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# A DISTRICT ATTORNEY'S DECISION WHETHER TO SEEK THE DEATH PENALTY: TOWARD AN IMPROVED PROCESS

## **Cover Page Footnote**

J.D., Fordham University School of Law, 1998. B.B.A., Accounting, Siena College, 1995.

# A DISTRICT ATTORNEY'S DECISION WHETHER TO SEEK THE DEATH PENALTY: TOWARD AN IMPROVED PROCESS

Jonathan DeMay\*

*[H]owever strongly one may favor the death penalty in principle, its propriety in practice depends on our ability to restrict its use to the worst of our criminals and to impose it in a nondiscriminatory fashion.<sup>1</sup>*

## Introduction

A district attorney's decision whether to seek the death penalty is the most critical decision in the criminal justice system,<sup>2</sup> because, if imposed, the death penalty results in the state sanctioned execution of an individual, an "irremediable" decision.<sup>3</sup> Despite the grave implications of this decision, the United States Supreme Court has never required that any procedures or guidelines be promulgated to control the process employed by prosecutors to reach this decision.<sup>4</sup> Instead, district attorneys look to a startlingly broad range of policies when deciding whether to seek the death penalty.

In New York State, for example, Bronx County District Attorney Robert Johnson (the "Bronx DA") steadfastly opposes the utilization of the death penalty. After the enactment of the death

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\* J.D., Fordham University School of Law, 1998. B.B.A., Accounting, Siena College, 1995. The author would like to thank Professor Bruce Green, Fordham University School of Law, for his guidance and suggestions.

1. SAMUEL R. GROSS & ROBERT MAURO, *DEATH & DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING* 5 (1989) (quoting Walter Berns, *Defending the Death Penalty*, 26 *CRIME & DELINQ.* 503, 511 (1980)).

2. See HUGO ADAM BEDAU, *THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES* 313 (Hugo Adam Bedau ed., 1997) ("[T]he decision whether to seek the death sentence is perhaps the most far-reaching decision to be made in the whole arena of criminal justice.").

3. See *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) ("In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability . . . . This special concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different.").

4. See BEDAU, *supra* note 2 (noting that unlike a jury's decision whether to impose the death penalty, prosecutors do not have statutory guidelines, or even any comparable guidelines, imposed on their decision whether to seek the death penalty).

penalty in New York,<sup>5</sup> the Bronx DA publicly announced that it was not his "present intention" to utilize the death penalty despite its widespread public and political support.<sup>6</sup> Moreover, he later refused to state that there were any circumstances under which he would seek the death penalty, even when this refusal meant certain supersedure<sup>7</sup> by New York Governor George Pataki (the "Governor").<sup>8</sup> When he was superseded,<sup>9</sup> the Bronx DA challenged the

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5. New York Penal Law section 60.06 provides that a person convicted of murder in the first degree must be sentenced "to death, to life imprisonment without parole or to a term of imprisonment for a class A-I felony other than a sentence of life imprisonment without parole." N.Y. PENAL LAW §§ 60.06, 125.27(1) (McKinney 1996). If a prosecutor elects to seek a sentence of death, the prosecutor must, within 120 days of a defendant's arraignment upon an indictment charging murder in the first degree, provide a written notice of intention to seek the death penalty to the defendant and the court. N.Y. CRIM. PROC. LAW §§ 250.40, 400.27, 470.30 (McKinney 1996). If the prosecution elects not to seek the death penalty, the decision is irrevocable. N.Y. CRIM. PROC. LAW § 250.40.

6. *Matter of Johnson v. Pataki*, No. 1714/96, slip op. at 5 (N.Y. Sup. Ct., July 9, 1996). The Bronx DA based this upon his "intense respect for the value and sanctity of human life," his fear of convicting an innocent person, and his skepticism regarding the death penalty's deterrent effect and the fairness of its application. *Id.* at 4-5. In addition, the Bronx DA did not feel the commitment of time and resources required by a death penalty prosecution were worthwhile given the uncertainty that a jury would impose it or that its imposition would be upheld on appeal. *See id.* at 5. Finally, the Bronx DA also proffered a list of areas where the money that would be committed towards death penalty prosecutions would be better spent. *See id.*

7. In New York, a Governor's power to supersede a district attorney is statutorily granted. *See* N.Y. EXEC. LAW § 63(2) (McKinney 1996) ("Whenever required by the governor, attend in person, or by one of his deputies, . . . for the purpose of managing and conducting . . . criminal actions or proceedings as shall be specified in such requirement; in which case the attorney-general or his deputy so attending shall exercise all the powers and perform all the duties . . . which the district attorney would otherwise be authorized or required to exercise or perform; and . . . the district attorney shall only exercise such powers and perform such duties as are required of him by the attorney-general or deputy attorney-general so attending."). This power is employed to ensure that the laws are executed faithfully. *See* Robert M. Pitler, *Superseding The District Attorneys in New York City—The Constitutionality and Legality of Executive Order No. 55*, 41 FORDHAM L. REV. 517 (1973) (stating that there is no question regarding the constitutionality of the governor's supersedure power in New York.).

8. James Dao, *The Governor: District Attorney Wouldn't Move, Pataki Aides Say, So He Was Moved*, N.Y. TIMES, Mar. 22, 1996, at B2 ("Aides to Governor George E. Pataki . . . suggested that Mr. Johnson do one of two things: express willingness to seek the death penalty in certain cases, or declare his opposition to capital punishment and then voluntarily step aside so that Mr. Pataki could name a special prosecutor . . . Mr. Johnson rebuffed both ideas.").

9. By issuing Executive Order 27, the Governor required New York State Attorney General Dennis C. Vacco to supersede the Bronx DA. *See Johnson*, No. 1714/96, slip op. at 11. The Governor found that the Bronx DA had "instituted a blanket policy not to seek the death penalty" that violated the Bronx DA's obligation to "make informed, reasoned decisions on a case-by-case basis . . ." *Id.* at 12. The Governor issued the Order based upon his obligation to ensure that the laws are

Governor's power to do so until his ability to appeal had been exhausted.<sup>10</sup>

In Pennsylvania, the policy instituted by Philadelphia County District Attorney Lynne Abraham (the "Philadelphia DA") regarding the utilization of the death penalty is nearly as zealous as the Bronx DA's opposition to its utilization.<sup>11</sup> Her office seeks the death penalty nearly every time the law allows it.<sup>12</sup> The Philadelphia DA employs this policy despite the high financial costs of the death penalty,<sup>13</sup> and often without regard for the criminal history or the state of mind of the defendant at the time the crime oc-

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"faithfully executed." *Id.* The Governor's belief that the "brutal murder of Police Officer Kevin Gillespie" warranted that the death penalty should be sought. *Id.* at 13. In addition, the Governor was concerned that the Bronx DA's policy "threaten[ed]" the validity of death sentences imposed in cases in other counties" because it could lead to challenges of New York's death penalty statute upon grounds that the "sentence of death is excessive or disproportionate to the penalty imposed in similar cases . . . ." *Id.* at 12.

10. On July 9, 1996, the Bronx DA filed a writ of mandamus to prevent Governor Pataki from enforcing Executive Order 27. *See id.* at 1-2. The Governor argued that Executive Order 27 impermissibly supplanted the Governor's policy regarding the death penalty in place of the statutory scheme enacted by the Legislature. *See id.* at 18. In addition, he argued that the supersedure interfered with a district attorney's independent Executive power. *See id.* at 22.

In *Matter of Johnson v. Pataki*, 91 N.Y.2d 214, 691 N.E.2d 1002, 668 N.Y.S.2d 978 (1997) the New York Court of Appeals declined to decide whether the decision to supersede a district attorney was justiciable, let alone what the standard of review would be if it was justiciable. 91 N.Y.2d at 226, 691 N.E.2d at 1007, 668 N.Y.S.2d at 983. The New York Court of Appeals did hold, however, that Executive Order 27 expressed the "executive judgment" of the Governor "that a 'blanket policy'—never unequivocally disavowed—existed that precluded the exercise of discretion by the District Attorney," *id.* at 228, 691 N.E.2d at 1008, 668 N.Y.S.2d at 984, and thus there was a threat to the faithful execution of the death penalty law that supported this particular supersedure." *Id.* at 226, 691 N.E.2d at 1007, 668 N.Y.S.2d at 984. The New York Court of Appeals further stated that the Legislature clearly "did not allow one or all 62 District Attorneys to functionally veto the statute by adopting a 'blanket policy,' thereby in effect refusing to exercise discretion." *Id.* at 226-27, 691 N.E.2d at 1007, 668 N.Y.S.2d at 983. The New York Court of Appeals noted that the supersedure did not "substitute the Governor's policy choice" for that of the Bronx DA. *Id.* at 226-27, 691 N.E.2d at 1007, 668 N.Y.S.2d at 983. Rather, "the Governor designated the Attorney General in place of the District Attorney in prosecuting the entire matter, including the exercise of discretion regarding sentence." *Id.*

11. *See* Tina Rosenberg, *The Deadliest D.A.*, in *THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES* 320 (quoting the Philadelphia DA) ("When it comes to the death penalty, I am passionate. I truly believe that it is manifestly correct.").

12. *See id.* at 324. Typically, the Philadelphia County District Attorney's Office seeks the death penalty in any case in which the prosecutors believe that they can prove a single aggravating factor. *See id.*

13. The death penalty is estimated to cost three million dollars per case—three times greater than the estimated cost of a life sentence in Pennsylvania. *See id.* at 321. The high expense of its use, however, is "not even a consideration." *Id.* at 320.

curred.<sup>14</sup> In fact, she focuses almost entirely on the victims and their families, with little accompanying concern for the defendant.<sup>15</sup>

The ideological dichotomy between the policies of the Bronx and Philadelphia DAs is a dramatic illustration of the potential for arbitrariness that is inherent in the decision whether to seek the death penalty. Indeed, the most important variable affecting whether a defendant will be subject to the death penalty is often the particular ideology of the district attorney of a respective county.<sup>16</sup> There are, however, more subtle forms of arbitrariness, such as bias based upon race, gender and class, that pervade the process.<sup>17</sup> In addition, inappropriate political considerations, or even public pressure, can have a significant impact on the decision.<sup>18</sup>

14. *Id.* at 320-21.

15. Lynne Abraham has stated, "I've looked at all those sentenced to be executed. No one will shed a tear. Prison is too good for them. They don't deserve to live. I represent the victim and the family. I don't care about killers." *Id.* at 321.

16. See Stewart F. Hankcock, 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, 1563-64 ("A result of the unguided discretion afforded to prosecutors, each of whom has sole prosecutorial authority in a particular county, is that whether the death penalty is sought against a defendant for a given crime may depend on the happenstance of where (i.e., the county in which) the crime is committed."); Rosenberg, *supra* note 11, at 319, 321 ("Prosecutorial discretion insures that the lives of identical murderers committing identical crimes can be valued completely differently on the opposite sides of a county line."). Cf. William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Procedure as an Instrument of Reform*, 54 OHIO ST. L.J. 1325, 1344 (1993) (noting that "the same criminal laws may be enforced differently within a single state").

17. See U.S. GENERAL ACCOUNTING OFFICE, *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities*, in THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES 271 (1997) (concluding that the race of the victim has a strong influence on death sentences); Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, in THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES 275 [hereinafter Bright, *Counsel for the Poor*] (arguing that the lack of financial resources is among the "most significant" variables impacting upon the outcome of death penalty cases); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT 1988, at 9 (1989) (finding that one out of eight individuals arrested for murder is female); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE 46 (2d ed. 1988) (finding that one out of every hundred death row inmates is female).

