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Volume 85 | Number 3

Article 6

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3-1-2007

# Using the Adversarial Process to Limit Arbitrariness in Capital Charging Decisions

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## Recommended Citation

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## Using the Adversarial Process To Limit Arbitrariness in Capital Charging Decisions

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### INTRODUCTION

A man opens fire in the parking lot of his former employer, killing one former coworker and injuring another, in retaliation for having been fired.<sup>1</sup> The prosecutor allows him to plead guilty to first-degree murder in exchange for a life sentence.<sup>2</sup> Another man beats and strangles to death a young, disabled woman for no apparent reason, and he, too, pleads guilty in exchange for a life sentence.<sup>3</sup> Yet

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1. Shannon Blosser, *PPG Shooter Pleads Guilty to First-Degree Murder*, SHELBY STAR (Shelby, N.C.), Sept. 9, 2003, available at <http://www.shelbystar.com/story.php?ID=7949> (describing the case of Brandon Michael Smith).

2. *Id.*

3. Shannon Blosser, *Autopsy: Woman Strangled*, SHELBY STAR (Shelby, N.C.), Dec. 24, 2003, available at <http://www.shelbystar.com/story.php?ID=8854> (describing the case of Teddy Brian Scism); Megan Ward, *Scism Pleads Guilty*, SHELBY STAR (Shelby, N.C.), Apr. 12, 2005, available at <http://www.shelbystar.com/story.php?ID=14040> (same).

another man shoots and kills two people,<sup>4</sup> and although the prosecutor charges him with two counts of first-degree murder, he decides not to pursue the death penalty.<sup>5</sup> Finally, a man high on cocaine enters a convenience store unarmed, intending to rob it.<sup>6</sup> When the clerk resists, he grabs the closest weapon, a tire iron from under the counter, and hits her with it, and the clerk dies from the blow.<sup>7</sup> The prosecutor in his case seeks the death penalty and gets it.<sup>8</sup>

The differences in charging decisions in these cases, all occurring within the same jurisdiction, might seem surprising. After all, the death penalty is supposed to be reserved for only the “most heinous crimes.”<sup>9</sup> Of the crimes described above, the last is arguably the least heinous, and yet it was the only one of the four in which the district attorney’s office sought the death penalty. These differences result from the near total discretion vested in prosecutors in the United States. Although each case involved different facts and circumstances, each was at the very least a death-eligible crime. Such inconsistent and surprising outcomes reflect the disturbing potential for arbitrary imposition of the death penalty when one prosecutorial office, and often one single person, is responsible for such a grave decision.

The United States Supreme Court has long been concerned about the role of discretion in the imposition of the death penalty, in particular the possibility that unchecked discretion can lead to arbitrary and inconsistent application of the penalty. Such a result is impermissible under the Eighth Amendment’s prohibition of cruel and unusual punishment.<sup>10</sup> In its most prominent decisions about the constitutionality of the death penalty, the Court focused on the discretion state statutes then afforded to juries in capital cases. In 1972, the Court’s per curiam opinion in *Furman v. Georgia* invalidated the death penalty as it existed in every state in the country.<sup>11</sup> Every member of the Court filed a separate opinion, with each of the five concurring justices concluding that the arbitrary

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4. Joy Scott, *Suspects Sought in Three Homicides*, SHELBY STAR (Shelby, N.C.), Oct. 1, 2002, available at <http://www.shelbystar.com/story.php?ID=4652> (describing the case of Travis James Lattimore).

5. Blosser, *supra* note 1.

6. Associated Press, *Gov. Easley Denies Clemency*, SHELBY STAR (Shelby, N.C.), Mar. 11, 2005, available at <http://www.shelbystar.com/story.php?ID=13625> (describing the case of William Dillard Powell).

7. *Id.*

8. *Id.* (describing Powell’s preparation for his execution).

9. *Furman v. Georgia*, 408 U.S. 238, 286 (1972) (per curiam).

10. See U.S. CONST. amend. VIII.

11. See *Furman*, 408 U.S. at 239.

manner in which states then imposed the death penalty violated the Eighth Amendment's prohibition on cruel and unusual punishment.<sup>12</sup> Despite writing separately, the concurring justices agreed that state laws violated the Eighth Amendment by granting juries unfettered discretion to determine which crimes and which defendants would receive the death penalty.<sup>13</sup> Justice Douglas noted: "Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of twelve."<sup>14</sup> Justice Stewart likened the imposition of the death penalty to "being struck by lightning"<sup>15</sup> and concluded that "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."<sup>16</sup> Justice White noted that "the death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."<sup>17</sup> These original concerns later guided the Court when it considered newly written state death penalty statutes; it upheld only those statutes under which the legislature imposed some kind of guidance to limit the unfettered discretion of the sentencing body in the imposition of the ultimate punishment.<sup>18</sup>

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12. *Id.* at 240.

13. See Janet C. Hoeffel, *Risking the Eighth Amendment: Arbitrariness, Juries, and Discretion in Capital Cases*, 46 B.C. L. REV. 771, 774-75 (2005); Raymond Paternoster, *Race of Victim and Location of Crime: The Decision To Seek the Death Penalty in South Carolina*, 74 J. CRIM. L. & CRIMINOLOGY 754, 755 (1983) ("In sum, *Furman* held that where a sentencer is provided with discretion in a matter so important and irrevocable as the death penalty, that discretion must be structured in some way so as to avoid the capricious and wanton imposition of capital punishment.").

14. *Furman*, 408 U.S. at 253 (Douglas, J., concurring).

15. *Id.* at 309 (Stewart, J., concurring).

16. *Id.* at 310.

17. *Id.* at 313 (White, J., concurring). Justices Brennan and Marshall, while holding that the death penalty is cruel and unusual under any circumstances, called attention to the arbitrary nature of the punishment as one of the reasons the penalty could not survive. Justice Brennan concluded that "the very words 'cruel and unusual punishments' imply condemnation of the arbitrary infliction of severe punishments," and went on to say that "[w]hen the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily." *Id.* at 274, 293 (Brennan, J., concurring). Justice Marshall emphasized the great degree to which "the burden of capital punishment falls upon the poor, the ignorant, and the underprivileged members of society," which are impermissible arbitrary criteria for its imposition. *Id.* at 365-66 (Marshall, J., concurring).

18. See *Gregg v. Georgia*, 428 U.S. 153, 164-67 (1976) (plurality opinion) (upholding capital sentencing scheme that requires a jury or judge to consider mitigating and aggravating circumstances and allows for automatic proportionality review by the state's highest court); *Proffitt v. Florida*, 428 U.S. 242, 248-50, 259-60 (1976) (upholding capital

The implication of *Furman* and *Gregg v. Georgia* is that in order to withstand Eighth Amendment scrutiny, the use of the death penalty cannot be arbitrary; therefore, it must be guided by strict standards that provide a "meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not"<sup>19</sup> and prevent it from being "so wantonly and so freakishly imposed."<sup>20</sup> However, the Court has never demanded similar limits for prosecutorial discretion,<sup>21</sup> even though it is the prosecutor, and not the jury, who serves as the true gatekeeper of the death penalty in this country.<sup>22</sup> The Court's focus on limiting the discretion of the sentencing body ignores the power of the prosecutor to give a jury that discretion in the first place and simply shifts the unlimited discretionary power from the jury to the prosecutor.<sup>23</sup> Because the Court does not demand that the prosecutor's decision follow legally relevant standards, it leaves the door wide open for extralegal and irrelevant factors to influence that decision, and ultimately for the penalty to be arbitrarily imposed.

This Comment argues that because of the vast discretion afforded to prosecutors at the very beginning of the decisionmaking process of a capital trial, the death penalty as it exists in most jurisdictions today does not withstand Eighth Amendment scrutiny. Some prosecutorial discretion is desirable, indeed necessary, in any system that imposes a penalty of death, for a prosecutor's discretion

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sentencing scheme that requires a jury or judge to weigh aggravating and mitigating factors and allows for automatic review by the state's highest court); *Jurek v. Texas*, 428 U.S. 262, 269-76 (1976) (upholding capital sentencing scheme that requires the jury to answer two special questions before it can impose the death penalty).

19. *Furman*, 408 U.S. at 313 (White, J., concurring).

20. *Id.* at 310 (Stewart, J., concurring).

21. See Hugo Adam Bedau, *Controversies from Prosecution to Execution*, in *THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES* 310, 313 (Hugo Adam Bedau ed., 1997) ("Although the Supreme Court [has] insisted that capital trial juries be given some form of statutory guidance in deciding whether to sentence the convicted defendant to life or to death, the Court has not insisted that comparable guidance be imposed on prosecutors.").

22. *Id.* ("Yet the decision whether to seek the death sentence is perhaps the most far-reaching decision to be made in the whole arena of criminal justice.").

23. See *State v. Keodatch*, 548 A.2d 939, 952-53 (N.J. 1988) ("While limiting jury sentencing discretion helps to assure that those sentenced to death are a rational subset of those *actually* charged of capital crimes, it does not at all assure that those convicted are a rational subset of those who *could* be charged with a death-eligible offense."); William J. Bowers, *The Pervasiveness of Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 74 J. CRIM. L. & CRIMINOLOGY 1067, 1070 (1983). In most cases, the government's decision whether to seek a death penalty in any given case begins and ends with the prosecuting office. See Paternoster, *supra* note 13, at 758.

can tilt toward leniency as easily as it can toward overzealousness.<sup>24</sup> But with few legal standards to limit the prosecutor's discretion to decide which crimes and defendants, among the many eligible, should receive the death penalty, a significant probability exists that extralegal factors could influence this decision, and the use of the punishment could therefore be rendered arbitrary. A system that gives virtually unreviewable discretion to the government to charge (or not to charge) a defendant with the death penalty must impose some kind of limits on that discretion in order to keep these decisions within a range that Eighth Amendment jurisprudence will tolerate. While current proposed systems for change may be unrealistic in light of long traditions of deference to prosecutors, this Comment suggests a process to provide an adequate check on prosecutorial power to seek the death penalty.

Part I of this Comment explores the nature and importance of prosecutorial discretion in the United States, specifically as it relates to the death penalty. This Part briefly discusses the history and rationale behind granting full discretion to the prosecutor, then analyzes the Supreme Court's stance on the relationship between this discretion and the Court's Eighth Amendment jurisprudence about the death penalty. Part II discusses the factors, both legal and extralegal, that influence death penalty charging decisions, and the disparities that result when extralegal and irrelevant factors come into play. Finally, Part III discusses the possibility of using the adversarial process to solve, or at least begin to address, the problem of unchecked discretion in death penalty decisionmaking. This Part argues that most currently proposed systems for limiting prosecutorial discretion will likely not suffice to bring charging decisions within Eighth Amendment boundaries. This Comment concludes by proposing the use of a pretrial hearing regarding the prosecutor's charging decision to render death penalty decisionmaking more transparent, more consistent, and less arbitrary.

## I. THE HISTORY OF PROSECUTORIAL DISCRETION AND THE DEATH PENALTY

American prosecutors have long enjoyed great deference in their decisionmaking as a result of a multitude of political, societal, and economic factors. While a discussion of these factors in their entirety

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24. See *infra* notes 43–49 and accompanying text.

is outside the scope of this Comment,<sup>25</sup> these forces have come together to produce a troublesome result: prosecutors in the United States enjoy almost limitless, unreviewable<sup>26</sup> discretion in whom to charge, what to charge, and with whom to bargain.<sup>27</sup> This discretion is so broad, so unbridled, that former United States Attorney General and Supreme Court Justice Robert H. Jackson characterized the phenomenon as follows: "The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous."<sup>28</sup> The Court has long upheld the validity of this discretion, saying, "In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."<sup>29</sup>

In fact, the Court has recognized only two constitutional limits on a prosecutor's charging decision: a prohibition on vindictive or

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25. For excellent discussions of the development of prosecutorial power in the United States, see Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 728-42 (1996) (tracing the history of the development of power in the local prosecutor and the factors contributing to the centralization in the prosecutor of authority in the criminal justice system); William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 OHIO ST. L.J. 1325, 1342 (1993) (discussing the growth of prosecutorial discretion as a result of a historical national tradition of local control); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1523-37 (1981) (explaining the process by which prosecutors "acquired essentially unreviewable discretion").

26. See *infra* notes 155-60 and accompanying text for a discussion of the limited value of judicial review to curb prosecutorial discretion.

27. See Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1, 2 (1971); E. Michael McCann, *Opposing Capital Punishment: A Prosecutor's Perspective*, 79 MARQ. L. REV. 649, 668 (1996); Misner, *supra* note 25, at 741; Jeffrey J. Pokorak, *Probing the Capital Prosecutor's Perspective: Race of the Discretionary Actors*, 83 CORNELL L. REV. 1811, 1813 (1998).

28. See Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 3 (1940) (publication of a speech made by then-Attorney General Jackson at the Second Annual Conference of United States Attorneys in Washington, D.C., on April 1, 1940).

29. *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978); see also Vorenberg, *supra* note 25, at 1540 n.71 ("While the Supreme Court opinions generally contain only dicta or else decide issues only tangentially related to prosecutorial discretion in the criminal law, they have generated an almost unbroken line of cases upholding prosecutors' powers to decide who and how to charge."). In large part, the Court's deference to the decisions of the prosecutor arises from a concern for separation of powers between the judicial and executive branches. See *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (stating the Court's reluctance "to exercise judicial power over a 'special province' of the Executive" (quoting *Heckler v. Chancy*, 470 U.S. 821, 832 (1985))).

retaliatory prosecution (on due process grounds)<sup>30</sup> and a prohibition on selective prosecution (on equal protection grounds).<sup>31</sup> However, these two very narrow constraints, grounded in the Fifth Amendment, do little or nothing to protect against the introduction of extralegal factors into the decision of whether or not to charge a case capitally, which could violate the Eighth Amendment. Importantly, this Comment does not argue that the arbitrariness inherent in prosecutorial decisionmaking around the death penalty is necessarily an invidious form of selective or vindictive prosecution. The seemingly arbitrary charging decisions may simply result from the prosecutor's subconscious or conscious consideration of extralegal factors that should be irrelevant to the decision of whether a certain crime or defendant is worthy of death. Consideration of these factors could result in arbitrary application of the death penalty and therefore violate the Eighth Amendment, as the Court held in *Furman*.<sup>32</sup> Thus, current constitutional restraints on selective or vindictive prosecution are of little use in this area.

