in capital cases.<sup>119</sup> In addition, many states provide lawyers for indigent defendants on appeal and state postconviction review, something that is not provided in non-capital cases.<sup>120</sup> In addition to attorney time, the state typically pays for court costs associated with death penalty cases.<sup>121</sup> A recent study of fourteen Kansas death-penalty cases found that the state paid more than \$3 million in appellate related costs, compared with less than \$100,000 paid by the counties.<sup>122</sup>

State legislators may soon grow weary of paying high appellate costs for death penalty verdicts that often are reversed on appeal. And legislators also might wish to shift those costs to county budgets. Consider the slowly emerging trend in non-capital expenditures. During the 1990s, state spending on corrections doubled from \$17 billion to \$35 billion.<sup>123</sup> But as prison costs have

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116. See COOK ET AL., *supra* note 110, at 77.

117. See Charles L. Linder, Opinion, *Cost of Death: A Billion Dollars and Counting*, L.A. TIMES, Aug. 29, 1993, at M1.

118. See, e.g., CONN. COMM'N ON THE DEATH PENALTY, STUDY PURSUANT TO PUBLIC ACT NO. 01-151 OF THE IMPOSITION OF THE DEATH PENALTY IN CONNECTICUT 67 (2003) (explaining that the Office of the Chief State's Attorney "has requested state funding to add six prosecutors and support staff to prosecute habeas corpus proceedings in death penalty cases"), available at [http://www.opm.state.ct.us/pdpdl/CDP/DCP\\_Final\\_Report-Jan2003.doc](http://www.opm.state.ct.us/pdpdl/CDP/DCP_Final_Report-Jan2003.doc).

119. See *supra* note 18.

120. For example, Tennessee's Office of the Post-Conviction Defender has a staff of thirteen and a budget of more than \$1 million per year. See WILSON ET AL., *supra* note 75, at 25-26.

121. In New Jersey, for instance, "two additional clerks have been needed almost full time to assist the [state supreme court] justices with research on the capital cases." MARY E. FORSBURG, N.J. POLICY PERSPECTIVE, MONEY FOR NOTHING?: THE FINANCIAL COST OF NEW JERSEY'S DEATH PENALTY 10 (2005), available at [http://www.njpp.org/rpt\\_moneyfor\\_nothing.html](http://www.njpp.org/rpt_moneyfor_nothing.html).

122. See KAN. DEATH PENALTY COSTS, *supra* note 115, at 12. The Kansas study found that the state had paid 85% of the total death penalty costs, compared with only 15% paid by the counties. See *id.*

123. See ROBIN CAMPBELL, VERA INSTITUTE OF JUSTICE, DOLLARS AND SENTENCES:

skyrocketed, some legislators have begun to express concerns about having enough funding for other public needs, such as health care, education, and law enforcement.<sup>124</sup> Although it is still popular to be “tough on crime,” some states recently have taken steps toward reducing their corrections costs.<sup>125</sup> In 2003, five states reduced sentences for nonviolent offenders, and a handful of other states created substance abuse treatment programs as an alternative to incarceration.<sup>126</sup> Recent reports by the Vera Institute of Justice have documented that twenty-five states reduced their corrections budgets in 2002,<sup>127</sup> while “at least nine states decreased their actual corrections expenditures in fiscal year 2003, and at least 14 [states] cut their initial corrections appropriations in fiscal year 2004.”<sup>128</sup> Whereas a decade ago it might

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LEGISLATORS' VIEWS ON PRISONS, PUNISHMENT, AND THE BUDGET CRISIS 3 (2003).

124. See, e.g., Ann Imse, *Prison Trend Costly; Inmates Enter State's Cellblocks at Rate Well Above Average*, ROCKY MOUNTAIN NEWS (Denver), June 19, 2006, at 4A (discussing a Colorado legislator's complaint that the need to come up with an extra 7,000 prison beds would cost a half-billion dollars and would “eat up our entire budget” and stating that “[t]he bill for prisons plays a major role in tight funding for other needs such as education and health care”); Bill Murphy, *Not All Agree New Jails Needed; Lawmaker Says County Should Let Some Offenders Out on Bail to Free Up Existing Cells*, HOUS. CHRON. Dec. 11, 2006, at A1 (quoting state legislator advocating shorter sentences or granting bail more often to avoid spending \$267 million to build new jails); Joseph Turner, *Huge Prison Bill on its Way*, NEWS TRIB. (Tacoma, Wash.), Oct. 8, 2006, at A1 (“Lawmakers tried for several years to avoid building a full-fledged prison in Eastern Washington because of its cost—\$231 million.”); cf. MICHAEL JACOBSON, *DOWNSIZING PRISONS: HOW TO REDUCE CRIME AND END MASS INCARCERATION* 12 (2005) (“Even with a slowly recovering national economy, states simply do not (and will not) have the revenue to continue prison expansion while simultaneously supporting Medicaid, maintaining low tax rates, and adequately funding education and health systems.”); Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1309 (2005) (“If the citizens in one state would rather spend a greater proportion of their limited budget on education than the construction of new prisons, they could adjust state sentencing policy accordingly.”).