18. See James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1558 (1981) (arguing that prosecutorial decision-making is susceptible to political influence); Stephen B. Bright et. al, *The Death Penalty in the Twenty-First Century*, 45 AM. U. L. REV. 239, 286 (1995) [hereinafter Bright et al., *Death Penalty*] (stating that death penalty cases allow prosecutors to get a large amount of public exposure); Daniel Wise, *Prosecutors Want Death Penalty: Qualms Voiced About Costs, Time, Training of Lawyers*, N.Y. L.J., Mar. 3, 1995, at 1 (quoting Albany County District Attorney Sol Greenberg that "[f]ailure to seek [the death penalty]

These considerations, while troubling in any context, are deeply disturbing in the context of the decision whether a defendant will be eligible for the death penalty. Despite the importance of ensuring that the death penalty is sought only against those who truly deserve it,<sup>19</sup> given the wide range of district attorney policies regarding the imposition of the death penalty and the potential influence of bias, inappropriate political considerations and subjective judgments, the death penalty could be sought against an individual for whom that punishment would be inappropriate. Conversely, a defendant who should be eligible for the imposition of the death penalty could be inappropriately removed from consideration.<sup>20</sup>

This Note argues that the dangers inherent in the present situation justify the imposition of controls over the exercise of prosecutorial discretion in the decision whether to seek the death penalty and explores the potential implementation of additional controls in light of the deference traditionally given prosecutorial discretion, the practical difficulties inherent in attempting to implement such controls and the strong need for prosecutorial discretion within the criminal justice system. Part I presents the nature and scope of prosecutorial discretion judicial review of that discretion and the influence that individual prosecutors can have in the exercise of such discretion in the context of the death penalty. Part II examines previously proffered controls of prosecutorial discretion and considers the appropriateness of utilizing these controls to limit the exercise of discretion in the decision whether to seek the death penalty. Part III asserts that within our current criminal justice system, potential controls must focus on improving the decision-making process in which discretion is exercised. This Note concludes that a single statewide inter-office death penalty committee is the most appropriate control of the exercise of prosecutorial discretion in such a critical decision.

### **I. Prosecutorial Discretion**

Prosecutors are the "gatekeepers" of the criminal justice system,<sup>21</sup> as they decide whether to charge suspects, and, if so, for

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will give political opponents an opening to air charges from the victim's family that a prosecutor has been 'soft on crime'" resulting in a tactic that "'could be very devastating for incumbent DAs.'")

19. BEDAU, *supra* note 2, at 313; *Ford v. Wainwright*, 477 U.S. at 411.

20. See KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 167-72, 230-31 (1969) (discussing whether failing to punish the guilty is unjust).

21. Phil Manzano, *The Hard Line on Crime*, OREGONIAN (Portland), Apr. 15, 1995, at A1.

what crime.<sup>22</sup> The power to decide who to prosecute is a matter of great discretion, and largely an unreviewed one.<sup>23</sup> Within this system, the policies of district attorneys toward the death penalty have a great impact upon its utilization from county to county.<sup>24</sup> Other forms of arbitrariness also can impact the decision, including race,<sup>25</sup> class,<sup>26</sup> gender<sup>27</sup> and political and subjective judgments.<sup>28</sup>

### A. The Nature and Scope of Prosecutorial Discretion

Prosecutorial discretion encompasses the power to charge or to refrain from charging an individual with a crime; to reduce charges to a lesser offense prior to trial; to not charge prior offenses; to dismiss or request court dismissal after a trial commences; or to recommend a lesser sentence.<sup>29</sup> This is not a single decision, but rather, a process involving a group of interrelated judgments made in no predetermined order.<sup>30</sup> In making this decision,<sup>31</sup> prosecu-

22. See *infra* Part I.A.

23. See *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) ("[S]o 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 [the prosecutor's] discretion."); *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (explaining that a prosecutor's charging decision is granted a great deal of latitude); *Wayte v. United States*, 470 U.S. 598, 607-08 (1985) (explaining that a prosecutor's charging decision is generally granted great discretion); *United States v. Cox*, 342 F.2d 167, *cert. den. sub nom.*, *Cox v. Hauberg*, 381 U.S. 935 (1965) (explaining that under the separation of powers doctrine courts are not to interfere with a federal prosecutor's "control over criminal prosecutions"); *Newman v. United States*, 382 F.2d 479, 480 (D.C. Cir. 1967) (noting the "very broad discretion" granted to prosecutors); Bennett L. Gershman, *A Moral Standard For the Prosecutor's Exercise of the Charging Discretion*, 20 FORDHAM URB. L.J. 513 (1993) [hereinafter Gershman, *A Moral Standard*] ("The prosecutor's decision to institute criminal charges is the broadest and least regulated power in American criminal law."). For early evidence of judicial recognition of the broad leeway given prosecutorial discretion, see *Confiscation Cases*, 74 U.S. 454, 457 (1868) (Public prosecutions are within the "exclusive jurisdiction of the district attorney.").

24. See *supra* note 16.

25. See discussion *infra* Part I.D.1.

26. See discussion *infra* Part I.D.2.

27. See discussion *infra* Part I.D.3.

28. See discussion *infra* Part I.D.4.

29. See Stanton L. Stein, Comment, *Prosecutorial Discretion and the Initiation of Criminal Complaints*, in *THE INVISIBLE JUSTICE SYSTEM: DISCRETION & THE LAW* 137 (Burton Atkins & Mark Pogrebin eds., 1978) (arguing that these functions are the most important aspects of discretion). See also Sidney I. Lezak & Maureen Leonard, *The Prosecutor's Discretion: Out of the Closet, Not Out of Control*, in *DISCRETION, JUSTICE, AND DEMOCRACY: A PUBLIC POLICY PERSPECTIVE* 44 (Carl F. Pinkle & William C. Louthan eds., 1985) (stating that prosecutorial discretion is, essentially, the power of a prosecutor to selectively enforce the laws).

30. See FRANK W. MILLER, *PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME* 11 (Frank J. Remington ed., 1970) ("The decision to charge, unlike the



tors must balance the opposing demands on the victim and the accused, the accusations of the police and societal expectations regarding the punishment of the defendant.<sup>32</sup>

Prosecutors attempt to balance these concerns while working within the confines of a criminal justice system replete with ambiguous statutes<sup>33</sup> and subject to continual variation due to ever-shifting political and social priorities.<sup>34</sup> Moreover prosecutors must consider the "infinite variety of detailed facts which human conduct continually presents."<sup>35</sup> Thus, the criminal justice system not only allows for the exercise of prosecutorial discretion,<sup>36</sup> but also requires the flexibility it provides.<sup>37</sup>

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decision to arrest, is not a unitary decision made at a readily identifiable time by a specified individual. It is, instead, a process consisting of a series of interrelated decisions, and the steps in the process do not always occur in the same sequence.").

31. Within our current system, each district attorney is free to set policies for that office based upon available prosecutorial resources and "local crime concerns and priorities." Pizzi, *supra* note 16, at 1344.

32. See T. KENNETH MORAN & JOHN L. COOPER, *DISCRETION AND THE CRIMINAL JUSTICE PROCESS* 52 (1983). Other factors that prosecutors consider include the attitude of the victim, cooperation by the defendant, resource costs of prosecution, and effectiveness of alternative procedures. See MILLER, *supra* note 30, at 173-85, 213-32, 241-52, 260-80. In addition, when deciding whether to plea bargain, prosecutors weigh factors such as the seriousness of the offense, background of the defendant, strength of the case, willingness of the victim to testify, attractiveness of the case to the jury, dangerousness of the defendant, and value of information the defendant might provide in future cases. See Pizzi, *supra* note 16, at 1369.

33. Criminal conduct necessarily must be described in generalized terms because they must "sweep together identical acts" by "markedly different actors amid infinitely variable circumstances." Charles D. Breitel, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427, 431 (1960) (citing ROSCOE POUND, *CRIMINAL JUSTICE IN AMERICA* 37-38 (1930)).

34. See *id.* at 9 (citing ROSCOE POUND, *CRIMINAL JUSTICE IN AMERICA* 36).

35. *Id.* (citing POUND, *CRIMINAL JUSTICE IN AMERICA* 36).

36. In the context of this Note, discretion is best understood as a "residual concept—the room left for subjective judgments by the statutes, judicial decisions, social patterns and institutional pressures that bear on an official's decision." Vorenberg, *supra* note 18, at 1521, 1524.

37. See Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1, 2, 5 (1971) (Prosecutorial discretion provides for flexibility and sensitivity in the decision-making process.); Breitel, *supra* note 33, at 427 (1960) ("If every policeman, every prosecutor, every court, and every presentence agency performed his or its responsibility in strict accordance with the rule of law, precisely and narrowly laid down, the criminal law would be ordered but intolerable."); MILLER, *supra* note 30, at 151 ("Full enforcement of the criminal law in the sense that every violator of every statute should be apprehended, charged, convicted, and sentenced to the maximum extent permitted by law has probably never been seriously considered a tenable idea.").

A criminal justice system without prosecutorial discretion would sacrifice the subtleties that are an indispensable feature of decision-making of any satisfactory quality. See *McCleskey v. Kemp*, 753 F.2d 877, 899 (11th Cir. 1985) (en banc), *aff'd*, 481 U.S.

## B. Judicial Review of Prosecutorial Discretion

A prosecutor's use of discretion to determine whether to prosecute an individual, and if so, for what crime or degree of crime generally is not reviewable,<sup>38</sup> but it is subject to constitutional limitations,<sup>39</sup> primarily, selective prosecution<sup>40</sup> and vindictive prosecution.<sup>41</sup> Selective prosecution occurs when the decision whether to prosecute is "deliberately based upon an unjustifiable standard such as race, religion, or arbitrary classification."<sup>42</sup> Selective prosecution may be demonstrated when "the administration of a criminal law is 'directed so exclusively against a particular class of persons . . . with a mind so unequal and oppressive' that the system of prosecution amounts to 'a practical denial' of equal protection of the law."<sup>43</sup> Vindictive prosecution may result when a prosecutor uses the charging process to penalize the exercise of constitutional or statutory rights, thus resulting in a due process violation.<sup>44</sup> A rebuttable presumption of vindictiveness is recognized whenever a prosecutor increases "the number or severity of charges after a defendant has asserted legally protected rights."<sup>45</sup>

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279 (1987) (The court explained that a statistical study relied upon by the defendant "not only ignore[d] quantitative differences in cases: looks, age, personality, education, profession, job, clothes, demeanor, and remorse, just to name a few, but it [also was] incapable of measuring qualitative differences of such things as aggravating and mitigating factors. There are, in fact, no exact duplicates in capital crimes and capital defendants."); Pizzi, *supra* note 16, at 1369 (noting additional factors including vocational skills, family ties and responsibilities, community ties and socioeconomic status). It is worthy to note that it is questionable whether a "rigid and mechanistic" system of prosecution actually would lead to greater consistency. Abrams, *supra* note 37, at 10. If discretion is eliminated and thus distinguishable cases are treated alike, this results in inconsistency as well. *See id.* at 5 n.10. Abrams states that an advocate of such a system likely would respond that the "cases are not distinguishable since the differences would be deemed irrelevant at that stage of the process." *Id.* at 5 n.10. This response, however, would be lacking because the very decision that such differences are irrelevant is rife with discretion—the very thing that a rigid and mechanistic system seeks to eliminate.

38. *See supra* note 23.

39. *See Armstrong*, 517 U.S. at 464 (quoting *United States v. Batchelder*, 442 U.S. 114, 125 (1979)) ("[A] prosecutor's discretion is 'subject to constitutional constraints.'").

40. *See id.* (explaining that selective prosecution violates Due Process).

41. *See Moran v. Burbine* 475 U.S. 412, 466 (1985) (dissenting opinion) (explaining that vindictive prosecution violates due process) (citing *Blackledge v. Perry*, 417 U.S. 21(1974)).

42. *Oyler v. Boles*, 368 U.S. 448, 456 (1962).

43. *Armstrong*, 517 U.S. at 464-65 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886)).

44. *See Katherine Lowe, Prosecutorial Discretion*, 81 GEO. L.J. 1029, 1035 (1993).