Prosecutorial discretion has few limits in the death penalty arena. At each stage of a death penalty prosecution, the prosecutor alone makes the decisions: whether to charge first degree murder, whether to file a notice of intent to seek the death penalty, and whether to proceed all the way through the guilt-innocence and sentencing phases of a capital trial.<sup>33</sup> Like prosecutorial discretion generally, the Supreme Court has also upheld the exercise of prosecutorial discretion in the area of the death penalty. When the Court first reinstated the death penalty in *Gregg v. Georgia*,<sup>34</sup> it found that the opportunities for discretionary action at each stage of the capital process were simply points at which "an actor in the criminal justice system makes a decision which may remove a defendant from

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30. See *United States v. Goodwin*, 457 U.S. 368, 372 (1982) ("[W]hile an individual certainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right.").

31. See *Armstrong*, 517 U.S. at 464 ("One of these [constitutional] constraints [on prosecutorial discretion] . . . is that the decision whether to prosecute may not be based on 'an unjustifiable standard such as race, religion, or other arbitrary classification.'" (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962))).

32. See *Furman v. Georgia*, 408 U.S. 238, 240 (1972) (per curiam).

33. See *Bowers*, *supra* note 23, at 1075 ("At this early stage in the process that leads to the death sentence, the prosecutor exercises almost total discretion over the decision whether to indict for first degree murder."); Jon Sorensen & Donald H. Wallace, *Prosecutorial Discretion in Seeking Death: An Analysis of Racial Disparity in the Pretrial Stages of Case Processing in a Midwestern County*, 16 JUST. Q. 559, 568 (1999) (discussing the "three identifiable decisions [made by the prosecutor] during the pretrial stages of capital case processing").

34. 428 U.S. 153 (1976) (plurality opinion).



consideration as a candidate for the death penalty.”<sup>35</sup> The Court further noted that “[n]othing in any of [its] cases suggests that the decision to afford an individual defendant mercy violates the Constitution.”<sup>36</sup> Here, the Court failed to recognize the possibility that the prosecutor’s very decisions to grant mercy in one case and seek the death penalty in another might result in an arbitrary application of the death penalty, depending on the reasons for those differing decisions. Justice White’s concurrence confirms the Court’s ignorance of this risk. He simply assumed that because the same aggravating factors that guide juries’ sentencing decisions must guide prosecutors’ charging decisions, “defendants will escape the death penalty through prosecutorial charging decisions only because the offense is not sufficiently serious; or because the proof is insufficiently strong.”<sup>37</sup> Justice White incorrectly assumed that prosecutors would never be influenced by extralegal factors in making the decision to seek the death penalty.<sup>38</sup>

The Court ignored similar possibilities a decade later in *McCleskey v. Kemp*,<sup>39</sup> an equal protection challenge to the application of the death penalty, even when faced with daunting empirical evidence of the significant effect of race on the imposition of the death penalty in Georgia.<sup>40</sup> In refusing to entertain McCleskey’s challenge to the prosecutor’s discretion whether to seek the death penalty, the Court stated:

[T]he capacity of prosecutorial discretion to provide individualized justice is “firmly entrenched in American law.” As we have noted, a prosecutor can decline to charge, offer a plea bargain, or decline to seek a death sentence in any particular case. Of course, “the power to be lenient [also] is the power to discriminate,” but a capital punishment system that did not allow for discretionary acts of leniency “would be totally alien to our notions of criminal justice.”<sup>41</sup>

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35. *Id.* at 199.

36. *Id.*

37. *Id.* at 225 (White, J., concurring).

38. See *infra* Part II (discussing the variety of extralegal factors that play a role in the decision to seek the death penalty).

39. 481 U.S. 279 (1987).

40. *Id.* at 286–87. McCleskey presented the findings of David Baldus’s study of the death penalty in Georgia, which revealed “that prosecutors sought the death penalty in 70% of the cases involving black defendants and white victims; 32% of the cases involving white defendants and white victims; 15% of the cases involving black defendants and black victims; and 19% of the cases involving white defendants and black victims.” *Id.* at 287.

41. *Id.* at 311–12 (citations omitted).

The Court noted that its longstanding precedent would not require a prosecutor to “explain his decisions unless the criminal defendant presents a *prima facie* case of unconstitutional conduct with respect to his case.”<sup>42</sup>

Despite its flaws, some prosecutorial discretion is desirable, even necessary, in a criminal justice system that strives for fairness. First of all, it is important that accountability for the enforcement of laws be centralized to the greatest extent possible in one government official who answers to the public.<sup>43</sup> Since prosecutors are typically elected officials,<sup>44</sup> this provides for some measure of public accountability for prosecutorial decisionmaking.<sup>45</sup> Secondly, the prosecutor has an ethical obligation to seek not just a conviction, but justice, in each individual case.<sup>46</sup> The United States Supreme Court has made clear that the prosecutor

is the representative not of an ordinary party to a controversy, but of a sovereignty whose . . . interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done . . . . He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.<sup>47</sup>

In order to seek the most just result, discretion allows the prosecutor to consider all of the circumstances of the crime and the characteristics of the individual defendant in order to determine

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42. *Id.* at 297 n.18.

43. See Misner, *supra* note 25, at 718 (“The centralization of authority in the prosecution is a development necessary for a coordinated and responsive criminal justice system in which the prosecutor will ultimately be held accountable to the voters for the successes and failures of the system.”); Pizzi, *supra* note 25, at 1339 (“If someone is to decide which laws will be aggressively enforced, which laws will be enforced occasionally, and which laws will never be enforced, it makes sense that the person who has to answer to the voters will make those determinations.”).

44. See Pizzi, *supra* note 25, at 1338 (noting that ninety-seven percent of state prosecutors are elected).

45. See *id.*; see also *supra* notes 43–44 and accompanying text (discussing the prosecutor’s heightened public accountability as a function of his elected status).

46. See CRIMINAL JUSTICE STANDARDS COMM., AM. BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-1.2(c) (3d ed. 1993); MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. 1 (2003).

47. *Berger v. United States*, 295 U.S. 78, 88 (1935) (responding to a federal prosecutor’s misconduct in highly improper questioning of witnesses and inflammatory arguments to the jury).

whether a capital charge is warranted.<sup>48</sup> Such flexibility is indeed desirable; after all, “criminal cases involve people and their actions, not fungible mechanical parts.”<sup>49</sup>

However, these benefits of discretion come with concomitant disadvantages. In the death penalty arena, public accountability, rather than ensuring that a prosecutor acts fairly and justly, can work to destroy fairness as prosecutors endeavor to respond to their constituencies, some of which may be avid supporters of the death penalty while others oppose it.<sup>50</sup> Secondly, the prosecutor’s ability to consider the circumstances of each case and the characteristics of each defendant means that while one defendant may benefit from the prosecutor’s lenience, another defendant in the same jurisdiction may not be so lucky, resulting in an arbitrary application of the penalty.<sup>51</sup> Furthermore, most states’ death penalty statutes are so broad and could cover such a wide range of homicides that the discretion of the prosecutor by necessity becomes even more expansive.<sup>52</sup>

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48. See Abrams, *supra* note 27, at 2 (discussing prosecutorial discretion generally and stating that “[t]he major advantage of such discretion is that it . . . permits a prosecutor in dealing with individual cases to consider special facts and circumstances not taken into account by the applicable rules”).

49. See Richard H. Kuh, *Plea Bargaining: Guidelines for the Manhattan District Attorney’s Office*, 11 CRIM. L. BULL. 48, 49 (1975).

50. See *infra* Part II.A for additional discussion of the influence of political and public pressure on the decision to charge the death penalty.

51. See *supra* notes 1–5 and accompanying text (discussing three particularly shocking crimes in which the prosecutor chose not to seek the death penalty); see also Vorenberg, *supra* note 25, at 1557 (“Because prosecutors often do not charge the maximum authorized and do offer leniency to most defendants through plea bargaining, a defendant is hurt in the most basic sense when treated in an unusually harsh manner.”). Furthermore, Vorenberg argues, allowing the prosecutor to exercise lenience in her application of the law essentially subverts the legislature’s policymaking judgment, which prevents the legislature from realizing the actual impact of the laws it passes, harsh as they may be. See *id.* at 1552. He argues: “If we are truly concerned about compassion, we are less likely to achieve it through the hidden and unpredictable use of prosecutorial discretion than through encouraging the legislature to see and respond to the results of archaic or overly harsh laws.” *Id.*

52. See Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today’s Arbitrary and Mandatory Capital Punishment Scheme*, 6 WM. & MARY BILL RTS. J. 345, 363 (1998) (arguing that the Supreme Court tolerates overly broad and vague aggravating factors, resulting in increasingly arbitrary application of the death penalty). For example, many state statutes include as an aggravating factor that the murder was committed for the purpose of pecuniary or financial gain. See, e.g., CAL. PENAL CODE § 190.2(a)(1) (West 1999) (“The murder was intentional and carried out for financial gain.”); FLA. STAT. ANN. § 921.141(5)(f) (West 2001) (“The capital felony was committed for pecuniary gain.”); MISS. CODE ANN. § 99-19-101(5)(f) (West 1999) (same); N.C. GEN. STAT. § 15A-2000(e)(6) (2005) (same). While a natural reading of the “pecuniary gain” aggravator would be that it is meant to address murderers for hire, some prosecutors have sought the death penalty under the “pecuniary gain” aggravator when the murder

Thus, while prosecutorial discretion can and often does serve important functions in the criminal justice system, it can also undermine the fairness and consistency that society and the United States Supreme Court demands of the justice system when it proposes to use the irreversible punishment of death. Despite the potential inconsistency that may result from a prosecutor's discretion to charge the death penalty, the Court has been hesitant to limit that discretion in any meaningful way. The Court fails to appreciate the seemingly arbitrary outcomes that may result from a prosecutor's conscious or subconscious consideration of extralegal and irrelevant factors. The next Part explores these factors, as well as the possible and actual disparities that result from them.

## II. THE IMPACT OF PROSECUTORIAL DISCRETION ON THE DEATH PENALTY

Because the charging power of the prosecutor is so broadly cast in most state statutes,<sup>53</sup> a prosecutor may weigh a wide variety of factors in her decision whether to seek the death penalty.

Some of these factors are legitimate and represent precisely what legislatures likely intended when drafting death penalty statutes. For example, the aggravating factors for death-eligible crimes in many death penalty statutes include whether the crime included multiple victims.<sup>54</sup> Thus, the number of victims of a crime would be a legally

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occurred during an ordinary robbery or burglary, arguing that these murders were also committed for "pecuniary gain." The prosecutor's charging decision in *State v. Powell*, 340 N.C. 674, 459 S.E.2d 219 (1995), which relied on a typical pecuniary gain statute, exemplifies this nearly limitless discretion to manipulate aggravating factors. Powell was unarmed when he entered a convenience store intending to rob it, and stated that when, in the process of the robbery, the clerk slapped him, "he had panicked, he had not intended to harm her, and he merely wanted the money from the cash register," at which point the defendant grabbed a tire iron that was under the counter and struck the clerk with it. *Id.* at 682–84. The jury found Powell guilty of first-degree murder solely on felony murder grounds (with the robbery itself as the underlying felony), found "pecuniary gain" as the sole aggravating circumstance, and recommended the death penalty. *Id.* at 685–86. Such a result exemplifies the prosecutor's limitless ability to manipulate the aggravating factors to fit a capital charge. See also *infra* notes 55–56 for a discussion of the overly broad "heinous, atrocious, and cruel" aggravating factor.

53. See *supra* note 52.

54. For a sample of state statutes including multiple victims as an aggravating factor, see, for example, ALA. CODE § 13A-5-49(9) (LexisNexis 2005); ARIZ. REV. STAT. ANN. § 13-703(f)(8) (2001); CAL. PENAL CODE § 190.2(3) (West 1999); COLO. REV. STAT. § 18-1.3-1201(5)(g) (2004); 720 ILL. COMP. STAT. ANN. 5/9-1(a)(3) (West 2002); KAN. STAT. ANN. § 21-4625(2) (1995); KY. REV. STAT. ANN. § 532.025(2)(a)(6) (LexisNexis 1999); MD. CODE ANN., CRIM. LAW § 2-303(g)(1)(ix) (LexisNexis 2002); NEV. REV. STAT. ANN. § 200.033(12) (LexisNexis 2001); OR. REV. STAT. § 163.095(1)(d) (2005); TEX. PENAL

relevant factor for a prosecutor to consider when making the decision whether to pursue the death penalty. Similarly, since most state death penalty statutes employ some form of aggravating circumstance that addresses the heinousness of the crime,<sup>55</sup> the circumstances surrounding the offense (whether it involved torture, significant pain and suffering for the victim prior to death, or other circumstances that show great cruelty) are appropriate considerations in making the decision.<sup>56</sup> Other legally relevant considerations might include the strength of the state's case or the quality of its evidence, including the reliability of witnesses.<sup>57</sup>

While most would agree that the decision to seek the death penalty should be based solely on these types of legally relevant factors,<sup>58</sup> the very nature of the broad discretion granted to the prosecutor makes it almost inevitable that other extralegal, and arguably irrelevant, factors might influence the decision to pursue the death penalty.<sup>59</sup> In one Florida study, when asked about influential

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CODE ANN. § 19.03(7) (Vernon 2003); VA. CODE ANN. § 18.2-31(7) (2004); WASH. REV. CODE ANN. § 10.95.020(10) (West 2002).