125. See JACOBSON, *supra* note 124, at 85 (discussing how twenty-five states reduced their corrections budgets in 2002 because of budget shortfalls); RYAN S. KING & MARC MAUER, *THE SENTENCING PROJECT, STATE SENTENCING AND CORRECTIONS IN AN ERA OF FISCAL RESTRAINT* 11–16 (2002), available at [http://www.sentencingproject.org/Admin/Documents/publications/inc\\_statesentencingpolicy.pdf](http://www.sentencingproject.org/Admin/Documents/publications/inc_statesentencingpolicy.pdf); Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 807 (2005).

126. See JON WOOL & DON STEMEN, VERA INSTITUTE OF JUSTICE, *CHANGING FORTUNES OR CHANGING ATTITUDES?: SENTENCING AND CORRECTIONS REFORMS IN 2003* 6–7 (2004), available at [http://www.vera.org/publication\\_pdf/226\\_431.pdf](http://www.vera.org/publication_pdf/226_431.pdf).

127. DANIEL F. WILHELM & NICHOLAS R. TURNER, VERA INSTITUTE OF JUSTICE, *IS THE BUDGET CRISIS CHANGING THE WAY WE LOOK AT SENTENCING AND INCARCERATION?* 2 (2002), available at [http://www.vera.org/publication\\_pdf/167\\_263.pdf](http://www.vera.org/publication_pdf/167_263.pdf).

128. WOOL & STEMEN, *supra* note 126, at 2.

have been impossible to cut corrections budgets, today it is frequently considered.<sup>129</sup> As Professor Rachel Barkow has explained:

Examples abound of legislators emphasizing fiscal concerns in their newfound support for reduced sentencing. A Michigan legislator noted that when he first introduced bills to reduce mandatory minimum sentences, he received little support. After a conference on the state budget, however, the governor called him "to see how we can make these bills happen." Kansas's decision to require treatment instead of incarceration for first-time, nonviolent drug offenders rested in part on the fact that "those people who favor being tough on crime don't want to find the money to build more prisons." Washington passed its drug treatment diversion programs, according to one expert, because "[t]he fiscal crisis has brought together the folks who think sentences are too long with the folks who are perfectly happy with the sentences but think prison is costing too much." One Texas state representative supported treatment options for drug offenders because it was cost effective and would free prison space for more violent offenders. Several governors have ordered the early release of prisoners with the explicit goal of reducing correctional costs and addressing budget crises.<sup>130</sup>

Although most of the movement to restore fiscal discipline has focused on reducing incarceration costs, the same logic should apply with even greater force to the use of the death penalty, particularly since there has been a small decline in the popularity of the death penalty<sup>131</sup> and a substantial decline in the number of death sentences in recent years.<sup>132</sup> Because capital cases are so expensive, and because so few of them actually end in executions, the system is ripe for reforms that impose greater fiscal discipline.<sup>133</sup> Money saved on exorbitant capital appeals is money the states could spend on other projects.<sup>134</sup>

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129. See CAMPBELL, *supra* note 123, at 4 (citing a Texas legislator's explanation in early 2003 that a budget deficit required the state to find \$172 million in corrections savings); Chris Suellentrop, *The Right Has a Jailhouse Conversion*, N.Y. TIMES, Dec. 24, 2006, § 6 (Magazine), at 47 (discussing support for the Second Chance Act, which proposed nearly \$100 million in spending to assist states in returning prisoners to society).

130. Barkow, *supra* note 124, at 1287–88.

131. See Robert M. Bohm, *American Death Penalty Opinion: Past, Present, and Future*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT 27 (James R. Acker et al. eds., 2d ed. 2003) (explaining that death penalty support, while still strong at 70%, is down from the 80% that favored the punishment in the mid-1990s).

132. See Neil A. Lewis, *Death Sentences Decline, and Experts Offer Reasons*, N.Y. TIMES, Dec. 15, 2006, at A28.

133. Consider the California experience, where many prisoners sit on death row but only a handful have been executed. Experts estimate that California could save tens of millions of dollars each year by choosing its death penalty cases more sparingly. See Tem-

B. *Why Small Counties Have an Added Incentive to Back the Bond Proposal*

As explained above, the most expensive part of the death-penalty system—appellate and postconviction costs—is typically funded at the state level. Thus, as Professor James Liebman has cogently explained, “nearly the entire cost of the review process and its outcome is borne, not by the trial-level actors who committed the errors in the first place, but by taxpayers spread throughout the entire state (who fund the state court system and state attorney general’s office).”<sup>135</sup> Financially, it is not a good deal for small counties that rarely seek the death penalty to subsidize the significant appellate costs of larger counties that make frequent use of capital punishment. Thus, counties that use the death penalty infrequently have an added incentive to support a proposal that requires active death penalty counties—which typically have greater resources—to post a bond and to pay for their own mistakes in unsuccessful capital cases.