45. *Id.* *See, e.g., Turner v. State*, 940 F.2d 1000, 1002 (6th Cir. 1991), *cert. denied*, 502 U.S. 1050 (1992) (quoting *Alabama v. Smith*, 490 U.S. 794, 802 (1989)) ("The

Even when equal protection or due process rights are at issue, however, courts are reluctant to intrude upon the “‘special province’” of the prosecutor.<sup>46</sup> For example, when unconstitutional selective prosecution is alleged, a court will continue to presume the prosecutor acted correctly unless there is “clear evidence to the contrary.”<sup>47</sup>

Several factors form the basis of the great judicial deference given to the prosecutor’s decision-making process. First, the decision whether to prosecute is especially ill-adapted to judicial review because the decision involves factors that are not easily open to the type of analysis that is within judicial competence, such as the strength of the evidence in the case, the general deterrent value of the prosecution, and the relation to the enforcement priorities and the “overall enforcement plan” of the government.<sup>48</sup> Second, courts are reluctant to encroach upon the operation of this essential executive constitutional role by interfering with the exercise of discretion by prosecutors in their administration of criminal prosecutions.<sup>49</sup> Third, judicial examination of prosecutorial decision-making leads to problematic “systemic costs,” including the delay of criminal proceedings, and the chilling of law enforcement by exposing a prosecutor’s decision-making process, as well as the enforcement policy of the prosecutor’s office, to external scrutiny.<sup>50</sup>

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prosecution is unlikely to gain any new insight as to the moral character of the defendant, the nature and extent of the crime, or the defendant’s suitability for rehabilitation at the conclusion of trial that it did not already possess from its extended investigation. Rather, the prosecution in such circumstances ‘can be expected to operate in the context of roughly the same sentencing considerations . . . ; any unexplained change in the sentence is therefore subject to a presumption of vindictiveness.’”).

46. See *Armstrong*, 517 U.S. at 464 (quoting *Heckler v. Chaney*, 470 U.S. 821, 832 (1985)) (A selective prosecution claim requests a court “to exercise judicial power over a ‘special province’ of the Executive.”); *United States v. Bassford*, 812 F.2d 16, 19 (1st Cir.) (“[C]ourts should presume that the prosecution was pursued in good faith execution of the law.”), *cert. denied*, 481 U.S. 1022 (1987).

47. *Armstrong*, 517 U.S. at 465 (quoting *United States v. Chemical Foundation*, 272 U.S. 1, 14-15 (1926)).

48. *Wayte*, 470 U.S. at 607. “Few subjects are less adapted to judicial review than the exercise” of discretion by the prosecutor in deciding whether to prosecute and what type of charge under which to prosecute. *Newman*, 382 F.2d at 480.

49. See *Armstrong*, 517 U.S. at 465 (Judicial deference to prosecutors “stems from a concern not to unnecessarily impair the performance of a core executive constitutional function.”); *Newman*, 382 F.2d 481 (As an “agent and attorney for the Executive” the prosecutor is responsible to the Executive and the courts have no power over either the prosecutor’s exercise of discretion or the prosecutor’s “motives” regarding the performance of duties within the scope of employment.).

50. See *Wayte*, 470 U.S. at 607 (“Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the

1. *Judicial Review of Prosecutorial Discretion in the Context of the Death Penalty*

In *Furman v. Georgia*,<sup>51</sup> the Supreme Court addressed whether the death penalty was cruel and unusual punishment.<sup>52</sup> In his concurrence, Justice Douglas placed particular emphasis on the "practically untrammelled discretion" judges and juries possess in deciding whether to impose the death penalty.<sup>53</sup> The extent of this discretion allowed for the selective application of the death penalty.<sup>54</sup> As a result, the Supreme Court held that, as imposed at that time,<sup>55</sup> the death penalty violated the requirement of equal protection "implicit in the ban on 'cruel and unusual punishment.'"<sup>56</sup>

In *Gregg v. Georgia*,<sup>57</sup> the Supreme Court specifically addressed the role of prosecutorial discretion in the decision whether to seek the death penalty.<sup>58</sup> The petitioner asserted that a prosecutor's "unfettered authority"<sup>59</sup> to select whom to prosecute for a capital offense was arbitrary and capricious, and therefore, unconstitutional under *Furman*.<sup>60</sup> The Supreme Court, however, rejected the argument that the mere existence of "discretionary stages"<sup>61</sup> violated *Furman*.<sup>62</sup> The Court explained that *Furman* held that the decision to impose the death penalty must be "guided by standards

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criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decision-making to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy.").

51. 408 U.S. 238 (1972).

52. 408 U.S. at 240.

53. *Id.* at 248.

54. *Id.* at 255.

55. In his concurrence, Justice Brennan stated that the imposition of the death penalty was so arbitrary that "it smack[ed] of little more than a lottery system." *Furman*, 408 U.S. at 293. Justice Brennan described the procedure surrounding a jury's decision whether to impose the death sentence as "wholly unguided by standards . . . ." Thus, the procedures did not "guard against the totally capricious selection of criminals for the punishment of death." *Id.* at 294-95.

56. *Id.* at 257 (Douglas, J., concurring).

57. 428 U.S. 153 (1976).

58. 428 U.S. at 153.

59. *Id.* at 199.

60. *Id.*

61. The petitioner argued that discretion permeated the entire system of capital sentencing and thus the system was in violation of *Furman*. See *Gregg*, 428 U.S. at 199. The petitioner noted the discretion a prosecutor had to decide whether to prosecute or to plea bargain with a capital-eligible defendant. See *id.* In addition, juries had the discretion to choose to convict a defendant of a lesser included offense even if evidence supports a capital verdict. See *id.* Finally, both the Governor of the State of Georgia and the Georgia Board of Pardons and Paroles could commute the death sentence of a defendant. See *id.*

62. See *id.* at 199.

so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant . . . .”<sup>63</sup> The Court determined that this was necessary to “minimize the risk that the death penalty would be imposed on a capriciously selected group of individuals . . . .”<sup>64</sup> Moreover, the Supreme Court reasoned that *Furman* did not suggest that the decision to “afford an individual defendant mercy violates the Constitution.”<sup>65</sup> The Court further noted that if the discretion to remove defendants from consideration as candidates for the death penalty was found unconstitutional, as the petitioner suggested, prosecuting authorities would be required to charge a capital offense whenever there arguably had been a capital murder.<sup>66</sup> The Supreme Court then rejected this result, stating that it would lead to a “system . . . totally alien to our notions of criminal justice.”<sup>67</sup>

### C. The Influence of Individual District Attorneys on the Death Penalty Decision

District attorneys are generally elected on a county-wide basis.<sup>68</sup> This election structure allows for a wide disparity in the utilization of the death penalty from county to county, as district attorneys each determine the criminal justice policies of their respective counties.<sup>69</sup> Contrasting the policies of, arguably, the death penalty’s staunchest opponent and its most zealous advocate among district attorneys, provide a dramatic illustration of the influence that a particular district attorney’s policy has on the utilization of the death penalty as a form of punishment.

#### 1. The Death Penalty Antagonist

On March 7, 1995, the New York State Legislature enacted a comprehensive set of statutes that provided the death penalty as a

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63. *Id.*

64. *Id.*

65. *Id.*

66. *See id.* at 199 n.50.

67. *Id.* at 199 n.50.

68. *See Pizzi, supra* note 16, at 1325, 1343 (1993) (stating district attorneys typically are elected on a county or district basis).

69. *See* Hankcock, Jr. et al, *supra* note 16; Pizzi, *supra* note 16, at 1344 (“In a state jurisdiction in which prosecutors usually run for office on a county-wide basis, are funded on the same local basis, and must work with juries drawn from the local population, it is almost guaranteed that prosecutors elected in highly rural counties will have quite different constituencies and will face very different criminal problems from those elected in heavily urban areas.”).

form of punishment for first degree murder.<sup>70</sup> Immediately following the passage of these death penalty statutes, the Bronx DA issued a press release stating that it was his "present intention not to utilize the death penalty provisions of the statute . . . ."<sup>71</sup> Instead, his office would "aggressively pursue life without parole."<sup>72</sup>

On March 14, 1996, a gunfight between the police and several fleeing suspects resulted in the murder of New York City Police Officer Kevin Gillespie.<sup>73</sup> After his arrest, the primary suspect acknowledged that he knew he was being pursued by police officers.<sup>74</sup> Thus, the Bronx DA was presented with a case eligible for the death penalty.<sup>75</sup>

On March 19, 1996, the swiftness with which the Bronx DA previously decided against seeking the death penalty in another case<sup>76</sup>

70. See *supra* note 5.

71. Pataki, No. 1714/96, slip op. at 3. See *supra* note 5.

72. *Id.*

73. See Clifford Krauss, *Officer Killed and Another Hurt in Carjacking Battle in the Bronx*, Mar. 15, 1996, N.Y. TIMES, at A1, B2. The gunfight, which also resulted in another police officer being shot, occurred when the officers attempted to prevent a carjacking near the Grand Concourse in Bronx County. See *id.* at A1. Two unmarked police cars made a "bumper-to-bumper sandwich" of the suspects' car, forcing the individuals within the car to flee. See Clifford Krauss, *3 Men Held in Killing of Officer, Bringing Calls for Death Penalty*, N.Y. TIMES, at 1, 24. The suspects tried to shoot their way out, and after the shoot-out, which totaled 40 shots, Officer Gillespie was killed. See *id.* In addition, off-duty transit officer Terrance McAllister was injured, along with three bystanders—two 14-year-old boys playing basketball, and an unidentified woman. See *id.* at 24. Angel Diaz, the primary suspect, had an extensive criminal history, having amassed three felony convictions—two of which were violent crimes—before the shooting of Officer Gillespie. See *id.*

74. After the arrest, Diaz made statements to investigators acknowledging that he was aware that they were being pursued by police officers before they began shooting. See *id.*

75. A person is guilty of first-degree murder, and thus is potentially subject to the death penalty, when:

[w]ith the intent to cause the death of another person, [the defendant] causes the death of such person or of a third person . . . and [the defendant commits the crime in any of the twelve ways specified by the legislature, including when] the intended victim was a police officer . . . who at the time of the killing engaged in the course of performing his official duties, and the defendant knew or reasonably should have known that the intended victim was a police officer . . . .

N.Y. PENAL LAW § 125.27 (McKinney 1996).

76. On December 19, 1995, Michael Vernon was arrested for suspicion of killing five people in a shoe store in the Bronx. See Matthew Purdy, *5 Are Killed by Gunman in Bronx Shoe Store*, N.Y. TIMES, Dec. 20, 1995, at A1. Within a day of the shooting, a spokesman for the Bronx DA stated that even if the case fit the criteria for the death penalty, the death penalty would not be sought in the case. *Id.* Governor Pataki accepted the Bronx DA's decision, albeit with "grave reservations." Pataki, No. 1714/96, slip op. at 7. The Governor's reservations were based upon the Bronx DA's evasive answer regarding whether he had a policy not seek the death penalty in

led the Governor to inquire if there were any circumstances under which the Bronx DA would seek the death penalty.<sup>77</sup> The Governor's aides suggested that the Bronx DA either "express willingness to seek the death penalty in certain cases, or declare his opposition to capital punishment and then voluntarily step aside so that Governor Pataki could name a special prosecutor."<sup>78</sup> Despite inevitable supersedure, the Bronx DA rebuffed the suggestion, and denounced the Governor for his "heavy handed approach."<sup>79</sup> One day after this response, the Governor issued Executive Order 27<sup>80</sup> to supersede the Bronx DA in the prosecution of the case.<sup>81</sup> Thereafter, the Bronx DA challenged the Governor's ability to supersede him until he had exhausted his appeals.<sup>82</sup>

## 2. The death penalty protagonist

On April 23, 1991, two shooting victims were discovered in a home in southwest Philadelphia.<sup>83</sup> Both had been shot in the head.<sup>84</sup> One was found dead at the scene, and the other survived.<sup>85</sup> The Philadelphia County DA's Office sought the death penalty against the defendant,<sup>86</sup> the surviving victim's boyfriend.<sup>87</sup> A jury later imposed the death sentence.<sup>88</sup> The defendant, however, would not have been a candidate for the death penalty in many prosecutors' offices<sup>89</sup> because he lacked a violent criminal history,<sup>90</sup>

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any circumstance, coupled with the Bronx DA's rapid decision not to seek the death penalty despite the 120 day period designed to allow for "due deliberation." *Id.*

77. See *Pataki*, No. 1714/96, slip op. at 9. Governor Pataki stated that "No one, including a District Attorney, can substitute his or her sense of right and wrong for that of the Legislature." *Id.*

78. Dao, *supra* note 8, at B2.

79. In response, the Bronx DA stated that he had never "taken 'a position in opposition to the death penalty,'" but rather he had "left the door ajar, however slight" that he would seek the death penalty. *Pataki*, No. 1714/96, slip op. at 9-10. He also stated that by enacting the death penalty, the Legislature had given him a "tool, not an order to use it," and that the Governor was attempting to "impose his will" with a "heavy handed approach." *Id.* at 10.