55. For a sample of state statutes including heinousness or extreme cruelty as an aggravating factor, see, for example, ALA. CODE § 13A-5-49(8) (LexisNexis 2005); ARIZ. REV. STAT. ANN. § 13-703(f)(6) (2001); CAL. PENAL CODE § 190.2(14) (West 1999); COLO. REV. STAT. 18-1.3-1201(5)(j) (2004); CONN. GEN. STAT. ANN. § 53a-46a(4) (West 2001); FLA. STAT. ANN. § 921.141(5)(h) (West 2001); IDAHO CODE ANN. § 19-2515(9)(e) (2004); KAN. STAT. ANN. § 21-4625(6) (1995); LA. CODE CRIM. PROC. ANN. art. 905.4(7) (2004); MISS. CODE ANN. § 99-19-101(5)(h) (West 1999); NEB. REV. STAT. § 29-2523(1)(d) (1996); N.H. REV. STAT. ANN. § 630:5(VII)(h) (LexisNexis 1996); N.C. GEN. STAT. § 15A-2000(e)(9) (2004); OKL. STAT. ANN. tit. 21, § 701.12(4) (West 2002); TENN. CODE ANN. § 39-13-202(i)(5) (2002); UTAH CODE ANN. § 76-5-202(1)(r) (2006); WYO. STAT. ANN. § 6-2-102(h)(7) (2005).

56. However, even these statutory aggravating circumstances may vest far too much discretion in the prosecutor to determine the meaning of "heinous, atrocious, or cruel." Professor Richard Rosen argues that the "especially heinous" aggravating factor tends to broaden the discretion of sentencing bodies, rather than limit it, as required by the Eighth Amendment. See Richard A. Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases—The Standardless Standard*, 64 N.C. L. REV. 941, 945 (1986). Rosen states that "[D]iscrimination, arbitrariness, [and] caprice . . . all can be present when the sentencer is left free to choose to execute or not depending on a subjective evaluation of the 'badness' or 'heinousness' of the murder." *Id.* at 992. The same can easily be said about the prosecutor's discretion as well.

57. See Bowers, *supra* note 23, at 1076.

58. See, e.g., Jonathan R. Sorensen & James W. Marquart, *Prosecutorial and Jury Decisionmaking in Post-Furman Texas Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 743, 743 (1990-91) (arguing that Supreme Court precedent requires that prosecutorial discretion in this area be limited by legal relevance).

59. See Stewart F. Hancock, Jr. et al., *Race, Unbridled Discretion, and the State Constitutional Validity of New York's Death Penalty Statute—Two Questions*, 59 ALB. L. REV. 1545, 1563 (1996) ("One inevitable consequence of unlimited prosecutorial discretion is that the critical decisions whether to charge a defendant with a capital crime

factors in decisions to indict on first-degree murder and take a case to trial on first-degree murder, prosecutors, judges, and defense attorneys “mentioned more extralegal considerations [than] . . . ‘legal factors or considerations.’”<sup>60</sup>

Factors that are legally irrelevant to the government’s ability to prove statutory aggravating factors necessary for the imposition of the death penalty are, in essence, arbitrary factors, that can and will vary from prosecutor to prosecutor within a given jurisdiction.<sup>61</sup> Thus, if prosecutors base their decisions, even in part, on such legally irrelevant factors, then a substantial risk exists that the death penalty is arbitrary, and therefore contravenes the Eighth Amendment.<sup>62</sup> The

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. . . will depend on the particular philosophical, ethical, religious or other views of the individual prosecutor.”); McCann, *supra* note 27, at 668 (“The danger [of discretion is that] the prosecutor will be guided not by the appropriate legal considerations of a particular case but rather by extraneous pressures that should not influence the charging decision as to whether to file for capital punishment.”); Paternoster, *supra* note 13, at 758 (“Numerous factors go into this decision, some of which are legally relevant . . . . Other factors, however, may enter into this decision, such as the race of the victim or the offender, or the location within the state where the homicide occurred.”); Pokorak, *supra* note 27, at 1813–14 (“With this prosecutorial freedom, however, comes the danger that invidious considerations will prompt these death penalty decision makers.”).

60. See Bowers, *supra* note 23, at 1077. The extralegal factors included, for example, the personal orientation of a prosecutor, situational pressures and constraints in handling a case, and social influences and pressures from the community, while the legal factors included the facts of the case, aggravating and mitigating considerations, strength of the case, and quality of the evidence. *Id.* at 1076.

61. The United States Supreme Court has never clearly defined what is arbitrary. While all of the Justices’ opinions in *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam), expressed concern about arbitrariness, most asserted that it existed simply because there was no way to predict which crimes and defendants would get the death penalty. See *supra* note 17 (describing the Justices’ positions on the issue). The closest the United States Supreme Court has come to defining what is “arbitrary” is by giving examples of what arbitrary factors might be when commenting on the Georgia Supreme Court’s death penalty statute, which requires the Court to review every death sentence to determine whether it “was imposed under the influence of passion, prejudice, or any other arbitrary factor.” *Gregg v. Georgia*, 428 U.S. 153, 166–67 (1976) (plurality opinion). *Black’s Law Dictionary* does not clarify the word any further, defining “arbitrary” as “depending on individual discretion; specif., determined by a judge rather than by fixed rules, procedures, or law.” BLACK’S LAW DICTIONARY 41 (8th ed. 2004).

62. See Michael J. Songer & Isaac Unah, *The Effect of Race, Gender, and Location on Prosecutorial Decisions To Seek the Death Penalty in South Carolina*, 58 S.C. L. REV. 161, 205–06 (2006) (discussing how the consideration of legally irrelevant factors such as victim and defendant characteristics and geographic location has led to the arbitrary imposition of the death penalty in South Carolina); Sorensen & Marquart, *supra* note 58, at 750–51 (“If prosecutors’ . . . decisions were not made on the basis of legally relevant factors, it may be concluded that the death penalty was imposed arbitrarily.”); Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 338 (1995) (“Any system for selecting offenders to die for their crimes that is so strongly influenced by a legally irrelevant consideration . . . is operating arbitrarily.”).

remainder of this Part explores some of the extralegal factors that pose the greatest risk of arbitrariness in the decisionmaking process, including political and public influences, financial considerations, characteristics of the victim, and the quality of defense counsel in the case.

#### A. *Political and Public Influences*

The political or public pressure that prosecutors may face from their superiors, law enforcement, and the public is perhaps one of the most disturbing extralegal factors that often plays into death penalty decisions.<sup>63</sup> As mentioned earlier, some argue that the prosecutor's elected status is one of the best controls on their discretion.<sup>64</sup> One commentator noted, "As an elected official, the prosecutor in exercising discretion is perhaps best controlled by the forces of public opinion. Where an aroused public insists on the enforcement of a particular statute, a thorough prosecution is likely."<sup>65</sup> The National District Attorney's Association's National Prosecution Standards also support the local election of the prosecutor, stating: "The key to election at the local level is public accountability and the need for autonomy within the local jurisdiction . . . . This system also works well to control the individual prosecutors in the exercise of sound discretion which is vital to the successful management of crime control."<sup>66</sup>

Despite the goal of checking discretion through political accountability, when local communities within a given state vary widely in their views of the purpose and goals of law enforcement, such public control over prosecutorial decisionmaking may itself

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63. See Bowers, *supra* note 23, at 1069 ("Prosecutors, who are typically elected, must be sensitive to community sentiments and reactions to crime, which they will encounter in the media, among associates; and from the police, families of victims, and prominent community spokesmen . . . . To maintain community support and to win reelection, prosecutors are likely to seek the death penalty when the community wants it, apart from strictly legal considerations.").

64. See *supra* notes 43-45 and accompanying text; see also John A. Horowitz, *Prosecutorial Discretion and the Death Penalty: Creating a Committee to Decide Whether To Seek the Death Penalty*, 65 FORDHAM L. REV. 2571, 2575 (1997) ("Local prosecutors must stay in close contact with the people they represent, and prosecute only those crimes and those criminals which most concern people. The electoral process, therefore, ensures that a community's standards will be reflected in the criminal justice system." (footnotes omitted)).

65. Note, *Prosecutor's Discretion*, 103 U. PA. L. REV. 1057, 1075 (1955).

66. NAT'L DIST. ATTORNEYS ASS'N, NATIONAL PROSECUTION STANDARDS 13-14 (1991) (standard 3.1 and commentary).

result in arbitrary application of the legislature's intent.<sup>67</sup> For example, if the majority of the voters in one county within a death penalty state are staunchly against the death penalty, while voters in another are strong supporters, such diversity of thought can create a "struggle between the interests of a local community and those of the state-at-large" which is "a fundamental problem in the administration of the death penalty."<sup>68</sup>

While constituents of a local community may sometimes serve as an adequate check on potential underenforcement of certain laws by a prosecutor, the public's hunger for the death penalty, or lack thereof, constitutes an extralegal factor that has nothing to do with the circumstances of a particular offense or the offender. Therefore, this factor should have nothing to do with a prosecutor's decision to seek the death penalty. When crimes are particularly noteworthy, public pressure for more severe punishment often increases,<sup>69</sup> and "[s]ince visibility focuses greater scrutiny on the prosecutor, only a prosecutor whose political position is unusually secure can disappoint expectations that are part of the climate in which he works."<sup>70</sup> But because "what is seen as outrageous varies with time and place,"<sup>71</sup> a prosecutor's response to this pressure may result in arbitrary treatment of defendants from community to community. Justice

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67. See Pizzi, *supra* note 25, at 1343–44 ("Partly because of differences in resources, and partly because of differences in enforcement philosophies and priorities, it will often be the case that two prosecutorial offices in the same state will treat the possession of a small amount of cocaine, a first time property offense, or drunk driving differently. This means that the same criminal laws may be enforced differently within a single state. In short, a certain disuniformity in the enforcement of the same criminal laws is built into the political structure in which American prosecutors operate.").

68. See Horowitz, *supra* note 64, at 2579–80. One could argue that the prosecutor's accountability to his constituency is no different than a state legislature's response to its constituency in adopting the death penalty and shaping the standards under which it will be imposed. These situations may seem facially similar, but a closer examination shows one very significant difference between these responses that is key to this discussion. A legislative body usually considers the opinions of a wide variety of interested parties and engages in significant debate before coming to the most appropriate conclusion regarding a proposed law. Additionally, legislative history provides further accountability by giving an account of how the legislature came to its decision. In contrast, a prosecutor need not consult anyone at all when deciding to seek the death penalty, nor is he required to publish or make any record of the reasoning behind his decision. While some prosecutors do consult with others, such consultation is not constitutionally required. Arguably, the differing standards for the death penalty across states could themselves result in arbitrary application of the death penalty, but that discussion is beyond the scope of this Comment.

69. See Bowers, *supra* note 23, at 1075. One state judge in the Florida study explicitly stated that a "high publicity case is more likely to be filed first degree murder," the first step en route to a death penalty charge. *Id.*

70. Vorenberg, *supra* note 25, at 1526–27.

71. *Id.* at 1527.



William Brennan, a consistent opponent of the death penalty, pointed out this notable flaw in the death penalty decisionmaking process:

Passions, as we all know, can run to the extreme when the State tries one accused of a barbaric act against society, or one accused of a crime that—for whatever reason—inflames the community. Pressures on the government to “do something,” can overwhelm even those of good conscience . . . . When prosecutors and judges are elected, or when they harbor political ambitions, such pressures are particularly dangerous.<sup>72</sup>

Justice Brennan’s suggestion that politically ambitious prosecutors might use the death penalty as a campaign tool raises even greater cause for concern when considering the public influence on the prosecutor’s decision. As one commentator noted: “[The death penalty’s] political value is the unstated dark side to prosecutors’ argument that they use the death penalty because their public demands it. One thing the most fervent district attorneys share is political ambition.”<sup>73</sup> A former prosecutor observed, darkly, that “the district attorney announcing a capital charge before news cameras, pressing the case in . . . courts where still and TV cameras are allowed, and then vehemently pressing after conviction for capital punishment before the jury and the cameras, can emerge as a folk hero,” and that such a possibility might lead an overly ambitious prosecutor to overcharge a case, or seek the death penalty where unwarranted.<sup>74</sup> The grim possibility that a prosecutor may overcharge, or more adamantly pursue the death penalty in response

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72. *Wainwright v. Witt*, 469 U.S. 412, 459 (1985) (Brennan, J., dissenting). Justice Brennan argued that death-qualification of a capital trial jury (the main issue in *Witt*) would allow such “overzealous” prosecutors to assemble juries who were “predisposed to convict and certainly predisposed to impose the ultimate sanction.” *Id.* at 459–60.

73. See Tina Rosenberg, *The Deadliest D.A.*, N.Y. TIMES, July 16, 1995, § 6 (Magazine) at 20, reprinted in THE DEATH PENALTY IN AMERICA, *supra* note 21, at 319, 328.

74. McCann, *supra* note 27, at 669 (footnotes omitted). Note that these prosecutors are often only following the lead of elected officials in higher offices in their states who have run on death penalty platforms. See Glenn L. Pierce & Michael L. Radelet, *The Role and Consequences of the Death Penalty in American Politics*, 18 N.Y.U. REV. L. & SOC. CHANGE 711, 720–26 (1990–91) (describing how politicians use the death penalty to garner votes). Even candidates for the office of President of the United States have centered campaigns on the death penalty. *Id.* at 711 (describing how George H.W. Bush “made the death penalty a central issue in the 1988 presidential race”); see also Alexander Nguyen, *Bill Clinton’s Death Penalty Waffle—and Why It’s Good News for Execution’s Foes*, AM. PROSPECT, July 14, 2000, <http://www.prospect.org/web/page.ww?section=root&name=ViewWeb&articleId=150> (discussing the transformation of former President Bill Clinton from a death penalty opponent to a supporter and back again, morphing as necessary to correspond with his important political moments).

to public expectations, seriously impairs any chance that the death penalty might be administered fairly and consistently across every jurisdiction in the country.