Take Texas, the nation’s leader in executions, as an example. In all likelihood, many of the legislators representing Harris County, which has sent nearly 300 individuals to death row over the last three decades,<sup>136</sup> would oppose any statute that required counties to post (and possibly forfeit) a bond to seek the death penalty. Presumably legislators in Bexar, Dallas, and Tarrant counties, which are collectively responsible for nearly 200 additional Texas death sentences,<sup>137</sup> also would oppose the bond statute. But what about the 138 Texas counties that did not hand down any death sentences between 1976 and 2000?<sup>138</sup> Or what about the fifty-three counties that imposed only a single death

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pest, *supra* note 112.

134. See *Costs of the Death Penalty and Related Issues: Hearing Before the N.Y. State Assemb. Standing Comm. on Codes, Judiciary, and Correction* 3 (2005) (statement of Richard C. Dieter), available at <http://www.deathpenaltyinfo.org/NY-RCD-Test.pdf> (explaining that tight budgets are leading to early release of prisoners and library closings to save costs); Fox Butterfield, *As Cities Struggle, Police Get By With Less*, N.Y. TIMES, July 27, 2004, at A10 (stating that cities have had to reduce their police forces because of reductions in state and federal aid).

135. LIEBMAN ET AL., *supra* note 13, at 380.

136. See Texas Department of Criminal Justice, Total Number of Offenders Sentenced to Death From Each County [hereinafter TDCJ], [http://www.tdcj.state.tx.us/stat/county\\_senenced.htm](http://www.tdcj.state.tx.us/stat/county_senenced.htm) (last visited Apr. 10, 2007).

137. See *id.*

138. See Tolson, *supra* note 7.

sentence during that same period?<sup>139</sup> What fiscal incentive do those nearly 200 counties have to pay for the appellate costs created by a handful of larger (and wealthier) counties that frequently use the death penalty?

Indeed, a head count of Texas counties finds that only seven of Texas's 254 counties sent more than twenty defendants to death row over the last thirty years.<sup>140</sup> The remaining 247 counties procured death sentences, on average, well less than once per year. To be sure, the seven Texas counties<sup>141</sup> that frequently use the death penalty are large jurisdictions and hold a substantial number of seats in the state legislature. But even if we were to count every Texas legislator who represents any portion of those seven counties, they would still account for only sixty-seven of the 150 seats in the Texas House of Representatives.<sup>142</sup> Moreover, many of those sixty-seven legislative districts are in predominantly minority sections of large cities—constituencies that tend to oppose the use of the death penalty.<sup>143</sup>

While the political calculus is surely more complicated than simply conducting a head-count, the reality is that well over half the legislative districts in Texas have a fiscal incentive to require counties to post a bond and pay for the costs of failed capital prosecutions. The same logic likely applies in many other states where only a handful of counties actively use the death penalty.

#### IV. CONCLUSION

At present, county prosecutors are free to seek the death penalty as they see fit, but they typically do not have to fund the very expensive appellate and postconviction stages of capital cases. Accordingly, when death sentences are reversed—and many of them are reversed for prosecutorial misconduct, ineffective assis-

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139. *See id.*

140. *See* TDCJ, *supra* note 136.

141. The seven Texas counties that have sent more than twenty individuals to death row during the last three decades are, as of November 2006, Bexar (73), Dallas (47), Harris (282), Jefferson (23), Nueces (22), Smith (21), and Tarrant (64). *See id.*

142. *See* Texas House of Representatives, House Membership, Listed By Name, <http://www.house.state.tx.us/members/welcome.php> (last visited Apr. 10, 2007).

143. Support for the death penalty is consistently 20 points lower among minorities than Caucasians. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS - 2003, at 144 tbl.2.50 (2005).

tance of counsel, and other reasons—county prosecutors are not forced to fully internalize the costs of their failed prosecutions. State legislatures can provide a better incentive structure for local prosecutors by requiring counties to post a bond before seeking the death penalty. Faced with the prospect of losing the bond if the defendant is not sentenced to death or if the death sentence is reversed on appeal, prosecutors would have an incentive to choose their capital cases carefully and to avoid any type of misconduct that might lead to reversal on appeal. Additionally, the prospect of forfeiting a bond likely would create secondary benefits, such as encouraging prosecutors to protest the appointment of unqualified defense lawyers who might give rise to colorable ineffective assistance of counsel claims. As a financial matter, the bond proposal should be appealing to state legislators because it would shift the costs of failed capital prosecutions away from state budgets and into the hands of the county actors who instigated the failed prosecutions. In addition, the bond proposal should be particularly appealing to legislators from small counties because it re-directs some of the high appellate and postconviction costs away from small counties that never use the death penalty to large jurisdictions that frequently seek capital punishment.