80. See *supra* note 9.

81. See *id.* at 11. The Bronx DA was replaced by New York State Attorney General Dennis Vacco. See *id.*

82. See *supra* note 10.

83. See *id.* at 319.

84. See *id.*

85. See *id.*

86. See *id.* at 326. The defendant rejected a proposed plea to a life sentence plus ten to twenty years for aggravated assault. See *id.*

87. See *id.* at 330.

88. See *id.* at 332.

89. See *id.* at 320 (discussing how most other cities' district attorneys' offices likely would have sought life imprisonment).

he potentially had suffered childhood abuse<sup>91</sup> and questions existed regarding his mental health.<sup>92</sup>

This case was not unusual for the Philadelphia County District Attorney's Office because the Philadelphia DA seeks the death penalty nearly every time the law allows it,<sup>93</sup> despite its financial costs<sup>94</sup> and her own belief that it is not an effective deterrent.<sup>95</sup> The Philadelphia DA bases her aggressive utilization of the death penalty upon her constituents' support of its use and her belief that it both returns a "feeling of control" to the community and is "manifestly correct."<sup>96</sup>

#### **D. Other Forms of Influence on the Death Penalty Decision**

##### **1. *The Influence of Race on the Decision Whether to Seek the Death Penalty***

In *McCleskey v. Kemp*,<sup>97</sup> the Supreme Court directly addressed the influence of race on the decision whether to seek the death penalty.<sup>98</sup> In *McCleskey*, a defendant relied solely on a statistical study entitled the "Baldus study"<sup>99</sup> to prove that Georgia adminis-

90. *See id.* at 330.

91. *See id.* at 330 (Barnaby Wittels, the defendant's lawyer, stated that "[the defendant] was an abused child, bounced around from relative to relative.>").

92. The defendant drank peroxide and took approximately twenty pills before attempting to cut his wrists, only to discontinue the attempt after making a superficial wound. *See id.* at 320. The defendant's confession included a description of a typical day with the surviving victim that was later described as "pure fantasy." *Id.* at 321. In addition, the defendant had attempted to commit suicide on more than one prior occasion. *Id.* at 326.

93. *See Rosenberg, supra* note 11, at 320 (noting that "no prosecutor in the country uses the death penalty more" than the Philadelphia DA). In Pennsylvania, murder in the first degree occurs when an "intentional killing" is committed. 18 PA. CONS. STAT. ANN. § 2502 (West 1974). If a defendant is convicted of first degree murder, section 9711(d) provides eighteen aggravating circumstances for the jury to consider when deciding whether to impose the death penalty, including whether it was a contract murder, a felony murder, or whether the defendant has a "significant history of felony convictions involving the use or threat of violence," or the victim was "involved, associated, or in competition with the defendant" regarding drugs. 42 PA. CONS. STAT. ANN. § 9711(d) (West 1997).

94. *See Rosenberg, supra* note 11, at 321 (The Philadelphia DA has stated, "I don't care how many million it costs, given the billions wasted every year in large cities. Please don't tell me about cost when talking about the rights of the victim. It's not even a consideration. Whatever it costs is worth it.>").

95. *See id.*

96. *Id.* at 320.

97. 481 U.S. 279 (1987).

98. *See id.* at 282-83.

99. The "Baldus study" is a statistical study, proffered by Professors David C. Baldus, Charles Pulaski, and George Woodworth, that attempts to demonstrate "a disparity in the imposition of the death sentence in Georgia based on the race of the



tered its sentencing process in a racially discriminatory manner.<sup>100</sup> In one of its models, the study concluded that defendants charged with the murder of white victims were 4.3 times as likely to be subject to the death penalty as defendants charged with murdering African-Americans.<sup>101</sup> The model also concluded that African-Americans were 1.1 times as likely to have the death penalty imposed against them as other defendants.<sup>102</sup>

The Supreme Court determined that the statistical evidence did not prove that the decision-makers in the defendant's case acted with discriminatory intent.<sup>103</sup> As such, the Court concluded that the study failed to show that the death penalty was administered in a racially discriminatory manner.<sup>104</sup> Unlike other limited contexts where statistics alone are sufficient proof of intent to discriminate,<sup>105</sup> the Court noted that the decision to seek the death penalty rests upon "innumerable factors that vary according to the characteristics of the individual defendant and the facts of the particular capital offense."<sup>106</sup> Thus, because of the essential role discretion plays in the criminal justice process, the Court requires "exceptionally clear proof" to draw an inference of abuse of discretion.<sup>107</sup>

Regardless of the outcome of *McCleskey*, there is legitimate concern regarding the influence of race on the decision whether to seek the death penalty. In 1990, Congress' General Accounting Office released a review of death sentencing research that concluded that there is "a pattern of evidence indicating racial disparities in the charging, the sentencing, and the imposition of the death penalty after the *Furman* decision."<sup>108</sup>

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murder victim and, to a lesser extent, the race of the defendant." *Id.* at 286. The study reviewed more than 2,000 murder cases that occurred in Georgia in the 1970's and took 230 variables into account "that could have explained the disparities on nonracial grounds." *Id.*

100. *See id.*

101. *See id.* at 287.

102. *See id.*

103. *See id.* at 297.

104. *See id.* at 293-97.

105. The Court has accepted statistical evidence to prove intent to discriminate in the context of "an equal protection violation in the selection of a jury," *id.* at 293, and to prove "statutory violations under Title VII of the Civil Rights Act of 1964." *Id.* at 294.

106. *Id.* The relationship of the statistics to the capital sentencing decision are "fundamentally different from corresponding elements in the venire-selection or Title VII cases." *Id.*

107. *Id.* at 297.

108. U.S. GENERAL ACCOUNTING OFFICE, *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities*, in *THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES* 271 (1990). The study summarized its synthesis of other studies as

## 2. *The Influence of Class on the Decision Whether to Seek the Death Penalty*

Although the socioeconomic status of a defendant should have no influence upon the determination of whether that defendant is put to death,<sup>109</sup> this status influences the whole death penalty process because indigent defendants typically are defended by attorneys with neither the skills, resources nor commitment to litigate death penalty cases.<sup>110</sup> When competent representation by the attorney is lacking, the "most fundamental component of the adversary system" is absent, and the process of determining who should be subject to the death penalty fails.<sup>111</sup> This results in the arbitrary imposition of the death penalty,<sup>112</sup> as it is imposed "not upon those who commit the worst crimes, but upon those who have the misfortune to be assigned the worst lawyers."<sup>113</sup>

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supporting "a strong race of victim influence." *Id.* at 272. "The race of offender influence is not as clear cut and varies across a number of dimensions." *Id.*

109. See Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 459 (1995) ("The effects of resource deprivation pervade the entire process of determining who shall be chosen to die for their crimes, manifesting itself more dramatically in the pretrial investigation and legal research that goes undone, and in the expert assistance that is never provided. It can be said with confidence that most indigent defendants who have been sentenced to death received severely substandard discretion, and that this pattern will continue unless the courts intercede.").

110. See Bright, *Counsel for the Poor*, *supra* note 17, at 275 ("It is not the facts of the crime, but the quality of the legal representation, that distinguish" cases "where the death penalty is imposed, from many similar cases where it is not."). See LEWIS E. LAWES, *LIFE AND DEATH IN SING SING* 155-60 (1928, foreword by Adolph Lewisohn) ("[The death penalty] is an unequal punishment in the way it is applied to the rich and to the poor. The defendant of wealth and position never goes to the electric chair or the gallows. Juries do not intentionally favour the rich, the law is theoretically impartial, but the defendant with ample means is able to have his case presented with every favorable aspect, while the poor defendant often has a lawyer assigned by the court."); *Furman*, 408 U.S. at 251 (Brennan, J., concurring) ("One searches our chronicles in vain for the execution of any member of the affluent strata of this society."). Cf. B. PRETTYMAN, JR., *DEATH AND THE SUPREME COURT* 296-97 (1961) ("The problem of proper representation is not a problem of money, as some have claimed, but of a lawyer's ability, and it is not true that only the rich have able lawyers. Both the rich and the poor usually are well represented—the poor because more often than not the best attorneys are appointed to defend them. It is the middle class defendant, who can afford to hire an attorney but not a very good one, who is at a disadvantage.").

111. Bright, *Counsel for the Poor*, *supra* note 17.

112. See *id.*

113. *Id.* at 303. "In sum, resource deprivation of defense services for the poor is among the most significant factors influencing the outcome of death penalty cases." Vick, *supra* note 109, at 412.

The literature regarding the effect of class upon the imposition of the death penalty focuses upon the effect of less than satisfactory representation on a defendant's chance of having the death penalty imposed upon him or her. See Vick, *supra* note

### 3. *The Influence of Gender on the Decision Whether to Seek the Death Penalty*

In his concurrence in *Furman v. Georgia*, Justice Marshall noted that there was "overwhelming evidence" that the death penalty is utilized "against men and not women."<sup>114</sup> In 1990, for example, only 30 of the 2,347 death row inmates were women.<sup>115</sup> Moreover, even though one out of every eight persons arrested for murder is a woman,<sup>116</sup> a mere one out of a hundred is a death row inmate.<sup>117</sup> The execution of a woman is such an anomalous event<sup>118</sup> that it fuels the perception that there is a reluctance to sentence women to death that may be based, in part, upon a notion of chivalry.<sup>119</sup>

The events surrounding the execution of Karla Faye Tucker provide support for this perception. Karla Faye Tucker was convicted of murdering two sleeping victims with a three-foot pick-ax<sup>120</sup>—a crime described as one of "the most lurid" in the history of Hous-

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109, at 459; Bright, *Counsel for the Poor*, *supra* note 17, at 275. There is little accompanying research regarding whether a defendant's class has a significant effect on the decision whether to seek the death penalty. For example, whether a district attorney would seek the death penalty against a poor defendant with appointed representation rather than a wealthy defendant capable of hiring a prominent defense attorney to handle the matter. Regardless, the effect that a defendant's wealth has upon the likelihood of the imposition of the death penalty warrant that every measure be employed to limit those against whom the death penalty is sought to those who truly deserve it. This is necessary because of the disproportionate imposition of the death penalty upon the poor. Moreover, if it is shown that the defendant's class does impermissibly influence the decision, it provides even more reason to impose additional controls over the decision.

114. *Furman*, 408 U.S. at 365 (Marshall, J., concurring).

115. See Elizabeth Rapaport, *Some Questions About Gender and the Death Penalty*, 20 GOLDEN GATE U. L. REV. 501, 503 (1990).

116. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT 1988, at 9 (1989).

117. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE 46 (2d ed. 1988).

118. Only two women have been executed since 1976. See Sam Howe Verhovek, *Texas, in First Time in 135 Years, Is Set To Execute Woman*, N.Y. TIMES, Feb. 3, 1998, at A1. During that time period, 434 men have been executed. See *id.*

119. See Rapaport, *supra* note 115, at 504 ("The rarity of women on death row and the cultural anomalousness of executing women inevitably fuels speculation about whether female murderers receive favorable treatment in sentencing. Prima facie, the grave disparity between the risk of execution faced by men and women suggests that American society is possessed of a chivalrous disinclination to sentence women to die.").