In addition to responding to public pressure, prosecutors must also respond to competing political considerations when dealing with their superiors and the law enforcement officers in their jurisdictions. One of the Florida state judges in the aforementioned study suggested that police pressure can often play a major role in the decision to file a first-degree murder charge: “[T]he police will convince themselves they’ve got a better case than they do, and the [prosecutor] assigned to charge the case may not be strong enough to stand up to a particular police investigator.”<sup>75</sup> Similarly, a former prosecutor noted the inherent danger when “a young and inexperienced prosecutor, such as are not infrequently elected in rural counties, may be induced by well-intentioned but ill-advising senior law enforcement officials to press a capital punishment charge on inadequate evidence.”<sup>76</sup>

Furthermore, a prosecutor often faces competing political pressure between her own constituency, which elected her, and her superiors, including the state attorney general, the governor, or others. In one particularly noteworthy case, New York Governor George Pataki superseded Bronx District Attorney Robert Johnson in the prosecution of Angel Diaz for the murder of a police officer.<sup>77</sup> Pataki, believing that Johnson was philosophically opposed to the death penalty and would not seek it in any case, appointed the state’s attorney general to try the case instead.<sup>78</sup> Pataki’s gubernatorial campaign had included a promise to reinstate the death penalty in New York,<sup>79</sup> and he made good on that promise when New York’s new death penalty statute was enacted on March 7, 1995.<sup>80</sup> On that day, Johnson publicly expressed his concerns about the effectiveness of the death penalty as a punishment and announced his “‘present intention not to utilize the death penalty provisions of the statute,’ ”<sup>81</sup> but never stated categorically that he would not seek the death penalty, nor was he given a chance to come to a decision about the

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75. Bowers, *supra* note 23, at 1075.

76. McCann, *supra* note 27, at 670.

77. See Rachel L. Swarns, *Governor Removes Bronx Prosecutor from Murder Case*, N.Y. TIMES, Mar. 22, 1996, at A1.

78. *Id.*

79. Rachel L. Swarns, *Prosecutor Resists Pataki Pressure on Death Penalty*, N.Y. TIMES, Mar. 21, 1996, at B1.

80. *Id.*

81. See Swarns, *supra* note 77.

death penalty in the Diaz case.<sup>82</sup> Johnson was reelected in the Bronx by a significant margin only eight months after his public statement about his intentions regarding New York's new death penalty statute,<sup>83</sup> and while he tried to resist pressure from the governor in order to carry out those intentions, he ultimately failed.<sup>84</sup> Indeed, Johnson himself said that Pataki's supersedure was "tantamount to the disenfranchisement of the voters of the Bronx."<sup>85</sup>

Similarly, Kamala Harris, a newly elected district attorney in San Francisco, faced a firestorm of controversy and the threat of supersedure when she announced her decision not to seek the death penalty against David Hill, who was charged with the murder of a police officer.<sup>86</sup> Harris faced pressure from all sides about the case.<sup>87</sup> The Police Officers Association, both United States Senators from California (notably, Democrats Barbara Boxer and Dianne Feinstein), forty members of the state legislature, and the state attorney general all called for Harris to change her decision.<sup>88</sup> On the other side, the San Francisco Board of Supervisors passed a resolution supporting the decision by a large majority,<sup>89</sup> and a public

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82. *Id.* The New York statute gave the prosecutor 120 days from arraignment to file notice of intent to seek the death penalty, but Pataki said, "It doesn't matter if he had 120 days or 120 years. Unless [he's] willing to look at this objectively, [he] will not apply the fair standard." *Id.*

83. Horowitz, *supra* note 64, at 2582.

84. While some commentators suggested that Pataki's action might not be constitutionally permissible, *see Swarns, supra* note 77, the New York Court of Appeals (that state's highest court) ultimately held that the supersedure was within the governor's constitutional authority. *Johnson v. Pataki*, 691 N.E.2d 1002, 1003 (N.Y. 1997). The defendant committed suicide in his cell before he was ever tried, while Pataki and Johnson continued to fight their constitutional battle over the supersedure in court. *Id.* at 1004. The New York Court of Appeals has since ruled that the state's death penalty is unconstitutional because of its so-called "deadlock instruction," *see N.Y. CRIM. PROC. LAW* § 400.27(10) (McKinney 2005), to the jury. *See People v. LaValle*, 817 N.E.2d 341, 359 (N.Y. 2004). Under the deadlock instruction, the jury must agree unanimously on either death or life in prison without parole, and if they fail to agree, the defendant receives life imprisonment with parole eligibility in as few as twenty years. *Id.* at 356. The court found that because the option in case of deadlock was a more lenient choice than either of the two before the jury, a juror arguing for life might be coerced into agreeing upon death because she fears the defendant will be back on the streets in twenty years. *Id.* at 358.

85. Horowitz, *supra* note 64, at 2582.

86. *See Harriet Chiang, Lockyer Sides with Harris*, S.F. CHRON., June 9, 2004, at B3; *Charlie Goodyear, Hundreds March To Demand Death for Officer's Killer*, S.F. CHRON., May 11, 2004, at B4. California's death penalty statute qualifies the murder of a police officer as an aggravating circumstance. CAL. PENAL CODE § 190.2(a)(7) (West 1999).

87. *Suzanne Herel, Supes Officially Back DA In Cop-Killer Case*, S.F. CHRON., May 26, 2004, at B4.

88. *Id.*

89. *Id.*

poll of San Francisco residents revealed that seventy percent supported the decision as well.<sup>90</sup> After suggesting originally that he might supersede Harris's decision and take over the case,<sup>91</sup> California Attorney General Bill Lockyer later announced that after reviewing the case, he determined that Harris had made the right decision based on the facts.<sup>92</sup> Both of these cases reveal the enormous, and often competing, public and political pressures brought to bear on district attorneys and the disparate (and arbitrary) effects that may result—Harris's decision reflected the first time since 1978 that a California prosecutor failed to seek the death penalty in the murder of a police officer.<sup>93</sup>

While some might argue that the constitutional limits on discriminatory or vindictive prosecution will act as a constraint on a politically ambitious prosecutor seeking the death penalty where unwarranted, a defendant faces a long uphill battle when trying to prove that the prosecutor acted upon political motivations.<sup>94</sup> Thus, little can operate as a check on a prosecutor's potential political use of the death penalty.<sup>95</sup>

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90. See Phillip Matier & Andrew Ross, *D.A.'s Death Penalty No-Go Gets a Thumbs-Up in S.F. Poll*, S.F. CHRON., May 19, 2004, at B1. Harris had also been very up front during her campaign about her position opposing the death penalty. See Harriet Chiang, *D.A. Defends Decision Not To Seek Execution*, S.F. CHRON., Apr. 25, 2004, at B1.

91. See Paul Feist & Jaxon Van Derbeken, *Lockyer Hints He'll Grab S.F. Cop-Killing Case*, S.F. CHRON., May 8, 2004, at A1.

92. See Chiang, *supra* note 86.

93. Jaxon Van Derbeken, *S.F. Police Push Hard for Death Penalty*, S.F. CHRON., Apr. 21, 2004, at A1.

94. McCann, *supra* note 27, at 668; see also *supra* notes 25–42 and accompanying text (describing the United States Supreme Court's posture of deference toward prosecutorial decisions in general and in the death penalty arena in particular).

95. The American Bar Association standards twice address the issue of political influence over prosecutorial charging decisions. Most relevant to this discussion, the standards state, "In making the decision to prosecute, the prosecutor should give no weight to the personal or political advantages or disadvantages which might be involved or to a desire to enhance his or her record of convictions." ABA COMM. ON CRIMINAL JUSTICE STANDARDS, STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION 71 (3d ed. 1993) (standard 3-3.9 (d)). On a more general plane, the ABA standards say, "A prosecutor should not permit his or her professional judgment or obligations to be affected by his or her own political, financial, business, property, or personal interests." *Id.* at 7 (standard 3-1.3(f)). However, no clear evidence exists that these ethical guidelines do much to limit the discretion of the prosecutor. Professor Kenneth Melilli argues that professional responsibility courses in law schools focus more on private practitioners, whose role is that of zealous advocate, and less on prosecutors, whose role is to seek justice. See Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669, 686. This results in prosecutors being "little-prepared for the responsibility of exercising charging discretion." *Id.* Nor does Melilli believe that much, if any, on-the-job ethical training exists. *Id.* Furthermore, "[h]oles will exist even in the tightest net of legal and ethical rules—holes that must be filled by the

### B. *Financial and Budgetary Considerations*

Death penalty prosecutions are extremely costly, in terms of money, human capital, and opportunity costs—under which a county may have to forego prosecution of lesser offenses in order to pursue a capital case. When a local prosecutor bases her decision to seek the death penalty, even in part, on whether the county can afford it, there is no question that arbitrary application of the punishment will result.<sup>96</sup> Wealthy counties will pursue the death penalty proportionally more often than poor counties.<sup>97</sup>

The costs involved in a capital case far exceed those of trying other crimes. Contrary to popular wisdom, the bulk of costs in a capital case arise at the trial level rather than during the lengthy appeals process, which means that the local jurisdiction (in most cases), not the state, bears the brunt of the expense.<sup>98</sup> In addition to the costs of the average criminal trial, the capital trial requires two separate proceedings to determine guilt and sentencing, which in turn means more investigation, more expert testimony regarding aggravating and mitigating circumstances, a significantly longer trial, and, accordingly, longer detention for the inmate in the county jail.<sup>99</sup> Jury selection tends to be much more extensive,<sup>100</sup> adding both financial and opportunity costs due to court time and attorney time that must be diverted from other cases.<sup>101</sup> Some states now require that indigent capital defendants be appointed two defense attorneys instead of one,<sup>102</sup> and counties may assign additional prosecutors to

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attorney's own judgment." Carolyn B. Ramsey, *The Discretionary Power of "Public" Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1318 (2002); see also Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 134–37 (2004) (discussing how the intense pressure on prosecutors to get convictions may interfere with prosecutors' desires to follow their professional and ethical obligations).

96. See Ashley Rupp, Note, *Death Penalty Prosecutorial Charging Decisions and County Budgetary Restrictions: Is the Death Penalty Arbitrarily Applied Based on County Funding?*, 71 FORDHAM L. REV. 2735, 2768 (2003).

97. *Id.* at 2769 ("The lack of money and the lasting economic impact of a death penalty trial on the community can create a real disincentive to pursue a death penalty conviction while a surplus can make counties more likely to pursue the death penalty.").

98. See Richard C. Dieter, *Millions Misspent: What Politicians Don't Say About the High Cost of the Death Penalty*, in THE DEATH PENALTY IN AMERICA, *supra* note 21, at 401, 405–06.

99. See McCann, *supra* note 27, at 699; Rupp, *supra* note 96, at 2754.

100. See Dieter, *supra* note 98, at 406; Pierce & Radelet, *supra* note 74, at 719.

101. See Rupp, *supra* note 96, at 2754.

102. Dieter, *supra* note 98, at 406.

capital cases as well, increasing costs even more.<sup>103</sup> Furthermore, if an appellate court reverses a death sentence for error and remands it to the trial court for resentencing, the county will bear that cost.<sup>104</sup>

These costs add up to a significant strain on county and state budgets. One study in California showed that that state spent \$90 million annually on capital cases above and beyond the cost of an average murder trials, \$78 million of which was spent at the trial (and thus the local) level.<sup>105</sup> Another study from Los Angeles showed that capital cases there cost three times as much as noncapital cases.<sup>106</sup> In Queens County, New York, capital trials create 300% to 500% more work than noncapital trials.<sup>107</sup> In one capital appeal in Brooklyn, the county had to enlist the help of eight other county prosecutors' offices.<sup>108</sup> The impact of these costs on a local county's budget can be devastating.<sup>109</sup> In some cases, these costs may force a county to make tradeoffs in other areas, like law enforcement and social benefits.<sup>110</sup> Prosecutors cannot simply ignore these realities. When faced with limited resources, prosecutors must decide which cases, among all the death-eligible crimes that occur in their jurisdictions, to pursue as capital.<sup>111</sup>

The obvious result of this reality is that financial considerations can and do come into play when a prosecutor is deciding whether to seek the death penalty. Particularly in smaller, more rural counties, prosecutors may wisely choose not to commit their county's resources to a capital trial.<sup>112</sup> On the other hand, of 944 executions in the

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103. See Rupp, *supra* note 96, at 2754 ("The hidden costs of death penalty trials are the opportunity costs to prosecutors' offices. If four prosecutors are needed in a capital case compared to only two in a non-capital murder case, prosecutorial resources are depleted." (footnote omitted)).

104. See Pierce & Radelet, *supra* note 74, at 719.

105. See Rupp, *supra* note 96, at 2755.

106. *Id.*

107. *Id.* at 2757.

108. *Id.*

109. See Dieter, *supra* note 98, at 401; Rupp, *supra* note 96, at 2759.

110. Rupp, *supra* note 96, at 2760–61 (noting that the exorbitant cost of capital trials may force counties to choose between these prosecutions and more basic needs like additional law enforcement officers, public nursing positions, and public employee raises).

111. See Horowitz, *supra* note 64, at 2578. Horowitz discusses how the discretion of the prosecutor in general has broadened as the criminal codes within states have burgeoned, and notes that this phenomenon forces the prosecutor to make difficult decisions: "With more conduct being considered criminal and a limited resource pool, prosecutors cannot enforce every criminal statute." *Id.* Given the extraordinary resources capital cases require, it would follow that the problem of limited resources will also limit the prosecutor's ability to pursue the death penalty in every death-eligible case.