120. Sam Howe Verhovek, *As Woman's Execution Nears, Texas Squirms*, N.Y. TIMES, Jan. 1, 1998, at A12.

ton, Texas.<sup>121</sup> There was little doubt about her guilt or whether she was responsible for her conduct. She confessed to the two murders.<sup>122</sup> She was an adult who was neither mentally ill nor retarded at the time of the murders.<sup>123</sup> Moreover, she showed no remorse following the murders, as she "boasted . . . that she had experienced a surge of sexual pleasure every time she swung the 3-foot pick-ax."<sup>124</sup>

Despite the egregious nature of her crime, there was a call for Texas Governor George W. Bush and the Texas Board of Pardons and Paroles to commute her death sentence to life in prison.<sup>125</sup> Those who called for clemency argued that she no longer was "the drug-addicted murderer of 14 years ago,"<sup>126</sup> but rather, she had become a born-again Christian<sup>127</sup> committed to a prison-based ministry that strove to prevent young individuals from becoming criminals.<sup>128</sup> Many men, however, have undergone similar transformations without any accompanying clamor for clemency.<sup>129</sup>

While further research is required to reliably ascertain whether favorable prejudice accounts for the paucity of women on death row, one scholar argues that the reason that women rarely are sentenced to death is not because of gender discrimination in their favor, but rather, because women rarely commit the types of murder that are subject to the death penalty.<sup>130</sup> Given the lack of research on this topic, however, any conclusions regarding the role of gender in the decision whether to seek the death penalty amount to nothing more than conjecture.<sup>131</sup>

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121. See *id.* at A14 ("Strung out with her boyfriend on a variety of drugs, [Karla Faye Tucker] repeatedly assaulted the sleeping victims with the murder weapon, [and] left it embedded in [a victim's] chest . . .").

122. See Editorial, *When the Murderer Is a Woman*, N.Y. TIMES, Jan. 31, 1998, at A14.

123. See *id.*

124. Verhovek, *supra* note 120, at A12.

125. See Editorial, *supra* note 122, at A14.

126. *Id.*

127. See *id.*

128. See Verhovek, *supra* note 120, at A12.

129. See Editorial, *supra* note 122, at A14.

130. See Rapaport, *supra* note 115, at 510. Over ninety-five percent of those convicted of violent crimes are male, typically a factor in favor of the availability of the death sentence. See *id.* at 509-10. In addition, approximately eighty percent of death row inmates were convicted of felony murder. See *id.* at 509. Women, however, comprise only six percent of those suspected of committing felony murder. See *id.* Also, while women commit "intra-family" homicides nearly as frequently as men, these offenses are very seldom subject to the death penalty. *Id.* at 509-10.

131. See Victor L. Streib, *Death Penalty for Female Offenders*, U. CIN. L. REV. 845, 878 (1990). However, if it is indeed true that women receive beneficial discrimination

4. *The Effect of Improper Political Influence and Subjective Judgments on the Decision Whether to Seek the Death Penalty*

As elected officials, prosecutors are concerned about their political well-being.<sup>132</sup> District attorneys deciding whether to seek the death penalty have the opportunity to state their intentions during press conferences, and to be seen on television while in the courtroom arguing a case.<sup>133</sup> Because potential death penalty cases place prosecutors in the limelight,<sup>134</sup> there is some concern that media attention focused on these cases may be sought for political advantage.<sup>135</sup>

Death penalty decisions also provide platforms for political foes. For example, a failure to seek the death penalty would give opponents an opportunity to broadcast charges from a victim's family that the prosecutor is "soft on crime" and thus damage the district attorney's public support.<sup>136</sup> Although allowing political considerations to affect the decision whether to seek the death penalty

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in this context, it only strengthens the argument for controls over the imposition of the death penalty.

132. See Hancock et al., *supra* note 16, at 1563 ("[P]rosecutors are elected officials potentially subject to the pressures of public opinion."); Vorenberg, *supra* note 18, at 1558 (stating that prosecutors are subject to political influence "largely but not solely" because they are elected).

133. See Bright et al., *Death Penalty* *supra* note 18, at 286 ("Trying death cases has helped the prosecutor get in front of the community. They call press conferences and announce they are going for the death penalty. Cameras in the court means that they are on television all during the trial, calling and arguing for the death penalty.").

134. See *id* at 286 (discussing how seeking the death penalty is politically beneficial to a prosecutor).

135. See Vorenberg, *supra* note 18, at 1558 ("One must worry that political influences will enter into the decisions prosecutors make and that they may deal harshly or gently with particular individuals for political reasons."); Bright et al., *Death Penalty*, *supra* note 18, at 286 (Even if a death penalty decision is reversed because of prosecutorial misconduct, the prosecutor can still benefit by calling a press conference and discussing, for example, "how the federal judges were hysterical, emotional, and personally opposed to the death penalty, and announced that he would seek the death penalty again.").

136. Wise, *supra* note 18.

clearly is inappropriate,<sup>137</sup> it is extremely difficult to prove that these considerations have affected the decision.<sup>138</sup>

In addition to its vulnerability to improper political considerations, a district attorney's decision to seek the death penalty is fraught with subjective judgments.<sup>139</sup> It is an unavoidable outcome of prosecutorial discretion that the decision whether to seek the death penalty will be influenced by the particular "philosophical, ethical, religious or other views" of a district attorney.<sup>140</sup> For example, a prosecutor may dislike certain offenses or offenders for personal reasons, and the prosecutor may vary leniency on this basis.<sup>141</sup> This creates a dangerous possibility "not accounted for in the assumption of rational, autonomous actors."<sup>142</sup>

## II. Previously Proffered Controls of the Exercise of Prosecutorial Discretion

It is fair to assume that prosecutors are professionals who take their jobs seriously,<sup>143</sup> and will attempt to avoid the political damage that would accompany the exposure of improper charging practices.<sup>144</sup> However, these assumptions are not sufficient to pro-

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137. "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 STANDARDS RELATING TO THE ADMIN. OF CRIM. JUST., The Prosecution Function, Standard 3-3.9 (3rd ed. 1992). These Standards reflect "the considered judgment of . . . a broad spectrum of prominent prosecutors, defense counsel, judges, and law professors as to appropriate, modern prosecutorial ethics." John M. Burkoff, *Prosecutorial Ethics: The Duty Not "To Strike Foul Blows,"* 53 U. PITT. L. REV. 271, 288 (1992).

138. See Bennett L. Gershman, *A Moral Standard*, *supra* note 23, at 513 n.2 ("[T]he doctrines of selective, vindictive, and bad faith prosecutions provide modest constraints on the prosecutor's charging power."); Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 441 (1992) ("[T]here is a presumption that the prosecutor acts in good faith, and overcoming that presumption is almost never successful.") [hereinafter Gershman, *The New Prosecutors*].

139. See Hancock et al., *supra* note 16, at 1563.

140. *Id.*

141. See Vorenberg, *supra* note 18, at 1553.

142. *Id.* Vorenberg also argues that obtaining information and leniency in sentencing should not be a justification for prosecutorial discretion because these cases represent a small percentage of those in which plea bargaining is used. See *id.* at 1552-53.

143. Prosecutors are professionals who take their responsibilities seriously. Pizzi, *supra* note 16, at 1336-37. Generally, if a district attorney wishes to be re-elected, the district attorney has a powerful incentive to run a "professional office" because that district attorney must defend the office's record and the manner in which discretion was employed to the local constituents. *Id.* at 1338, 1344. This involves making fair charging decisions, and ensuring that prosecutors in the office charge similar crimes in a similar manner. See *id.* at 1344.

144. See *id.* at 1345 (A controversy caused by the manner in which a discretion is exercised in an office could damage the district attorney's chances of re-election.

tect against the potential for arbitrariness and influence of bias inherent in the death penalty decision,<sup>145</sup> particularly in light of the great deference granted prosecutors by the judiciary.<sup>146</sup> As a result of this situation, authors have proffered four primary controls to check or limit the use of prosecutorial discretion: internal controls,<sup>147</sup> legislative controls<sup>148</sup> judicial controls<sup>149</sup> and administrative controls.<sup>150</sup>

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While this means that prosecutors are politically influenced, this form of political influence is distinct from improper political considerations because these focus upon the process used to reach a decision rather than altering an individual decision to gain political advantage or avoid political disadvantage.).

145. See Vorenberg, *supra* note 18, at 1560, 1562 ("It is illusory . . . to assume that prosecutorial discretion makes the system more efficient and effective in controlling crime. Instead, it subverts the processes of accountability and oversight that are essential to the improvement of the criminal justice system. \* \* \* [T]he key to narrowing discretion is to make prosecutors accountable for their decisions.").

146. See *supra* Part I.B.

147. See generally Abrams, *supra* note 37, at 7-58; DAVIS, *supra* note 20, at 102-03, 143-44, Pizzi, *supra* note 16, at 1344-45, 1363-72; Vorenberg, *supra* note 18, at 1543-45, 1562-66.

148. See generally DAVIS, *supra* note 20, at 45-46, 56, 69, 146-47; Vorenberg, *supra* note 18, at 1564-68.

149. See generally DAVIS, *supra* note 20, at 151-61, 207-14; Vorenberg, *supra* note 18, at 1568-72.

150. See generally John A. Horowitz, Note, *Prosecutorial Discretion and the Death Penalty: Creating a Committee to Decide Whether to Seek the Death Penalty*, 65 *FORDHAM L. REV.* 2571, 2600-10 (1997).

Gubernatorial supersedure also has been utilized to control prosecutorial discretion in the context of the decision whether to seek the death penalty. It is not widely utilized, however, as only New York and Colorado have statutes providing for gubernatorial supersedure of district attorneys. For example, Colorado has granted its governor great discretion in superseding district attorneys at the local level. See *COLO. REV. STAT. ANN.* § 24-31-101(1)(a) (1988) (The attorney general "shall appear for the state and prosecute and defend all actions and proceedings, civil and criminal, in which the state is a party or is interested when required to do so by the governor, and he shall prosecute and defend for the state all causes in the appellate courts in which the state is a party or interested."). Under Colorado law, this discretion is vested only with the governor, as the supersedure of a district attorney can only be based upon the governor's order. See *id.* See also *People ex rel. Witcher v. District Court*, 549 P.2d 778, 779-80 (Colo. 1976) (en banc) (quoting *People v. Gibson*, 125 P. 531, 536 (Colo. 1912)) ("[W]hen the Governor . . . requires the attorney general to prosecute a criminal case in which the state is a party, he becomes to all intents and purposes the district attorney, and may in his own name and official capacity exercise all the powers of such officer, for he is then, and in that case, the public prosecutor. Being authorized and empowered to appear and prosecute, he can do each and everything essential to prosecute in accordance with the law of the land . . .").

In New York, the governor's power to supersede a district attorney is well established. See *supra* note 7 and accompanying text. On the rare occasion that a New York governor has exercised this power, Pitler, *supra* note 7, at 517, the use has been based upon the "nature of the problem," the governor's "view of the nature of executive power and its relation to the needs of the local community . . ." *Id.* at 522.

### A. Internal Controls

Internal guidelines generally involve the promulgation of policy statements that guide the exercise of decision-making within a particular prosecutor's office.<sup>151</sup> The goal of internal guidelines is to promote consistent prosecutorial decision-making by providing each prosecutor with some notion of the criteria that others employ.<sup>152</sup> This can be accomplished by creating guidelines that set out factors to be considered in a comprehensive and detailed manner.<sup>153</sup>

Internal guidelines generally do not encroach on a prosecutor's decisional autonomy.<sup>154</sup> Typically, prosecutors' offices have an unofficial system of internal controls in order to provide inexperienced prosecutors with guidance and supervision from experienced

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Despite the general acceptance of the governor's supersedure power, there are serious questions regarding the appropriateness of its use in the context of a district attorney's decision whether to seek the death penalty. One scholar has argued that a governor should show considerable restraint when exercising the power, especially "where party or local politics" are at issue. *Id.* See also *id.* ("One constant pattern has been a fairly general reluctance to issue an executive order of superseder where party or local politics was involved. The power of superseder has been used rarely, and such is its design."). Moreover, the utilization of gubernatorial supersedure to control the exercise of prosecutorial discretion in the decision whether to seek the death penalty is fraught with dangers because it amounts, essentially, to the "self-appointed transfer of discretion from one individual to another." *Johnson*, 91 N.Y.2d at 241 (Smith, J., dissenting).

151. See *Abrams*, *supra* note 37, at 25-26, 57; Theodora Galacatos, Note, *The United States Department of Justice Environmental Crimes Section: A Case Study of Inter- and Intra-branch Conflict Over Congressional Oversight And the Exercise of Prosecutorial Discretion*, 64 *FORDHAM L. REV.* 587, 643 (1995) ("Internal controls include formal guidelines, official memoranda, and public or nonpublic policy statements.").

152. See *Abrams*, *supra* note 37, at 7, 57 (stating that internal guidelines can, "at the very least, narrow the range of considerations deemed relevant and channel the thinking of all prosecutors working within the same prosecutorial system toward the same elements. This will not insure absolute uniformity of the decision, but it should move the prosecutorial system further along the road to 'tolerable consistency.'").

153. See *id.* at 57 ("[I]t is both feasible and desirable to develop comprehensive and detailed policy statements governing the exercise of prosecutorial decision-making and . . . prosecutorial resources should be allocated to talk of developing such policy.").

154. See *Pizzi*, *supra* note 16, at 1345. This informal system usually involves a scheme of guidelines or policies, or a scheme of direct review of charging decisions, or mixture of the two. *Id.* Informal internal guidelines are often used to prevent "scandal." *Id.* In addition, they are used to ensure that charging decisions will be decided similarly. See *id.* When a jurisdiction must process a high number of cases, it is much easier to accomplish if all the actors in the process—the prosecutors, "defense lawyers[,] and judges"—understand the general policies of a particular district attorney's office. *Id.*



prosecutors.<sup>155</sup> As prosecutors already have accepted a form of internal guidelines, the arguments against their utilization generally focus on their ineffectiveness, rather than their degree of intrusion into decisional autonomy. For example, one author argues that because of the need to preserve the hierarchical relationship between superior officers and their subordinates,<sup>156</sup> the superior officer's examination of a subordinate's decision may not be decided solely on the merits, thus the effectiveness of the guidelines would be undermined.<sup>157</sup> It also is asserted that it would be impossible to draft a set of guidelines that could anticipate every conceivable situation that might occur.<sup>158</sup> In addition, it is argued that internal guidelines currently do not control prosecutorial discretion effectively because instead of eliminating discretion completely, they only push the unreviewable exercise of discretion upward<sup>159</sup> to higher ranking prosecutors.<sup>160</sup>

Unlike the implementation of internal guidelines, the actual publication of these guidelines could lead to significant controversy regarding the effect that the outside examination of prosecutorial policies could have on the administration of the criminal justice system. Prosecutors generally object to the publication of internal controls because they fear that if an office's policy is lenient towards certain offenses, it would appear as if the office was "soft on crime."<sup>161</sup> Prosecutors also fear that published guidelines would

155. See *id.*

156. See DAVIS, *supra* note 20, at 144 (A superior officer "often has official, psychological, or personal reasons for protecting that relation . . .").

157. See *id.* at 144-45.

158. Pizzi, *supra* note 16, at 1368; Gershman, *A Moral Standard*, *supra* note 23, at 519, 520 ("[Internal] guidelines could not be sufficiently explicit to regulate prosecutorial discretion in fact-specific cases."). Guidelines are a "starting point" to control the exercise of prosecutorial discretion, but they "cannot and should not eliminate" it. *Id.* The difficulties inherent in attempting to draft such a set of guidelines are exhibited by the ABA Standards Relating to the Administration of Criminal Justice. See Pizzi, *supra* note 16, at 1369; ABA STANDARDS RELATING TO THE ADMIN. OF CRIM. JUST., The Prosecution Function, Standard 3-3.9 (3rd ed. 1992). The ABA standards rule essentially affords "general guidance" for the manner in which a prosecutor should exercise discretion, but, in the end, reaffirms the notion that prosecutors have extensive discretion. See Pizzi, *supra* note 20, at 1369. The rule neither attempts to "exhaust" the factors a prosecutor may contemplate in determining how to exercise discretion, nor does it indicate the manner in which the listed factors should be weighed against each other when they lead to different conclusions. *Id.* at 1369-70.

159. See Vorenberg, *supra* note 18, at 1545.

160. See *id.*

161. The appearance that the prosecutor is "soft on crime" could evoke an issue that is politically damaging. Pizzi, *supra* note 16, at 1365. See also Wise, *supra* note 18.

become "litigation weapons" with which individual prosecutorial decisions could be attacked.<sup>162</sup> Moreover, even if publication was allowed, a prosecutor's desire to maintain as much flexibility as possible for unusual cases would likely result in guidelines that are "hedged with general exceptions" to maintain the greatest amount of flexibility for departures from the policy.<sup>163</sup>

One proponent of the publication of internal guidelines argues that the publication of prosecutorial policy will subject a prosecutor's decision-making to outside examination and, therefore, to "scrutiny, evaluation, and criticism."<sup>164</sup> It is argued that this scrutiny and criticism will lead prosecutors to both exercise a greater degree of care in the formulation of policy,<sup>165</sup> and to revise and improve policy.<sup>166</sup> Moreover, it is argued that the secrecy inherent in the non-publication of prosecutorial policy, and the lack of accountability that accompanies it, invites corruption, irrationality, and discrimination in decision-making.<sup>167</sup> However, because a storm of controversy engulfs the decision to seek the death penalty,<sup>168</sup> one advocate of published prosecutorial guidelines con-

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162. For example, if a district attorney's office had a policy to be lenient on first-time offenders, but a prosecutor within that office decided to prosecute a first-time offender despite that policy, the defendant might attempt to challenge the decision to prosecute in court because it conflicts with office policy. See Pizzi, *supra* note 16, at 1364-66 (discussing how published guidelines could be turned into litigation weapons). The publication of internal guidelines would likely result in guidelines that are "hedged with general exceptions" to assure that the greatest amount of flexibility for departures from the policy is maintained. See *id.* at 1367.

163. See *id.*

164. Abrams, *supra* note 37, at 27; SISSELA BOK, SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION 25 (1982) (arguing that secrecy can harm those that utilize it by preventing "criticism and feedback," eventually leading individuals to "erroneous beliefs and ways of thinking").

165. See Abrams, *supra* note 37, at 27.

166. See *id.*

167. See BOK, *supra* note 164, at 106 ("[S]ecrecy carries some risk of corruption and irrationality; if [individuals] dispose of greater than ordinary power over others, and if this power is exercised in secret, with no accountability to those whom it affects, the invitation to abuse is great."). Discrimination is perhaps the most problematic consequence of secrecy. See also *id.* at 109-10 (Collective secrecy leads to other dangers, including "discrimination . . . between insider and outsider, between those set apart and all others. Such discrimination is one thing when it sets an individual apart as unique and protects his privacy. It is quite another thing for a group. The criteria selected for inclusion or exclusion may then lead to discriminatory action toward those excluded—on racial grounds, perhaps, or on sexual, political, or religious ones.").

168. The controversy that the decision to seek the death penalty causes can be summed up as follows:

Defenders of the death penalty believe that despite needless expense and avoidable delay, capital punishment as actually administered does a reason-

cedes that publication should not be required under such politically sensitive circumstances,<sup>169</sup> because it likely would hinder the formulation of the death penalty policy.<sup>170</sup>

### B. Legislative Controls

One author asserts that legislative bodies should take an "affirmative obligation to ensure that the laws it enacts are enforced."<sup>171</sup> The author argues that this can be accomplished through "vigorous oversight" of prosecutors that involves the sharing of information concerning "law enforcement strategies and the development of prosecutorial criteria."<sup>172</sup> Another author contends that prosecutors should be required by law to issue both guidelines for making decisions and reports summarizing the analysis used to reach these decisions.<sup>173</sup>

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able (not perfect) job of winnowing out the worst and most dangerous offenders from among the bad—and that an even better job would be done if the laws were changed to abolish frivolous appeals and to reduce costs and the pileup on the nation's death rows. Opponents of the death penalty disagree; they argue that the present system is but the latest version of death penalty practices that cannot be justified, that no significant improvements are likely, and that moral and practical objections to the death penalty ought therefore to prevail.

BEDAU, *supra* note 2, at 24. These opposing views arise whenever the death penalty is sought, but they become particularly heated when a high-profile, highly controversial case is involved. For example, the superseding of the Bronx DA by Governor Pataki was described as an "unprecedented feud over politics, principles, and the law." Rachel L. Swarms, *Governor Removes Bronx Prosecutor from Murder Case*, N.Y. TIMES, Mar. 22, 1996, at A1. This "unprecedented feud" was carried out via faxes, press conferences, and even before a national audience on the "Today" show. *See id.* Another example of the controversy that can occur is provided by the recent execution of Karla Faye Tucker, which caused an intense nationwide debate regarding the death penalty. *See* B. Drummond Ayres, *Death Penalty Support Declines After Execution*, N.Y. TIMES, Mar. 23, 1998, at A5.

169. *See* Abrams, *supra* note 37, at 33.

170. "Undoubtedly a requirement of publication of policy relating to controversial and politically sensitive matters will inhibit the formulation of such policies. But it may be necessary to recognize that sometimes publication of policy will arouse undeniable controversy and therefore should not occur." Abrams, *supra* note 37, at 33. The basis for nonpublication should not, however, be utilized by prosecutors to undermine a requirement of publication under general circumstances. *See id.* Abrams thus argues that "the burden should be placed on those who oppose it to justify nonpublication in the particular case." *Id.*

171. Galacatos, *supra* note 151, at 647 (citing Vorenberg, *supra* note 18, at 1558).

172. *Id.* (citing Vorenberg, *supra* note 18, at 1567).

173. Vorenberg, *supra* note 18, at 1566. The basis of the argument for the utilization of legislative controls to limit prosecutorial discretion is that individuals that have power are necessarily reluctant to voluntarily relinquish that power, and thus the individuals must be statutorily forced to do so. *See id.* at 1564-65 (arguing that few prosecutors' offices would promulgate guidelines that effectively limit their power unless

Opponents of legislative controls object to their utilization based upon a fear of the politicization of the prosecutorial decision-making process,<sup>174</sup> and the disclosure of law enforcement documents and policies.<sup>175</sup> One proponent of legislative controls, however, argues that any concerns about the confidentiality of ongoing investigations and law enforcement strategies could be accommodated.<sup>176</sup> For example, sensitive information could be examined in non-public hearings.<sup>177</sup> Another believes that it should be feasible to effectuate general legislative "oversight"<sup>178</sup> over case management without offending law enforcement concerns.<sup>179</sup> However, one op-

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required by the legislature); DAVIS, *supra* note 20, at 224 (noting the "seeming unanimity of American prosecutors that their discretionary power must be completely uncontrolled"). This is especially true given the degree to which discretion has become engrained in the professional role of prosecutors. *See also id.* at 191 (noting how "deeply embedded" the belief is that a prosecutor's discretion must be uncontrolled). *Cf.* Gershman, *A Moral Standard*, *supra* note 23, at 519 ("[A]n institutional reluctance to unduly restrict their own discretion makes it even more unlikely that prosecutors would promulgate overly specific guidelines.").

174. *See* Galacatos, *supra* note 151, at 632 ("Legislators because of their susceptibility to political pressures should have no voice in such deliberations.") (citing Benjamin R. Civiletti, Justice Unbalanced: Congress and Prosecutorial Discretion, Address Before The Heritage Foundation (Aug. 19, 1993)).

175. *See* Ronald L. Claveloux, Note, *The Conflict Between Executive Privilege and Congressional Oversight: The Gorsuch Controversy*, 1983 DUKE L.J. 1333, 1348 (1983) (Officials feared that law enforcement efforts and litigation would be stymied if lists of potential witnesses, available evidence, anticipated defenses and legal issues were disclosed.); Peter M. Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress*, 71 MINN. L. REV. 461, 511 (1987) (The United States Department of Justice rationales for the non-disclosure of ongoing investigative files include "forestalling political influence over the conduct of an investigation, preventing the disclosure of investigative sources and methods, protecting the privacy of innocent parties named in investigative files, protecting the safety of confidential informants, and maintaining the appearance of 'integrity, impartiality and fairness of the law enforcement process as a whole.'").

176. *See* Galacatos, *supra* note 151, at 647 (citing Vorenberg, *supra* note 18, at 1567) ("Advocates of such reforms further argue that vigorous oversight can accommodate concerns for confidentiality of sensitive information regarding targets and pending cases and the need to keep law enforcement strategies secret.").

177. Galacatos, *supra* note 151, at 639.

178. Vorenberg argues that "[o]versight does not involve separation-of-powers issues that arise when the legislative branch seeks information or control relating to particular prosecutions. It is appropriate for the legislature to exercise general oversight; because prosecutorial power can nullify or vary legislative policy, the legislature is entitled to information about how that power is exercised." Vorenberg, *supra* note 18, at 1567 n.146.