112. See Dieter, *supra* note 98, at 405 ("While many politicians continue to ignore these costs in using the death penalty to sound tough, some prosecutors are now deciding not to

United States between 1977 and 2005, almost one-tenth originated in Harris County (Houston), Texas, one local jurisdiction.<sup>113</sup> The county's ability to prosecute so many homicides as capital cases is due in large part to the significant resources provided to the district attorney's office by the county commission.<sup>114</sup>

The cost of a capital trial is totally irrelevant to the circumstances of the crime or the strength of the case against the defendant, and is therefore an extralegal factor in the prosecutor's decision. It poses a great danger that a defendant's risk of facing the death penalty increases or decreases with the size of the local budget. Such a danger is intolerable under the Eighth Amendment.<sup>115</sup>

Both the political and financial pressure brought to bear on local prosecutors in a homicide case can result in widely variant decisionmaking from jurisdiction to jurisdiction, as evidenced in the Harris County example above. One Maryland study found that a defendant's chances of facing a notice to seek the death penalty depend in large part upon the county in which he is charged.<sup>116</sup>

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seek executions because the cases are simply too expensive."); Hancock et al., *supra* note 59, at 1563; Nicci Lovre-Laughlin, *Lethal Decisions: Examining the Role of Prosecutorial Discretion in Capital Cases in South Dakota and the Federal Justice System*, 50 S.D. L. REV. 555, 572 (2005).

113. See TEX. DEFENDER SERV., MINIMIZING RISK: A BLUEPRINT FOR DEATH PENALTY REFORM IN TEXAS 38 (2005). Harris County's murder rates are relatively similar to that of other urban Texas counties, including Dallas County and Bexar County (San Antonio), yet Harris County sends almost twice as many murder defendants to death row than the other two counties combined. *Id.* at 39. The county's relentless pursuit of the death penalty in almost every eligible case prompted death penalty abolitionists to lobby the International Olympic Committee to reject Houston's bid for the 2012 Summer Games. See Mike Tolson, *A Deadly Distinction*, HOUSTON CHRON., Feb. 4, 2001, at A1.

114. Tolson, *supra* note 113; see also Mike Tolson, *A Deadly Distinction: County Has Budget To Prosecute with a Vengeance*, HOUSTON CHRON., Feb. 5, 2001, at A28 (comparing the \$292,000 prosecutorial budget of a small Texas county with the \$30 million budget in the Harris County D.A.'s office and discussing the impact of this difference on the two counties' abilities to pursue capital convictions). Tolson's four-part series uses the Harris County case study to offer a comprehensive and compelling look at all sides of the death penalty issue, including arbitrariness, prosecutorial discretion, indigent defense, innocence, and more. One factor that may have played a role in the success of Harris County prosecutors in obtaining death sentences is that, until 2005, Texas was one of only two death penalty states (the other is New Mexico) that did not offer jurors the option of life without parole. See Jim Vertuno, *Perry Signs Life Without Parole Bill*, HOUSTON CHRON., June 17, 2005, at B1. But this does not explain the disparity between Harris County and every other county in Texas.

115. See Rupp, *supra* note 96, at 2770-73. Rupp argues that because budgetary considerations are not a legal factor upon which meaningful distinctions can be drawn among death-eligible cases, Eighth Amendment arbitrariness analysis should be applied at the pretrial stage to the prosecutor's charging decision. *Id.* at 2775-77.

116. RAYMOND PATERNOSTER & ROBERT BRAME, AN EMPIRICAL ANALYSIS OF MARYLAND'S DEATH SENTENCING SYSTEM WITH RESPECT TO THE INFLUENCE OF

Studies across the nation reveal significant differences in death penalty charging decisions between urban and rural areas, and even more significantly, the studies vary in whether prosecutors in urban areas or rural areas are more likely to seek the death penalty than their counterparts.<sup>117</sup> In some counties, the prosecutor seeks the death penalty as often as she is allowed,<sup>118</sup> while in others, the prosecutor rarely, if ever, seeks the death penalty.<sup>119</sup> These differences, if based even in minute part on extralegal factors like cost, constitute a violation of the Eighth Amendment, and therefore should not be tolerated.

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RACE AND LEGAL JURISDICTION 23–25 (2003), available at <http://www.newsdesk.umd.edu/pdf/exec.pdf> (Executive Summary). For example, these researchers found that, controlling for variables in the crimes themselves, a prosecutor in Baltimore County was thirteen times more likely to file notice to seek the death penalty than in Baltimore City. *Id.* at 25.

117. For example, a South Carolina study showed that the “prosecutor’s decision to request a death sentence is significantly more likely in rural than urban areas . . . . [T]his is true even though a slightly greater proportion of homicides are capital murders in urban . . . than in rural areas . . . .” See Paternoster, *supra* note 13, at 780. Similarly, in Nebraska, prosecutors in the major urban counties were more than twice as likely to pursue a capital charge all the way through to sentencing than elsewhere in the state. See David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973–1999)*, 81 NEB. L. REV. 486, 626 fig.30 (2002). But a study of Virginia’s death penalty showed that prosecutors were more likely to seek the death penalty in “low-density, typically rural localities” (85% of death-eligible cases) and “medium-density, mostly suburban jurisdictions” (85%) than in “high-density, mostly urban areas” (16%). See JOINT LEGISLATIVE AUDIT AND REVIEW COMM’N OF THE VA. GEN. ASSEMBLY, REVIEW OF VIRGINIA’S SYSTEM OF CAPITAL PUNISHMENT 46–47 (2001) [hereinafter JLARC REPORT], available at <http://jlarc.state.va.us/Meetings/December01/capital.pdf>.

118. For example, Johnny Holmes, the district attorney for Harris County, Texas, from 1981 to 2000, sought the death penalty in every death-eligible case. See TEX. DEFENDER SERV., *supra* note 113, at 38. Holmes told the *Houston Chronicle*, “If there are rules, they ought to be enforced . . . . If the death penalty substantively fits a given crime and I have enough stuff so that a jury will give it, tell me why I shouldn’t prosecute it. It promotes disrespect for the law if you don’t enforce it.” Tolson, *supra* note 113. Similarly, in 1995, “Philadelphia County’s death-row population of 105 [was] the third largest of any county’s in the nation, close behind Houston’s Harris County and Los Angeles County—counties far more populous and murderous than Philadelphia” because the Philadelphia District Attorney seeks the death penalty “virtually as often as the law will allow.” Rosenberg, *supra* note 73, at 320.

119. See *supra* notes 77–85 and accompanying text (discussing the reluctance of Bronx D.A. Robert Johnson to seek the death penalty in any case and the resulting intervention by Governor George Pataki); Rosenberg, *supra* note 73, at 322 (“Pittsburgh’s District Attorney . . . is as sparing in the application of the death penalty as Philadelphia’s is ardent.”).



### C. *Identity of the Victim*

Few death penalty proponents would openly argue that the lives of some victims count more than others. However, when examining prosecutors' decisions, this indeed seems to be the case. The identity of the victim can play a significant role in whether a prosecutor decides to pursue the death penalty in a particular case. This is particularly true if the victim is not a sympathetic character.<sup>120</sup> For example, a jury may be less able to identify and empathize with victims who are alcoholics or drug addicts, or who fail to conform to social norms.<sup>121</sup> Conversely, when the victim is particularly sympathetic, a prosecutor may be more likely to seek the death penalty, even though the crime itself may be identical to one perpetrated on a less sympathetic victim. Prosecutors surveyed by one study of Virginia's capital punishment system said that "defendants who are charged with a capital-eligible murder involving victims with whom juries are likely to sympathize will usually be indicted for capital murder."<sup>122</sup> The authors of that study went on to conclude that this reasoning by the prosecutors may explain Virginia prosecutors' decisions to charge the death penalty more frequently in female-victim cases (when the victim is a female, the state seeks the death penalty in 91% percent of death-eligible cases) than in male-victim cases (when the victim is male, the State seeks the death

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120. Vorenberg, *supra* note 25, at 1527 ("[I]f the victim excites little sympathy, prosecutors occasionally may choose a charge below the maximum . . .").

121. See Scott E. Sundby, *The Capital Jury and Empathy: The Problem of Worthy and Unworthy Victims*, 88 CORNELL L. REV. 343, 354 (2003). Sundby describes the results of the Capital Jury Project, a study used to determine what factors influence juries' decisions between life and death in capital cases. *Id.* at 343–44. The study found that capital jurors, when asked in the abstract, tended to feel that a victim's characteristics would not influence their decisions between life and death. *Id.* at 346–48. Yet when the study inquired about actual deliberations in the jury room, jurors revealed that the characteristics of the victim indeed played a significant role in their decisions. *Id.* at 350–51. The study ultimately found that jurors tended to impose death more often in the "randomly chosen victim" cases "because jurors are most likely to empathize with a victim who is engaged in everyday activities." *Id.* at 375. On the other hand, jurors were less likely to identify or sympathize with a victim who was "engaged in high-risk or antisocial behavior leading up to the crime" and were therefore less likely to impose the death penalty. *Id.* For example, jurors made statements like "She was a hippie sort of person, a bit of a gypsy. I've known people like that. I didn't approve of her actions, because she put herself in danger. She was very unwise." *Id.* at 365. Other jurors, when discussing a victim who was a promiscuous gay male, said the victim "disgusted" them, or "the lifestyle—is somewhat disturbing, I guess." *Id.* While these statements reflect the views of the jury, and not of the prosecutor, prosecutors are certainly aware of these attitudes and doubtless take them into consideration when determining the likelihood of obtaining a death sentence.

122. See JLARC REPORT, *supra* note 117, at 52.

penalty only 63% of the time).<sup>123</sup> A victim might also be more sympathetic if he or she comes from a wealthy or prominent family.<sup>124</sup>

Unfortunately, statistically speaking, the victim's race seems to be a factor in the prosecutor's decision as well.<sup>125</sup> The United States General Accounting Office conducted a review of twenty-eight other studies of the death penalty, and found that in eighty-two percent of the studies, the race of the victim was found to influence both the decision to charge a case capitally, and the actual death sentences meted out.<sup>126</sup> While these results include both the charging decision and actual death sentences, the review found the race of the victim to be more influential at the early stages of the process where a prosecutor decides whether to pursue the death penalty and whether to take the case to trial.<sup>127</sup> A recent study out of Maryland came to a similar conclusion: controlling for other variables, prosecutors were significantly more likely to treat a case capitally in the early stages of a murder case when the victim was white than when the victim was black.<sup>128</sup> The Maryland study found that black defendants who kill white victims were more likely than any other racial combination of

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123. *Id.*

124. Stephen B. Bright, *Capital Cases: Challenging Racial Discrimination in Capital Cases*, CHAMPION, Jan.–Feb. 1997, at 19, 20. Bright says that among other things,

the need to avenge the murder because of the prominence of the victim in the community [and] the social and political clout of the family in the community . . . are usually far more important to the district attorney in deciding whether to seek death than the criteria set out in the state's death penalty statute.

*Id.* A study of Nebraska's death penalty found that a prosecutor's decision to seek the death penalty was based, in part, on the victim's socioeconomic status. See Baldus et al., *supra* note 117, at 613 fig.25 (showing that the prosecutor was more likely to seek the death penalty for victims with high socioeconomic status than other victims). Baldus further notes that some of the discrepancy based on socioeconomic status may be due in part to evidence that prosecutors may tend to be more deferential to families of wealthier victims. *Id.* at 619. Baldus quotes the opinion of one Nebraska attorney who said, "A lower [socioeconomic status] victim's family might get a single shot on the 10 o'clock news, but that would be it. The VP of an advertising firm will have rallies, posters, letters to the editor, etc." *Id.* at 619 n.279.

125. See Paternoster, *supra* note 13, at 761 (describing the results of studies in several different states that show that the victim's race, or the combination of the defendant's race and the victim's race, have an impact on the decision to indict for capital murder); Sorensen & Marquart, *supra* note 58, at 751–52 (describing the same findings).

126. U.S. GEN. ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES A PATTERN OF RACIAL DISPARITIES 5 (1990).

127. *Id.* The review of the studies found the race of the victim to be an influential factor even after controlling for legally relevant factors such as aggravating circumstances, *id.* at 6, and regardless of the quality of the study or methodology used by the researchers, *id.* at 5.

128. See PATERNOSTER & BRAME, *supra* note 116, at 29.

offenders and victims to be charged with a capital crime if the offense was death-eligible.<sup>129</sup> One study in South Carolina found that “the victim’s race is the most important predictor of the prosecutor’s decision” to seek the death penalty and that the murder of a white victim was most likely to provoke a death penalty request by the prosecutor.<sup>130</sup> While this consideration may not be a conscious one, it seems to be a real one. As one commentator noted: “Murderers of white victims are seen as more deserving of capital punishment than murderers of black victims,” and therefore the prosecutor may feel more likely to convict and get a death sentence for the killer of a white victim.<sup>131</sup>

Characteristics of the victim of a homicide represent extralegal factors that should have no weight in the decision whether or not to seek the death penalty, unless the state’s death penalty statute specifies the identity of the victim as an aggravating factor, e.g., that the victim is a member of some class to which the legislature wants to afford special protection.<sup>132</sup> But the characteristics of the victim discussed above, including race, class, gender, and background, involve none of these types of statutorily imposed aggravating factors. As such, these characteristics should be irrelevant to a death penalty

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129. *Id.* at 29–30.

130. Paternoster, *supra* note 13, at 784.

131. See Sorensen & Marquart, *supra* note 58, at 756. Bryan Stevenson, Director of the Equal Justice Initiative of Alabama, addresses this disparity in the starkest of terms:

We are still living at a time when crimes committed against people of color are devalued, are seen as not so important, whereas crimes committed against people who have status, people who are white, are considered all-important. If you add into that all-important crime the element of race, that is, a minority defendant and a white victim, you have what for many prosecutors is an all-too-tempting opportunity to make a reputation, to make a name, to stake a claim on protecting and responding to the problems of violence that we are all so concerned about.