179. *See id.* For example, legislative committees could create an "annual reporting format, requiring clear depiction" of the manner in which discretion is utilized and explanations for divergence from usual patterns. *Id.* This annual reporting format could include "summaries, without individual identification," of the manner in which cases are handled on an individual basis. *Id.* This review would play an integral part in ensuring that prosecutors are not acting in contravention of "legislative policy." *Id.*

ponent of legislative controls counters that legislators may have neither the time, the expertise, nor the inclination necessary to effectuate anything more than general formulations.<sup>180</sup>

### C. Judicial Controls

Judicial controls over prosecutorial discretion are the least likely controls to be implemented because the doctrine of separation of powers prohibits the review of a prosecutor's exercise of discretion by the judiciary.<sup>181</sup> Despite this widely recognized policy, it has

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180. See DAVIS, *supra* note 20, at 46. "Legislators and their staffs know their own limitations, they know they are ill-equipped to plan detailed programs, and they know that administrators and their staffs are better equipped because they can work continuously for long periods in limited areas." *Id.* at 56. First, a legislator and the legislator's staff have "limited confidence" in their ability—in the time available—to develop an excellent understanding of a specialized subject matter, and this "state of mind" results in "general and vague formulations" of purposes. *Id.* Second, the creation of policies regarding complex subject matter is often best accomplished by contemplating each "concrete problem" as it presents itself. *Id.* Any attempt to generalize in advance effectively is usually "beyond the capacity of the best minds." *Id.* Third, subject matter involving delegation is usually "highly controversial." *Id.* Consequently, the more specific the statement of legislative purpose, the more arduous the attempt to gain a consensus that will muster enough support for passage; however, the "more vague and general" the statement of legislative purpose, the more likely it is that a consensus will be achieved. *Id.* Thus, the most qualified authorities to confine the exercise of prosecutorial discretion are the prosecutors themselves, who are "clearly in the best position to act" because they have "the most direct knowledge of practical needs" regarding the exercise of this discretion. *Id.* at 69. As evidence, one need look no further than the "brutal unfairness" that can result from imposed guidelines such as the Federal Sentencing Guidelines. Pizzi, *supra* note 16, at 368. Moreover, the exercise of prosecutorial discretion is much more complex than the discretion employed by the judiciary, which rather complicates matters. *Id.*

181. See Vorenberg, *supra* note 18, at 1546 ("Courts often justify their refusal to review prosecutorial discretion on the ground that separation-of-powers concerns prohibit such review."). "Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought." *Newman*, 382 F.2d at 480. "Put bluntly, except in the narrow band of cases where a prosecutor's actions violates the Constitution, an American judge has no power to reduce or reshape criminal charges to fit the evidence or the equities of a particular case." Pizzi, *supra* note 16, at 1351.

For example, in *State v. Bloom*, 497 So.2d 2 (1986), the Supreme Court of Florida specifically addressed whether it was appropriate for a judge to determine, before trial, whether the death penalty should be sought in a particular case. 497 So.2d at 2. In *Bloom*, a defendant who was charged with first-degree murder moved to preclude the prosecution from seeking the death penalty. See *id.* at 3. The defendant argued that the state "lacked sufficient evidence" to impose the death penalty in the case. *Id.* The circuit judge granted this motion, and directed the prosecution to "proceed with the first-degree murder trial as a non-capital case." *Id.* The prosecution appealed, asserting that the circuit judge did not have the authority to determine the appropriateness of the decision to seek the death penalty in a case before trial. See *id.* The prosecution argued that the circuit judge's ruling "unconstitutionally infringe[d] . . . an

been argued that reliance upon the separation of powers doctrine is misguided because, unlike the time when the doctrine first was developed, judicial review of administrative discretion currently is allowed.<sup>182</sup> Today, courts review executive action to guard against abuses of administrative discretion while avoiding assumption of executive power.<sup>183</sup> Moreover, it is argued that because there is a stronger need for judicial review of the exercise of prosecutorial discretion than that for administrative discretion — as abuse by prosecutors is prevalent, injustice could be prevented, the issues are suitable for judicial review, and significant interests are involved—it is even more critical that judicial controls be implemented.<sup>184</sup>

Opponents of judicial controls note two practical problems with their adoption. First, given the confined scope of review that likely would be applied to prosecutorial decision-making,<sup>185</sup> and considering the lack of general standards to guide courts,<sup>186</sup> judges are likely to be extremely hesitant to overturn a prosecutor's decision whether to prosecute unless the abuse is "extreme."<sup>187</sup> Even if there were general standards to guide the courts, judicial review would add "a whole new layer of pretrial review that dwarfs any of the efficiencies that guidelines can achieve."<sup>188</sup> Second, to ask a judge to review charging decisions is diametrically opposed to the traditional role of judges in the adversarial system, in which judges

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executive function exclusively within a prosecutor's discretion." *See id.* The Florida Supreme Court held that the circuit judge had "no authority to interfere with the prosecutor's discretion in proceeding with this cause as a death penalty case." *Id.* In reaching this decision, the court noted the great deference granted prosecutor's in the exercise of their discretion. *See id.* The court also noted that allowing a judge to determine, before trial, whether it was appropriate to seek the death penalty in a particular case would modify the procedure implemented by Florida's death penalty statute. *See id.*

182. DAVIS, *supra* note 20, at 229 (arguing that this assumption should be re-examined given the modern view that courts can review executive decisions "to protect against abuses while at the same time avoiding judicial assumptions of executive power").

183. *See id.* There is an "enormous difference" between making a prosecutor seek prosecution or charge a suspect and regulating that authority. Vorenberg, *supra* note 18, at 1546.

184. *See* DAVIS, *supra* note 20, at 211-12; Vorenberg, *supra* note 18, at 1546 (Judicial review of executive action is commonly performed in the context of administrative discretion, however, the interests at stake in criminal prosecution are much greater, and thus the basis for judicial review of prosecutorial discretion is stronger than in the administrative arena.).

185. *See* Abrams, *supra* note 37, at 51.

186. *See id.*

187. *Id.*

188. Pizzi, *supra* note 16, at 1366.

maintain a "neutral and passive role" regarding "charging decisions and the development of evidence at trial."<sup>189</sup> Unless one is prepared to alter this role, it is an inescapable reality that judicial review of a prosecutor's decision will be a mere "formality."<sup>190</sup>

#### D. Administrative Controls

One student author proffered a provocative alternative check on prosecutorial discretion in the form of a legislatively enacted administrative death penalty committee.<sup>191</sup> In support of his proposition, the author asserts that previous solutions "fail[ed] to solve all of the discretionary problems present in the capital context,"<sup>192</sup> and argues that the dangers inherent in prosecutorial discretion warrant the removal of prosecutors from participating in the decision whether to seek the death penalty.<sup>193</sup>

The author further contends that removing a district attorney from the decision to seek the death penalty and vesting the decision with a committee will increase both the legitimacy of the deci-

189. *Id.* at 1353.

190. *Id.* at 1353-54 (questioning whether a judge would review a case with a prosecutor, and, if so, whether there would be an *ex parte* proceeding, or whether the defendant would be represented by counsel).

191. Horowitz, *supra* note 150, at 2571.

192. *Id.* at 2600.

193. *Id.* The author argues for a legislatively enacted administrative death penalty committee. *See id.* Each county would have a different committee, comprised of seven members, that would determine whether to seek the death penalty. *See id.* The composition of the committee would be determined by the governor, the district attorney, and the members of the panel itself. *See id.* at 2601-02. The governor and the county's district attorney would each appoint three committee members, and the remaining member would be selected by the other six members of the committee. *See id.* Each member of the committee would remain on the committee as long as the person who appointed them remained in office. *See id.* at 2606-07. If an official left office prior to the end of his or her term, the replacement would not be allowed to appoint new members. *See id.* at 2607. This is because the replacement's appointments might not "accurately reflect the views of the electorate." *See id.*

In practice the death penalty committee would function as follows. The prosecutor would decide when first degree murder was an appropriate charge, but at that point the decision whether to seek the death penalty would be the committee's decision. *See id.* After a "statutorily determined" period of time had passed, the prosecution and the defense would present the results of their respective investigations to the committee. *Id.* "The committee would listen to arguments, review the evidence, request additional information if desired, and render a decision." *Id.* This decision would be based upon a majority vote of the members and would be released to the public as a memorandum. *See id.* at 2601-02. The memorandum would explain the basis of the decision, however, the specific votes of each member would remain anonymous. *See id.* After the decision is rendered, the matter would be returned to the prosecutor's office for prosecution, and the responsibility for all discretionary decisions is once again theirs. *See id.* at 2602.

sion-making process<sup>194</sup> and the "public accountability of the decision-maker."<sup>195</sup> The author argues this would result in a less political decision<sup>196</sup> that avoids the discriminatory imposition of the death penalty.<sup>197</sup>

### III. An Overlooked Solution

Previously proffered controls over prosecutorial discretion fail when employed individually. When useful elements of these controls are employed collectively, however, the death penalty decision-making process is improved. Nevertheless, the exact form of the control utilized must be chosen carefully to balance the competing concerns of maintaining uniform decision-making and relatively direct constituent control within the confines of district attorneys' offices that vary widely in size.

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194. Insulating the decision whether to seek the death penalty from political pressure protects the decision from "personal and political issues" that can impact it. *See id.* at 2607. These issues include experiences from the past, "their relationship with the defendant's attorney, political factors including a need to be tough on crime, or personal revenge (e.g., the victim is a police officer, from the district attorney's office, a family member, or a friend)." *Id.* at 2608. Even if one member of the committee has a "personal agenda," the need for a majority vote will ensure that this bias will be "unlikely to affect" the decision. *Id.* at 2607. The presence of a "moderate" member appointed after the "negotiation" of the members, and not the result of a "political mandate" further enhances the legitimacy of the decision. *Id.* at 2608. This ensures "a thoughtful and even-handed decision" even if the governor and district attorney have opposite views regarding the death penalty. *Id.*

195. *Id.* The use of a committee would lessen the "secrecy" of the decision and thus increase the "accountability" of the decision-making process by publishing the reasons for decisions. *See id.* The publication of memoranda explaining the basis of their decisions would provide a body of informal precedent to guide future decisions. *See id.* at 2609. This would ensure uniformity in factually similar cases in each respective county. *See id.*

196. The author argues that the creation of a committee empowered to decide whether to seek the death penalty would allow politicians to "openly espouse their views" without fear of later repercussions. *Id.* at 2606. This also would allow district attorneys to voice their views without fear of supersedure, and thus lead to a more informed electorate, resulting in a "functioning representative democracy." *Id.* The utilization of a committee thus would ensure that the political process would remain an important part of the decision whether to seek the death penalty. *See id.* The decision, however, would be "one layer removed" from the political process because members remain on the committee for as long as the person who appoints them remains in office. *Id.* Thus ensuring that "no member could be removed for refusing to be a puppet for the person who appointed" the member, *id.* at 2606-07, and ensuring that the committee members are "immune to public opinion." *Id.* at 2607.