*Remarks of Bryan Stevenson, Carter Center Symposium on the Death Penalty—July 24, 1997*, 14 GA. ST. U. L. REV. 329, 372 (1998). Note that this disparity is even more prominent in actual death sentences meted out by juries. In his remarks, Professor Stevenson went on to note that in his home state of Alabama, in 1996, less than 5% of murders there involved a black-on-white killing, and that although 67% of murder victims in the state are black, 84% of the death sentences there involved murders of white victims, and 75% of the inmates on death row are black. *Id.*

132. ALA. CODE § 13A-5-40(a)(5) (LexisNexis 2005) (victim was an on-duty police officer); CAL. PENAL CODE § 190.2(a)(9) (West 1999) (victim was an on-duty firefighter); COLO. REV. STAT. 18-1.3-1201(5)(c)(III) (2005) (victim was a judge); DEL. CODE ANN. tit. 11, § 4209(e)(1)(p) (2001) (victim was pregnant); FLA. STAT. ANN. § 921.141(5)(l) (West 2006) (victim was under twelve years of age); 720 ILL. COMP. STAT. ANN. 5/9-1(b)(20) (West 2002) (victim was a teacher on school grounds); TENN. CODE ANN. § 39-13-204(i)(14) (2003) (victim was elderly or disabled).

decision, and their consideration poses yet another danger of arbitrary application of the death penalty.<sup>133</sup>

#### D. *Quality of Defense Counsel*

Another disturbing extralegal factor that prosecutors may consider when deciding whether or not to seek a death sentence is the identity of the defendant's counsel.<sup>134</sup> One study in Florida found that first-degree murder indictments (the first step in a death penalty prosecution) occurred much more frequently for defendants with court-appointed attorneys than those with private counsel.<sup>135</sup> The authors of the study suggest that court-appointed attorneys are "less effective in averting a first degree murder indictment than are other types of attorneys."<sup>136</sup> This statement indicates that it may simply be the defense attorney's incompetence that leads to the charge, rather than any conscious decision by the prosecutor to try to railroad an inept attorney. However, the qualitative data from the study support a conclusion that prosecutors take into account the skill of the opposing attorney when deciding how to charge a murder case.

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133. To push this conclusion even further, the Virginia ACLU notes that "the character of a victim is generally irrelevant and inadmissible in criminal cases, except in cases of self-defense." RACHEL KING, ACLU OF VA., *BROKEN JUSTICE: THE DEATH PENALTY IN VIRGINIA* 15 (2003), available at <http://www.acluva.org/publications/vadeathpenalty2003.pdf>. On the other hand, the United States Supreme Court has held that the introduction of victim-impact evidence at sentencing does not violate a defendant's constitutional rights, see *Payne v. Tennessee*, 501 U.S. 808, 825 (1991), meaning that if the prosecutor uses such evidence, he may be more likely to secure a death sentence from a jury if the testimony makes the victim out to be more sympathetic, or if the jury can otherwise identify with the victim. See *supra* notes 120–22 and accompanying text. However, this factor only helps the prosecutor determine whether he is likely to succeed before a jury; it does nothing to inform him in his process of deciding, based on the legally relevant factors laid out in his state's death penalty statute, whether an appropriate case is actually death-worthy.

134. For a thorough discussion of the harsh consequences of inadequate defense counsel for the indigent on death penalty sentencing in general (as opposed to a specific impact on the prosecutor's decision to charge the death penalty), see generally 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 (1994).

135. See Bowers, *supra* note 23, at 1075. For the purposes of this discussion, the term "court-appointed attorneys" refers to private attorneys chosen from a list by the court to represent an indigent defendant, as opposed to an attorney from a county- or state-funded public defender office. This distinction is a critical one, in that court-appointed private attorneys may have little to no experience with capital trials. See Bright, *supra* note 134, at 1843–44. Public defender offices, on the other hand, deal with criminal matters routinely, and several states have even created offices specifically targeting capital trials for the indigent. See 150 CONG. REC. S11, 613 (daily ed. Nov. 19, 2004) (statement of Sen. Leahy discussing the creation of statewide capital defender offices in North Carolina and New York).

136. Bowers, *supra* note 23, at 1075.

When asked what factors influence the decision to take a case to trial on first degree murder, one judge in the study responded: "Facts of the case plus how well the attorneys . . . work[] together. You pay more attention to a good attorney than one you know is a lightweight . . . ."<sup>137</sup> Similarly, a Georgia study found that prosecutors are more likely to ask for the death penalty when the defendant's counsel is court-appointed, which "suggests that prosecutors make an initial judgment that they are more likely to be successful in getting a death sentence after a guilty verdict when opposing counsel is appointed."<sup>138</sup>

The quality of a defendant's representation is not the only factor involving opposing counsel that prosecutors may consider when making a capital charging decision. The level of resources, funding, and time available to court-appointed attorneys or public defenders to spend on capital cases may also affect their ability to adequately represent capital defendants, and therefore may factor into prosecutors' decisions whether to seek the death penalty. For example, after Indiana passed a law requiring that court-appointed attorneys receive seventy dollars an hour and money for experts, prosecutors sought the death penalty only half as often as they had previously.<sup>139</sup>

As Professor Bowers noted: "The type of attorney is not a legally relevant consideration that should influence the outcome of any case, certainly not that of a capital case."<sup>140</sup> Therefore, the use of such a factor poses a risk of arbitrary imposition of death sentences across jurisdictions.

In conclusion, the fact that extralegal factors play a role in the prosecutor's death penalty decision does not, in and of itself, render the imposition of the death penalty a per se violation of the Eighth Amendment. While the evidence is certainly troublesome, it does not necessarily rise to a risk of constitutional dimensions. However, in order for the consideration of extralegal factors to be constitutionally harmless, the resulting capital charges would have to be consistent from jurisdiction to jurisdiction based on legally relevant factors. In that case, one would expect to see only a small number of death-eligible crimes with very similar types of aggravating factors charged capitally, meaning that even though some extralegal factors may have

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137. *Id.* at 1075-76.

138. James C. Beck & Robert Shumsky, *A Comparison of Retained and Appointed Counsel in Cases of Capital Murder*, 21 *LAW & HUM. BEHAV.* 525, 536 (1997).

139. See Rosenberg, *supra* note 73, at 331. The head of the Indiana Public Defender Council stated that the new law had "swayed prosecutors not to ask for death." *Id.*

140. Bowers, *supra* note 23, at 1078.

come into play, such factors did not create inherent arbitrariness. However, as the examples above demonstrate, there is considerable evidence that shows these factors do in fact create great disparities between the cases where prosecutors seek the death penalty and those where they do not. Such results are so arbitrary that “there is no *meaningful basis* for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not,”<sup>141</sup> rendering the prosecutor’s unfettered discretion impermissible under the Eighth Amendment.

### III. POSSIBLE SOLUTIONS: LEGITIMATE CONTROLS FOR PROSECUTORIAL DISCRETION

As evidenced by the discussion in Parts I and II, prosecutorial discretion has long been, and continues to be, of great concern to the entire field of criminal justice. However, as this Part will discuss, no current or proposed system has yet succeeded in finding a way to strike a balance between the need for discretion in capital cases and the need for restraint of discretion so as to keep a prosecutor’s decisions within a tolerable range under the Eighth Amendment. This Part suggests entitling capital defendants to use the adversarial process to force prosecutors to justify their charging decisions and, therefore, to conform to Eighth Amendment requirements by considering only legally relevant factors when deciding to seek the death penalty.

#### A. *Current and Proposed Solutions Remain Inadequate*

One of the most commonly proposed (and sometimes used) restraints on prosecutorial discretion in the death penalty arena is internal or informal guidelines to steer the prosecutor’s decisions when a death-eligible homicide prosecution arises. The National District Attorneys Association calls upon district attorneys to establish guidelines under which charging decisions may be made.<sup>142</sup> Such guidelines would offer some advantages. They might help achieve greater consistency in death penalty charging decisions across death-eligible cases.<sup>143</sup> In one of a handful of judicial decisions in the

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141. *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring) (emphasis added).

142. See NAT’L DIST. ATTORNEYS ASS’N, *supra* note 66, at 132 (commentary to standards 43.1–43.6). The standard refers to charging decisions in general, but would logically encompass death penalty decisions.

143. See *Abrams*, *supra* note 27, at 57 (“[A]dequately formulated policy can, at the very least, narrow the range of considerations deemed relevant and channel the thinking

country to find that prosecutorial discretion in charging the death penalty might raise a concern about arbitrary application, the New Jersey Supreme Court, while upholding the prosecutor's discretion as constitutional, still suggested that there was a "need to promote uniformity in the administration of the death penalty[.]" and therefore "strongly recommend[ed] that the Attorney General, and the various County Prosecutors, in consultation with the Public Defender, adopt guidelines for use throughout the state by prosecutors in determining the selection of capital cases."<sup>144</sup> Without such guidelines, prosecutors may be left to rely on their memory or on a record devoid of any detail from past prosecutors to examine what has been done before.<sup>145</sup> Furthermore, prosecutorial guidelines, if published, would allow a prosecutor's constituency to hold her accountable for her decisions in any given case.<sup>146</sup>

However, internal policies as restraints on prosecutorial discretion are not very effective in curbing arbitrariness. Guidelines of this type that have been developed in the past to control prosecutorial discretion generally tended to be "so broad as to be of little predictive value."<sup>147</sup> Indeed, after the New Jersey Supreme Court directed the Attorney General's office to develop statewide guidelines,<sup>148</sup> all New Jersey county prosecutors' offices adopted the guidelines,<sup>149</sup> but several critics suggested that the guidelines were too general and vague to be of any use.<sup>150</sup> Also, prosecutors are generally

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of all prosecutors working within the same prosecutorial system toward the same elements.").

144. *State v. Koedatich*, 548 A.2d 939, 955 (N.J. 1988).

145. *See Abrams*, *supra* note 27, at 6 ("[E]ven the single prosecutor may forget what he has done in the past; his ideas, values, and attitudes may change, or he may not recognize discrepancies between two decisions separated in time because he has failed adequately to think through or articulate his grounds for decision." (footnote omitted)).

146. *Id.* at 26; *see also Misner*, *supra* note 25, at 767-70 (discussing prosecutorial discretion generally and arguing that a prosecutor's failure to follow his own guidelines would be a "political issue for the electorate").

147. *Misner*, *supra* note 25, at 744.

148. *See supra* note 144 and accompanying text.

149. *See Joseph R. McCarthy*, Note, *Implications of County Variance in New Jersey Capital Murder Cases: Arbitrary Decisionmaking by County Prosecutors*, 19 N.Y.L. SCH. J. HUM. RTS. 969, 988 (2003).

150. *See id.* The guidelines do little more than suggest that the prosecutor follow the New Jersey statute regarding aggravating circumstances, and that each county establish a committee to help the prosecutor review cases. *Id.* at 988-89. In a subsequent capital case, a defendant challenged the prosecutor's withdrawal of a plea bargain as a violation of the guidelines, but the trial court declined to intervene. *State v. Jackson*, 607 A.2d 974, 975 (N.J. 1992) (Handler, J., dissenting). The New Jersey Supreme Court denied him leave to appeal the decision, but stayed the defendant's trial, ordering the prosecutor to determine de novo, in accordance with the adopted guidelines, whether to seek the death

reluctant to adopt, publish, or follow such guidelines as a matter of course,<sup>151</sup> nor do the public or the courts expect them to given the long tradition of deference to prosecutorial discretion discussed throughout this Comment. Thus, internal guidelines and policies in general fail to serve the purpose of restraining the prosecutor's discretion to any meaningful degree.

Some propose the establishment of centralized reviewing committees, which would evaluate death penalty charging decisions by local prosecutors. For example, in Illinois, the State's Commission on Capital Punishment recommended in 2002 that the State establish a statewide committee that would function to review death penalty charging decisions by local prosecutors.<sup>152</sup> Another author suggests the creation of committees in each prosecutorial jurisdiction to

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penalty, and to put his reasons for the decision on the record. *Id.* at 974 (mem.). Dissenting Judge Handler criticized the majority for simply accepting the guidelines as a valid means to control the prosecutor's discretion, and went on to state that the "substantive standards of the guidelines are vague and unfocused in that they fail to specify the kind of evidence that is genuinely appropriate to determine death eligibility and death worthiness as a constituent part of the prosecutorial charging function." *Id.* at 978. Handler said that "the guidelines leave totally unsupervised the exercise of discretion by prosecutors in determining whether defendants should or should not be tried for capital murder." *Id.* In essence, Handler argued that the guidelines failed to direct in any way how New Jersey prosecutors made capital charging decisions.

151. See Abrams, *supra* note 27, at 25; Misner, *supra* note 25, at 744. Professor Vorenberg attributes this reluctance to the natural human desire for power:

In the end, however, such limits are likely to be no stronger than the determination of the men and women who abide by them to limit their own discretion. Human nature being what it is, people rarely give up power voluntarily, and thus the capacity of self-regulation to remove prosecutorial abuse and arbitrariness from the criminal justice system is limited.

Vorenberg, *supra* note 25, at 1545. Pizzi argues that prosecutors may also fear publishing policies of any kind because "any policy that might be seen as 'soft' on crime can raise a political issue that might put the prosecutor on the defensive," so a prosecutor might favor an informal policy that everyone in his office knows, but to which the public lacks access. Pizzi, *supra* note 25, at 1365.

152. See STATE OF ILLINOIS, REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT 84, Recommendation 30 (2002), available at [http://www.idoc.state.il.us/ccp/ccp/reports/commission\\_report/complete\\_report.pdf](http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/complete_report.pdf). Note that Governor George Ryan ordered this study shortly after declaring a moratorium on the State's death penalty in 2000. *Id.* at *i* (Preamble). The proposed statewide review committee would be composed of the attorney general, a retired judge appointed by governor, and three state's attorneys. *Id.* at 84. The committee would review death penalty charging decisions after hearing evidence from both the prosecution and the defense. *Id.* at 85. The state legislature did implement sweeping death penalty reform legislation in 2003, but declined to create a statewide review panel as suggested by the Commission. See Edwin Colfax, Executive Dir., Ill. Death Penalty Educ. Project, Summary of the November 19, 2003 Veto Override by the Illinois Legislature, <http://www.deathpenaltyinfo.org/article.php?scid=6&did=784> (last visited Feb. 10, 2007).



actually make the decision whether to seek the death penalty (as opposed to just reviewing a decision the prosecutor has already made) in each case where the prosecutor has decided to indict on first degree murder.<sup>153</sup> However, any committee which involves political appointees will be subject to the same political pressures discussed earlier in Part II.A. Furthermore, allowing both sides to present evidence before these committees would almost approximate an entire trial, or at least a sentencing hearing, and would therefore be an inefficient approach when the parties will have to present all the same evidence at a later trial.<sup>154</sup>

Finally, judicial review of prosecutors' charging decisions could be used as a possible restraint on prosecutorial discretion in death penalty cases. The long history in this nation of deference to the discretionary choices of the prosecutor<sup>155</sup> makes this a difficult proposition. The nation's constitutional tradition of separation of powers makes the judiciary very reluctant to exercise any kind of

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153. See Horowitz, *supra* note 64, at 2601. Horowitz's proposed committees would be comprised of seven appointed members, with appointments shared by the governor, the district attorney, and the committee itself, and both the prosecution and defense would get to present the results of their investigations. *Id.* at 2600–01.

154. The federal government has used a centralized review system for capital cases since the late 1980s. See U.S. DEP'T OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: SUPPLEMENTARY DATA, ANALYSIS AND REVISED PROTOCOLS FOR CAPITAL CASE REVIEW (2001), <http://www.usdoj.gov/dag/pubdoc/deathpenaltystudy.htm> [hereinafter FEDERAL DEATH PENALTY SYSTEM] (click on "Part I: Legal Rules and Administrative Procedures"). No United States Attorney may seek the death penalty in any case without the authorization of the United States Attorney General. See *id.* (click on "Part I.B: The Capital Case Review Procedure"). When a federal prosecutor charges a defendant with a capital offense, she must submit a "death penalty evaluation form," regardless of whether she intends to seek the death penalty. *Id.* The prosecutor submits along with the form all materials related to the case, including indictments, a "detailed prosecution memorandum," and materials submitted by the defendant's counsel. *Id.* The case is reviewed by the Capital Case Unit of DOJ's Criminal Division, then by the Attorney General's capital case review committee. *Id.* The latter committee forwards its recommendation to the Attorney General, who makes the "final decision" about whether the federal government will seek the death penalty in a capital case. *Id.* Thus, even though a review process exists in name, the ultimate decision still vests total discretion in the United States Attorney General. Even if the U.S. Attorney in the particular case recommends against the death penalty, the Attorney General "retain[s] legal authority as head of the Justice Department to determine in an exceptional case that the death penalty is an appropriate punishment . . ." *Id.* (click on "Part IV.B: Simplification of Decisions Against Seeking the Death Penalty"). Furthermore, the U.S. Attorney still retains the discretion to "refrain[] from a capital charge and review procedure submission in the first place" or to "reach[] a non-capital plea agreement with the defendant" regardless of the Attorney General's ultimate decision. *Id.* (click on "Part III.B: Subsequent Decisional Stages").

155. See FEDERAL DEATH PENALTY SYSTEM, *supra* note 154 (click on "Part I: Legal Rules and Administrative Procedures").

control over the executive branch's designated role of prosecuting crime.<sup>156</sup> There are also practical difficulties involved in allowing a judge the power to consider de novo whether a prosecutor's charge fits the evidence: if the judge sees a particular piece of evidence that she feels would or should affect the prosecutor's decision, to raise it sua sponte would undermine the adversarial tradition.<sup>157</sup>

But the real difficulty of using judicial review to control prosecutorial discretion is the lack of any kind of standard by which such review might be done.<sup>158</sup> As the United States Supreme Court recognized in *Wayte v. United States*:<sup>159</sup>

In our criminal justice system, the Government retains "broad discretion" as to whom to prosecute . . . . This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake.<sup>160</sup>

However, this Comment argues that the mere absence of currently existing standards for such review does not mean that such standards could not be developed. Such standards, properly developed and used, can assist judges to determine, through an adversarial process, whether a prosecutor's decision in a particular case comports with consideration of legally relevant factors and with the prosecutor's past use of the death penalty to effect the "[g]overnment's enforcement priorities" and "overall enforcement plan."<sup>161</sup> The development of such a system would be difficult, but not impossible.

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156. See Horowitz, *supra* note 64, at 2595; Pizzi, *supra* note 25, at 1353-54 ("To ask that an American judge play a[n] . . . aggressive role with respect to charging decisions raises serious separation of powers problems and runs contrary to the adversary tradition in which judges are assigned a neutral and passive role with respect to charging decisions and the development of evidence at trial.").

157. See Pizzi, *supra* note 25, at 1354. Note that Pizzi's argument here discusses prosecutorial discretion in its broadest sense, encompassing the entire range of crimes over which the prosecutor has discretion to charge. Thus, the difficulties inherent in a judicial review model in such a system far exceed those likely to arise in the process proposed by this Comment. See *infra* Part III.B.

158. Vorenberg, *supra* note 25, at 1539 ("More important than the absence of any opportunity for an early challenge to any abuse of discretion is the lack of any judicially recognized basis for any such challenge.").

159. 470 U.S. 598 (1985).

160. *Id.* at 607.

161. See *infra* Part III.B.

Furthermore, although the Court in *Wayte* went on to say that the use of judicial review would exact serious costs from the efficiency and effectiveness of both law enforcement and the judicial system,<sup>162</sup> such an argument is unavailing in the death penalty arena for two reasons. First, the issue in *Wayte* was selective prosecution of individuals who failed to register for the draft,<sup>163</sup> and that case therefore involved prosecutorial discretion in general to deal with all kinds of criminal statutes and criminal behavior. Judicial review in the system proposed in the next Section would limit a judge's review only to the handful of cases in which a prosecutor chooses to seek the death penalty. As such, the proposed system would only lengthen proceedings in capital cases, therefore limiting the impact on the efficiency of the courts. Such a system could actually result in greater efficiency if decisions made on the front end removed the state from the much longer proceedings involved with a capital trial. Furthermore, the defendant's constitutional rights to be free from arbitrary imposition of the death penalty outweigh the government's interest in efficient and effective law enforcement, especially in light of the United States Supreme Court's consistent position that "death is different."<sup>164</sup> Therefore, the government's decisions in the death penalty arena should be subjected to greater scrutiny at every step of the way.

*B. Safeguards to Both Preserve and Check Prosecutorial Discretion*

Reforming the system of prosecutorial discretion in death penalty decisions certainly poses a great deal of challenges, most prominently the long tradition of deference to prosecutorial discretion.<sup>165</sup> However, the nature of the adversarial process provides

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162. *Wayte*, 470 U.S. at 607-08 ("Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute.").

163. *Id.* at 601-02.

164. *See Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion) ("Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. . . . [T]here is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."). As noted previously, the Court has upheld prosecutorial discretion to seek the death penalty. *See supra* notes 29-38 and accompanying text.

165. *See Misner, supra* note 25, at 763 ("One cannot simply ignore history, tradition and practical politics when suggesting change"); *id.* at 765-66 ("The preeminent role of the prosecutor in the criminal justice system is unlikely to change. The history of the office of

a method by which the judicial system in every jurisdiction can act as an appropriate check on the unfettered discretion of the prosecutor, without endangering that discretion or its inherent value to the judicial system at large. One author has argued that the Supreme Court's arbitrariness analysis should extend beyond the sentencing phase of a death penalty trial and into pretrial stages of the process. However, the author failed to propose a methodology for conducting this analysis, whether it should occur as de novo review at the appellate level or otherwise.<sup>166</sup> This Section argues that defendants should be entitled to use the adversarial process to attempt to prove arbitrariness in a prosecutor's death penalty charging decisions.

In his concurrence in *Gregg v. Georgia*,<sup>167</sup> Justice White noted that the mere existence of prosecutorial discretion in death penalty decisions was not enough by itself to pose a constitutional risk of arbitrariness:

Petitioner simply asserts that since prosecutors have the power not to charge capital felonies they will exercise that power in a standardless fashion. This is untenable. Absent facts to the contrary, it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts.<sup>168</sup>

Justice White went on to suggest that prosecutors would consider only those same factors that guide the jury at sentencing, that is, aggravating and mitigating circumstances proven during the proceedings.<sup>169</sup> Regrettably, as this Comment illustrates, prosecutors often rely on factors totally unrelated to the factors that juries are instructed to consider at the sentencing phase of a capital trial. If "facts to the contrary" are available, defendants should be entitled to bring them before the court.

Similarly, in *McCleskey v. Kemp*,<sup>170</sup> the Court held that statistical evidence which indicated a disparate impact on black defendants in Georgia, in and of itself, was not enough to support a claim of

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prosecutors, the constitutional direction of the United States Supreme Court . . . and the elected nature of the office of prosecutor all point to a continued expansive role for the prosecutor."); Pizzi, *supra* note 25, at 1330.

166. See Rupp, *supra* note 96, at 2775-77.

167. 428 U.S. 153 (1976) (plurality opinion).

168. *Id.* at 225 (White, J., concurring).

169. *Id.*

170. 481 U.S. 279 (1987).

discriminatory application of the death penalty.<sup>171</sup> The Court held that for McCleskey to prevail on an equal protection challenge, he would have to “prove that the decisionmakers in *his* case acted with discriminatory purpose,”<sup>172</sup> and he offered no such evidence.<sup>173</sup> This logically implies that if McCleskey could provide specific facts showing discrimination by his particular prosecutor, he would have prevailed on his equal protection claim. Indeed, the Court noted that “[r]equiring a prosecutor to rebut a study that analyzes the past conduct of scores of prosecutors is quite different from requiring a prosecutor to rebut a contemporaneous challenge to his own acts.”<sup>174</sup> The Court stated that “a prosecutor need not explain his decisions unless the criminal defendant presents a prima facie case of unconstitutional conduct with respect to his case.”<sup>175</sup>

*McCleskey* involved an equal protection claim, but its reasoning applies equally well to an Eighth Amendment challenge based on arbitrariness. A capital defendant should be able to prevail in an Eighth Amendment arbitrariness challenge if he can provide enough facts for a prima facie showing that a particular prosecutor has acted arbitrarily in *his particular case*. Defendants should be entitled to present evidence of this type of arbitrary decisionmaking in a pretrial adversarial proceeding in order to force the prosecutor to justify his decisions on the record, and preserve the claim for review.

The *McCleskey* Court concluded its opinion by noting the essential function of discretion at all stages of the criminal justice system in a murder trial, not just the prosecutor’s charging decision: “Implementation of these laws necessarily requires discretionary judgments. Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused.”<sup>176</sup> Presumably, the Court’s pronouncement on challenges to prosecutorial discretion would apply equally to an Eighth Amendment arbitrariness challenge as to a Fourteenth Amendment equal protection challenge. A logical

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171. *Id.* at 292–93. McCleskey presented as evidence David C. Baldus’s sophisticated statistical analysis of the imposition of the death penalty in Georgia as it related to race. *Id.* at 286. The Baldus study found that prosecutors sought the death penalty more than three times as often when the defendant was black and the victim white than when the defendant was white and the victim black. *Id.* at 287. Regarding death sentences actually imposed, even controlling for other variables, defendants convicted of killing white victims were 4.3 times as likely to get the death penalty as those who killed black victims. *Id.*

172. *Id.* at 292.

173. *Id.* at 293.

174. *Id.* at 296 n.17.

175. *Id.* at 296 n.18.

176. *Id.* at 297.

question, then, would be how the defendant can provide clear proof that a prosecutor has abused his discretion and acted arbitrarily in his case, in violation of the Eighth Amendment.

### 1. Collecting and Publishing Data About All Death-Eligible Crimes

One of the main problems any defendant would face in raising a claim of arbitrariness is that little data currently exists to support such a claim, making it difficult, if not impossible, for a judge to meaningfully consider the claim.<sup>177</sup> While many researchers have conducted aggregate studies of death penalty decisionmaking within an entire state, there exists very little disaggregated research available to a defendant who is trying to prove that his particular prosecutor has acted arbitrarily.<sup>178</sup> Neither Texas nor Virginia, the two states who have executed the greatest number of people since the 1976 reinstatement of the death penalty,<sup>179</sup> keep any such records at all.<sup>180</sup>

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177. See Vorenberg, *supra* note 25, at 1568 (stating that one of the main problems with judicial review of prosecutorial decisionmaking is that judges are often “operating in the dark”).

178. Sorensen & Marquart, *supra* note 58, at 758 (“To obtain a complete picture of prosecutorial discretion, a researcher would have to analyze all death-eligible offenders from arrest through sentencing.”).

179. DEBORAH FINS, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., DEATH ROW USA FALL 2005, at 8 (2005), available at [http://www.naacpldf.org/content/pdf/pubs/drusa/DRUSA\\_Fall\\_2005.pdf](http://www.naacpldf.org/content/pdf/pubs/drusa/DRUSA_Fall_2005.pdf). As of fall 2005, Texas had executed 349 people, while Virginia had executed 94. *Id.*

180. See Sorensen & Marquart, *supra* note 58, at 758 (Texas); see also ACLU OF VA., *supra* note 133, at 9 (“No statewide records are kept on the frequency with which individual Virginia prosecutors seek death sentences.”). In this report, the Virginia ACLU recommends that “[e]very county attorney’s office should keep statistics on every potentially capital case in Virginia, including race, ethnicity, gender, and age of the victim and offender.” *Id.* at 25. Note that the federal death penalty protocol, see *supra* note 154, formerly required the United States Attorney to submit a “death penalty evaluation form” only when she intended to request permission to seek the death penalty. See FEDERAL DEATH PENALTY SYSTEM, *supra* note 154 (click on “Part IV.A: Broadening the Scope of the Process”). The Department of Justice’s revised process now requires the form in all potentially capital cases, including when the U.S. Attorney does not intend to seek the death penalty. *Id.* The form must include “gender, race, and ethnicity information for defendants and victims, the charges against the defendant, and the reasons the United States Attorney decided not to seek the death penalty or charge a capital offense.” *Id.* The purpose of gathering the broader information, according to the Department of Justice, is to “maintain public confidence in the system by making more complete racial and ethnic data available for both actual and potential federal capital cases.” *Id.* Additionally, two states require similar data collection: Nevada requires a report to the state supreme court on all cases that included a murder or voluntary manslaughter charge, see NEV. REV. STAT. ANN. § 178.750 (LexisNexis 1996), while Washington requires a report to the state supreme court on all cases where the defendant was convicted of aggravated first-degree murder, see WASH. REV. CODE ANN. § 10.95.120 (West 2002).

Therefore, the first step in instituting a process by which defendants could present proof of arbitrariness in an adversarial proceeding would be to require that all prosecutors keep and publish detailed records about every homicide case the office handles. This record should include as many of the relevant facts of the case as practicable, including a summary of the facts of the crime, the race, ethnicity, gender, and age of the defendant(s) and victim(s), as well as any aggravating or mitigating circumstances the prosecutor has considered when making a decision whether to seek the death penalty. The record should also include the ultimate disposition of the case, including whether the prosecutor decided to charge capital murder (where it exists), first-degree murder, second-degree murder or some other lesser offense; whether the prosecutor struck a plea bargain with the defendant; whether the prosecutor decided to pursue the death penalty, life imprisonment without parole, or some other lesser sentence; whether the case went to trial; and the ultimate outcome of the trial, including whether the prosecutor withdrew any intent to seek the death penalty before the penalty phase proceedings began. Finally, the prosecutor should state, in this record, his reasons for selecting a particular sentencing disposition.

The value of such data would be immeasurable, not only to defendants seeking to prove arbitrariness, but also to the legislature as it attempts to evaluate the effectiveness of its statutory imperatives.<sup>181</sup> For defendants and reviewing judges, these data would help create a universe of decisions to which each subsequent death penalty decision can be compared for consistency.<sup>182</sup> As such, a

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181. See Misner, *supra* note 25, at 770–71; Vorenberg, *supra* note 25, at 1567.

182. See Vorenberg, *supra* note 25, at 1570 (“Given . . . post hoc reporting by prosecutors, courts could determine whether particular charging or bargaining decisions were consistent with the prosecutor’s general pattern, fell within specific, previously announced exceptions, or were instances of prosecutorial thoughtlessness or vindictiveness.”). Vorenberg discusses prosecutorial discretion in general, rather than death penalty decisions specifically. But again, the same rationale applies. He does note some of the practical and tactical difficulties of maintaining such a record, including the added burden of actually creating and keeping the records, as well as the need for protecting the identity of individuals against whom charges were “considered but not brought.” *Id.* at 1566. Vorenberg addresses the first concern by noting that the burden of keeping records is outweighed by the need for transparency in prosecutorial decisionmaking. *Id.* The need for consistent decisions is even greater in the death penalty area, as has been discussed at length elsewhere in this Comment. Vorenberg addresses the latter concern by stating that the necessary information involves the prosecutor’s decisionmaking process, not the identity of the individuals, which could therefore be redacted. *Id.* The concern about protecting the privacy of individuals would be reduced in the death penalty arena, for the decisions at issue here are whether to charge a murder

defendant could use the data to make a prima facie case of arbitrariness, if, for example, the facts of his case are plainly similar to, or appear to be less aggravating than, facts of another case where the prosecutor ultimately opted not to charge the death penalty.<sup>183</sup>

## 2. Using a Three-Step Adversarial Process for Pretrial Arbitrariness Analysis

Once armed with this kind of data, a defendant should be entitled to use the traditional adversarial process to challenge the prosecutor's decision to seek the death penalty against him. As the Supreme Court stated in *McCleskey*, "[r]equiring a prosecutor to rebut a study that analyzes the past conduct of scores of prosecutors is quite different from requiring a prosecutor to rebut a contemporaneous challenge to his own acts."<sup>184</sup> Here, the Court references its opinion in *Batson v. Kentucky*,<sup>185</sup> in which it laid out a three-part test for a defendant attempting to prove that the prosecutor had been racially discriminatory in exercising peremptory challenges, or challenges without cause, against prospective jurors in the defendant's particular case.<sup>186</sup> *Batson's* three-step process operates as follows: first, the defendant must establish a prima facie showing of racial discrimination in the prosecutor's peremptory challenges, and may use all relevant circumstances of the case to do so; second, if the defendant successfully raises a prima facie case, the burden shifts to the prosecutor to provide race-neutral reasons to justify each peremptory challenge; and third, the trial court must determine whether, given all the evidence, purposeful discrimination occurred.<sup>187</sup>

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capitally, not whether to charge at all. Thus the identity of the defendant is likely already public.

183. Professor Vorenberg discusses the use of published general prosecutorial guidelines in making a prima facie case of overbroad discretion and argues that having published guidelines would ease the burden of proof on the defendant claiming arbitrary charging. *See id.* at 1564. He states that a prosecutor's failure to follow his own guidelines could itself be a prima facie case of arbitrariness or, at the very least, would give the defendant leverage with which to negotiate a plea bargain. *Id.* Again, while Vorenberg's analysis is of prosecutorial discretion in general, his argument applies equally to capital prosecutions. If a capital defendant could make a showing that a prosecutor has failed to follow a documented pattern of decisionmaking, it could at least be enough to shift the burden to the prosecutor to justify his decision with a legally relevant reason. *See infra* notes 188–89 and accompanying text. And similarly, at the least, a defendant could use the past practices as a plea bargaining tool in order to receive a sentence less than death.

184. *McCleskey v. Kemp*, 481 U.S. 279, 296 n.17 (1986).

185. 476 U.S. 79 (1986).

186. *Id.* at 96–98.

187. *Id.*



Again, the process used in the equal protection realm could work similarly in the arbitrariness realm. A capital defendant wishing to prove arbitrary charging of the death penalty should be entitled to prove that the particular prosecutor in his case is seeking the death penalty on arbitrary grounds. The defendant should have the right, prior to his trial, to challenge the prosecutor's decision to seek the death penalty in his particular case. The procedure to make such a challenge would operate as follows: first, at an ordinary pretrial motions hearing,<sup>188</sup> the defendant would compare the facts of his particular case with the record of the prosecutor's past charging decisions in order to raise a *prima facie* case of arbitrariness. If the trial court determined that the defendant successfully raised a *prima facie* case, either because the facts of his case were substantially similar to, or in fact less aggravating than, the facts of a prior case or cases, then the burden would shift to the prosecutor to state, on the record, the factors that distinguish this case from those past cases where the prosecutor came to a different conclusion about the death-worthiness of the crime. This burden would require the prosecutor to justify his decision by articulating only *legally relevant* reasons for seeking the death penalty in the case. The trial court would then determine whether, given the evidence presented by both sides, the prosecutor's decision to seek the death penalty in the defendant's case was inherently arbitrary.

Using a process akin to the *Batson* analysis would be appropriate in assessing whether the prosecutor has arbitrarily applied the death penalty in a particular defendant's case. First, peremptory challenges have traditionally been an area where attorneys have been given great discretion.<sup>189</sup> Discretion is inherent in the nature of the peremptory challenge, as it allows an attorney to challenge a juror without showing any cause for doing so. Thus, there is Supreme Court precedent for a process intended to limit the prosecutor's discretion when it is being exercised unconstitutionally.

Furthermore, the suggested method employs the adversarial process to impose limits on prosecutorial discretion, thereby removing a significant factor in the concern about separation of powers between the judiciary and the executive branch that has made

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188. A pretrial hearing might typically encompass a series of preliminary motions, including motions to suppress certain evidence, motions to sever defendants, and motions for discovery. See FED. R. CRIM. P. 12(b).

189. See *Swain v. Alabama*, 380 U.S. 202, 213–21 (1965) (discussing the roots in English common law of peremptory challenges and the expansive role of the peremptory challenge in American jury selection).

judicial review of prosecutors' decisions unpalatable in the past.<sup>190</sup> Such a procedure would also preserve the tradition of prosecutorial discretion, because this process would not totally remove the discretion of the prosecutor to make charging decisions—it would simply ensure that those decisions were based on legally relevant factors, therefore bringing the prosecutor's decisions within the confines of the Eighth Amendment prohibition against arbitrary imposition of the death penalty. Prosecutors would be forced to be even more selective, thorough, and consistent when reviewing the facts of each case before deciding whether to pursue a capital charge.

Such a process obviously would not be without flaws or obstacles. First, because the process only works to challenge the decisions within one prosecutorial office, it would not cure all of the disparities previously discussed, such as those resulting from different county budgets across a state or the political leanings of a particular prosecutor's constituency.<sup>191</sup> However, the process could operate to constrain one prosecutor's political use of the death penalty in an election year, for example, or an inconsistent use of the death penalty resulting from fluctuating annual budgets. The process would still operate to curtail arbitrary decisionmaking resulting from consideration of the identity of the victim or the quality of the defendant's lawyers.

The proposed process is also imperfect because the majority of state court judges are also elected officials, just like prosecutors.<sup>192</sup> Thus, one could argue that the adversarial process described above would ultimately shift the decision about whether or not to seek the death penalty onto the shoulders of yet another public officer subject to the same political and public pressures with which this Comment is concerned. While this is indeed a valid concern, the process will, at

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190. See *supra* notes 155–57 and accompanying text.

191. To further supplement the efficacy of this proposed process and address some of these other disparities, state legislatures might also consider restraining prosecutorial discretion by significantly narrowing the class of death-eligible offenses by eliminating overly broad aggravating factors, see *supra* note 56 (discussing Professor Rosen's comments on the overly broad "heinous, atrocious, and cruel" aggravating factor); see also Kirchmeier, *supra* note 52, at 363–74 (discussing the overbreadth and vagueness of the "heinous, atrocious and cruel" and "future danger" aggravating factors). States might also consider reforming requirements for charging the death penalty in felony murder cases. David McCord, *State Death Sentencing for Felony Murder Accomplices Under the Enmund and Tison Standards*, 32 ARIZ. ST. L.J. 843, 893–96 (2000) (proposing several reforms to reduce the improper use of the death penalty in certain felony murder cases).

192. See Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 777–78 (1995).

the very least, create a vital record of prosecutorial decisions and state court judges' reactions to them, which federal courts may later consider in habeas corpus proceedings as well. While federal judges are not entirely insulated from the political process,<sup>193</sup> their lifetime appointments do protect them from "the threat of being voted out of office for an unpopular decision,"<sup>194</sup> and they are thus less susceptible to the kind of political pressure that elected state prosecutors and judges may face when making death penalty decisions.

Furthermore, in the *McCleskey* decision, the United States Supreme Court was very reluctant to inquire into prosecutors' decisions whether to seek the death penalty.<sup>195</sup> In its recitation of the procedural history of the case, the Court cited, seemingly with approval, the Eleventh Circuit's opinion in the matter:

The very exercise of discretion means that persons exercising discretion may reach different results from exact duplicates. Assuming each result is within the range of discretion, all are correct in the eyes of the law. It would not make sense for the system to require the exercise of discretion in order to be facially constitutional, and at the same time hold a system unconstitutional in application where that discretion achieved different results for what appear to be exact duplicates, absent the state showing the reasons for the difference . . . .<sup>196</sup>

However, in its later analysis of *McCleskey*'s claim, the Court made its own statement that "[t]he Constitution is not offended by inconsistency in results based on the objective circumstances of the crime. Numerous legitimate factors may influence the outcome of a trial and a defendant's ultimate sentence, even though they may be irrelevant to his actual guilt."<sup>197</sup> Implicit in this statement is the Court's incorrect assumption, like that of Justice White in *Gregg v. Georgia* ten years before, that prosecutors base their death penalty decisions on wholly objective criteria.<sup>198</sup> Given the evidence that this

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193. *Id.* at 789-90 (discussing the potential importance of a nominee's votes on the death penalty in the process of appointment to the federal bench).

194. *Id.* at 816.

195. *McCleskey v. Kemp*, 481 U.S. 279, 297 (1987); see also *supra* notes 28-42 and accompanying text for discussion of the Court's position on prosecutorial discretion and the death penalty. Note that the Court decided *McCleskey* after *Batson v. Kentucky*, 476 U.S. 79 (1986).

196. *McCleskey*, 481 U.S. at 289-90 (quoting *McCleskey v. Kemp*, 753 F.2d 877, 898-99 (11th Cir. 1985)).

197. *Id.* at 307 n.28.

198. *Gregg v. Georgia*, 428 U.S. 153, 225 (1976) (White, J., concurring).

assumption is indeed wrong, if the exercise of discretion reaches different results based on exact duplicates, the only possible inferences that may be drawn are that either some extralegal factor played a role in the decision, or that the decision is simply inherently arbitrary. Neither possibility withstands Eighth Amendment scrutiny. Thus, if a defendant can make a showing, using data about the prosecutor's prior decisions, that the exercise of discretion in his particular case was potentially arbitrary, then the state should be required to rebut that showing with legally relevant factors that made the difference in the defendant's case.

#### CONCLUSION

While the exercise of discretion, particularly that of the prosecutor, is indeed a historically important element of our criminal justice system, the qualitative difference of death as a penalty requires that discretion to be circumscribed in order to comport with the Eighth Amendment. While the United States Supreme Court has recognized the need to limit the discretion of the sentencing body in capital punishment cases, and has strictly enforced those limitations, it has largely left the prosecutor to her own devices to determine if and when to seek a death sentence in the first place. Prosecutors are therefore free to consider, whether consciously or subconsciously, legally irrelevant factors when deciding whether to pursue the death penalty. As a result, the imposition of the death penalty remains inherently arbitrary, with no way to predict, among all the death-eligible cases, which defendants will face the death penalty as a possible sentence. Such a state of affairs directly violates the Eighth Amendment's prohibition on cruel and unusual punishment. The institution of an adversarial process, through which the defendant may demonstrate that the prosecutor has acted arbitrarily in his particular case, would provide a legitimate method for limiting a prosecutor's discretion to a tolerable range within the boundaries of the Eighth Amendment, while still preserving the essential role of that discretion in our criminal justice system.

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