197. The increase in accountability will better the "chances of preventing the discriminatory application of capital sentences" because there will be pressure on the governor and the respective district attorney to ensure "minority representation" on the committee. *Id.*



### A. A Critique of Previously Proffered Controls of the Exercise of Prosecutorial Discretion

Internal, legislative, judicial and administrative controls each have individual strengths and weaknesses when utilized as a means to limit the exercise of discretion in the decision whether to seek the death penalty.<sup>198</sup> While these controls are flawed individually,

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198. In addition, there are problems inherent in the utilization of gubernatorial supersedure to as a control over the exercise of discretion in the context of the decision to seek the death penalty. It is useful to use the Governor's supersedure of the Bronx DA to illustrate these problems. The Governor's decision to supersede the Bronx DA was based upon several reasons. Robert Johnson's rejection of the Governor's aides' suggestion for compromise "convinced" the Governor and his aides that the Bronx DA would never seek the death penalty, regardless of the circumstances, even though he publicly stated he might. Dao, *supra* note 8, at B2. When this became clear, Governor Pataki feared that the death penalty law would be open to challenge because it was not being consistently applied statewide. *Johnson*, No. 1714/96, slip op. at 12. This concern is based upon a provision of the death penalty law which requires the New York Court of Appeals to periodically review whether the death penalty is being applied in similar ways across the state. Dao, *supra* note 8, at B2. Finally, there was a degree of animosity at play in the Governor's quick decision. *See id.* There was a consensus among the Pataki staff that Robert Johnson had been so "confrontational and stubborn" that quick action was needed to "protect" the Governor's authority as well as the death penalty. *Id.* On the basis of these concerns, the Governor removed the Bronx DA before the statutorily provided 120 days had expired, because, if Johnson decided not to seek the death penalty, it could not be sought by any prosecutor who took his place thereafter. *See id.*

The Governor apparently attempted to avoid this action by asking Robert Johnson to tell him his decision in advance, but the Bronx DA refused. *See id.* Robert Johnson did not dispute that Governor Pataki had made such proposals. *See id.* Rather, he argued that the Governor had acted prematurely, for he had not ruled out the proposals his aides had offered. *See id.* Robert Johnson stated that "[t]he Governor and his staff, as they have throughout the process, they want the answers they want, when they want them . . . I couldn't do that and be true to my obligations as district attorney." *Id.*

Despite the apparent reasonableness of the Governor's supersedure of the Bronx DA, the use of this power as a means to control a district attorney's decision whether to seek the death penalty is problematic for three principle reasons. First, there is no effective political check on the unjustified use of supersedure. Second, the decision to supersede a district attorney is highly political in nature. Third, supersedure vests the discretion whether to seek the death penalty with the governor, a highly political office, while displacing a district attorney, who has expertise in the criminal justice system and is elected to make these types of discretionary judgments.

There is no judicial check upon gubernatorial supersedure of a district attorney for failure to seek the death penalty. There is no judicial check because New York courts have generally held that supersedure is not justiciable. *See Johnson v. Pataki*, 229 A.D.2d 242, 245-46, 655 N.Y.S.2d 463, 465-66 (1st Dep't 1997) (citing *Mulroy v. Carey*, 58 A.D.2d 207, 397 N.Y.S.2d 929 (4th Dep't), *aff'd*, 43 N.Y.2d 819, 373 N.E.2d 369, 402 N.Y.S.2d 570 (1977)) (The court queried "whether, in virtually any situation, the courts could interfere without violating the doctrine of separation of powers" because the body politic and the Legislature had "adequate recourse," under the New York Constitution, "to check any abuse of discretion." The New York Court of Ap-

peals thereafter affirmed the decision "for the reasons stated," while leaving open "whether in any or all circumstances the exercise of the executive power to supersede an elected District Attorney would be beyond judicial review or correction in a direct or collateral action . . ."); *Matter of Johnson v. Pataki*, 91 N.Y.2d at 226, 691 N.E.2d at 1007, 668 N.Y.S.2d at 983 (The New York Court of Appeals left open the possibility that the gubernatorial supersedure may be reviewable.).

There is also no effective political check upon gubernatorial supersedure in this context. In New York, Governor Pataki's embrace of the death penalty was a key to his election. See James Dao, *Death Penalty in New York Reinstated After 18 Years; Pataki Sees Justice Served: A Vow Fulfilled, Law Takes Effect Sept. 1—Its Foes Promise a Court Challenge*, N.Y. TIMES, Mar. 8, 1995, A1, B5 (stating that by signing the death penalty bill into law, Governor Pataki fulfilled a central campaign promise vital to his election); Todd S. Purdum, *Voters Cry: Enough, Mr. Cuomo!: Governor's Toughest Opponent was his Well-Known Self*, N.Y. TIMES, Nov. 9, 1994, B11 (One out of five voters stated that the death penalty was the most important campaign issue.); Jacques Steinberg, *Suburbs Give Pataki Bounce*, N.Y. TIMES, Nov. 13, 1994, § 13, at 1, 6 (stating that four out of five Pataki voters favored the death penalty for people convicted of first degree murder, and fewer than two in ten preferred life in prison without parole). Moreover, support among the public for the death penalty is near a record high. See also Phoebe C. Ellsworth & Samuel R. Gross, *Hardening of the Attitudes: Americans' Views on the Death Penalty*, in THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES 90. When the support for the death penalty and the unsympathetic nature of a death penalty eligible defendant are considered, one has to question whether the normal functioning of the political process would be an effective check of a governor's use of the power to supersede a district attorney. It likely would not, especially given that there are so many other issues that affect the voting of constituents with respect to incumbents. For example, it is not likely that a governor would be voted out of office for improperly removing a district attorney who would not seek the death penalty, if, for example, at the time of election, the economy of the state was in a state of prosperity.

The decision to supersede a district attorney is highly political in nature and can become embroiled in controversy. The confrontation between Governor Pataki and the Bronx DA was described as an "unprecedented feud." Swarms, *supra* note 168. This feud was carried out through faxes, press conferences, and even before a national audience on the "Today" show. See *id.* Moreover, during the press conference in which Governor Pataki announced the supersedure of the Bronx DA, Officer Gillespie's brother, Officer Gillespie's partner, and the President of the Patrolmen's Benevolent Association flanked the Governor. See *id.* This was not an unusual tactic for Governor Pataki, who signed the death penalty bill into law using the pens that belonged to police officers killed in the line of duty while police union officials and the relatives of seven murder victims observed. See *id.* (The signing of the bill "as the cameras whirled" was described as having "all the choreographed flourish of one of [the Governor's] stump events."). Given Governor Pataki's method of presenting these momentous decisions to the people of New York State, one may reasonably question the degree to which the political ramifications of his acts impact his decision-making process.

The decision whether to seek the death penalty necessarily entails the exercise of discretion. The decision of a governor to supersede a district attorney shifts the discretion employed when deciding whether it is appropriate to seek the death penalty in a particular case from the district attorney to the governor. When a governor decides to supersede a district attorney, the Governor is deciding whether the process employed by the district attorney effectuates the will of the Legislature as the Governor views that will. In addition, the Governor is also removing the power to decide whether to seek the death penalty from the district attorney and placing it with the

they each contain a useful element, which when combined with the others, ultimately forms a more effective control.

### 1. *Internal guidelines*

The fact that internal guidelines are promulgated within district attorneys' offices is their greatest strength and, simultaneously, their greatest weakness. Because they generate the guidelines, prosecutors, who have acquired a great deal of expertise in the administration of the criminal justice system,<sup>199</sup> decide how best to control the utilization of discretion and retain their autonomy.<sup>200</sup> Having experienced prosecutors and the district attorney promulgate the guidelines, however, can be a disadvantage because they control office policy.<sup>201</sup>

In the context of the death penalty, where district attorneys generally make the final decisions, the utilization of internal guidelines pragmatically place no check upon the discretion of the district attorney. Because of this, internal guidelines, individually, are not effective in controlling the exercise of discretion involved in the decision whether to seek the death penalty. However, the guide-

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New York State Attorney General (the "Attorney General"). While this does not mean that the Attorney General will be unable to independently assess the appropriateness of the death penalty as punishment in the particular case, it does raise the concern that the Attorney General will undergo tremendous political pressure from the governor to decide in a manner that is consistent with the Governor's view. *See, e.g.,* Horowitz, *supra* note 150, at 2592-93, 2600. This concern is heightened when the Attorney General shares the same views as the Governor regarding the utilization of the death penalty. While the same could point could be asserted regarding the effect of political pressure on a district attorney's decision to seek the death penalty, the district attorney is at least directly politically accountable for his decision, and thus the concern is lessened.

199. *See* Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORD-HAM L. REV. 2117, 2136-37, 2141 (1998).

Our criminal justice system will remain "a functioning administrative system of punishment . . . [s]o long as our criminal codes contain too many prohibitions, the contents of which are left to be defined by their implementation, or which cover conduct that is clearly not intended to be punished in every instance, or which provide for the punishment of those who act without wrongful intent, prosecutors must exercise judgment about which of the many cases that are technically covered by the criminal law are really worthy of criminal punishment. (And, given the number of legitimate cases that could be brought, so long as crime rates remain high and the resources devoted to criminal justice remain inadequate to deal with them all, prosecutors must also make decisions about which cases constitute the best use of limited judicial and law enforcement resources.

*Id.*

200. *See id.* at 2144 ("[P]rosecutors act in a quasi-legislative or quasi-judicial capacity . . .").

201. *See supra* notes 156-160 and accompanying text.

lines' preservation of a prosecutor's decisional autonomy is an essential element of any effective control.

Generally, the publication of internal guidelines fails as a control of the prosecutorial discretion inherent in the decision to seek the death penalty because of the heated controversy that surrounds the decision. If internal guidelines were published, it would likely inhibit the formulation of policy regarding the death penalty. However, the utilization of a more limited form of publication, in which the decision whether to seek the death penalty, but not the rationale behind it, is published would be a useful element of an effective control. This would allow for the outside examination of the decision, while maintaining the confidentiality of the rationale leading to the decision. This significantly lessens the offense to countervailing traditional and practical interests.<sup>202</sup>

## 2. Legislative controls

It is argued that prosecutors should be legislatively mandated to issue both guidelines for making decisions and reports summarizing the analysis used to reach these decisions.<sup>203</sup> However, the publication of internal guidelines has already been rejected as an effective control of the prosecutorial discretion exercised in the decision to seek the death penalty,<sup>204</sup> and a legislative mandate to publish these same guidelines fails for the same reason. This is especially true given that legislators generally lack the expertise or time necessary to enact specific guidelines.<sup>205</sup> Also, when legislators do attempt to adopt controls over an area as amorphous as decision-making discretion, significant difficulties result.<sup>206</sup> Moreover, while vigorous oversight of prosecutorial decision-making appears beneficial as an abstraction, the risk of even greater politicization of the decision-making process, and the great deference traditionally granted prosecutorial decision-making, make the implementation of vigorous oversight extremely unlikely, even if law enforcement concerns can be accommodated.

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202. See discussion *supra* pp. 789-794.

203. See Vorenberg, *supra* note 18, at 1566.

204. See discussion *supra* Part II.A.1.

205. See DAVIS, *supra* note 20.

206. As evidence, one need look no further than the "brutal unfairness" that can result from imposed guidelines such as the Federal Sentencing Guidelines. Pizzi, *supra* note 16, at 368. Moreover, the exercise of prosecutorial discretion is much more complex than the discretion employed by the judiciary that the Federal Sentencing Guidelines were aimed at controlling. See *id.*

Legislative controls, however, are useful in two ways. First, legislators can enact a broad mandate that requires a specific decision-making process, but that allows the prosecutors to make the actual decision free from legislative intrusion. Second, legislators can promulgate non-enforceable statements that provide guidance to prosecutors regarding the manner in which to effectuate their broad mandate.

### 3. *Judicial controls*

Judicial review of the exercise of prosecutorial discretion is inappropriate because of the separation of powers doctrine. If the doctrine were to be set aside, however, the implementation of judicial review still would encounter a number of significant difficulties. First, judicial review would entail the substitution of a judge's view of the proper exercise of prosecutorial discretion for that of a prosecutor in an area in which a judge often has little expertise. Second, judicial review of the decision whether to seek the death penalty would require judges to sacrifice the neutral role that is central to the adversarial process.<sup>207</sup> Third, judicial review would compromise the confidentiality of the prosecutor's decision-making process, thus leading to a "chilling of law enforcement."<sup>208</sup>

Even if the foregoing concerns could be met satisfactorily,<sup>209</sup> judicial review would not be worthwhile for three principle reasons. First, the difficulties inherent in attempting to prove that a prosecutor has based a decision on "impermissible motives or personal ani-

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207. In arguing that Judge John Sirica, in handling the Watergate case, inappropriately usurped the prosecutor's role in order to ensure an effective prosecution, Professor Freedman stated that "the adversary system does not rely upon activist judges to conduct criminal investigations. Rather, the adversary system depends upon judges who maintain their impartiality, leaving to the advocates for each side the responsibility for digging out and presenting the evidence of guilt or innocence . . . . Learned Hand said it best: '[The trial judge] must not take on the role of a partisan; he must not enter the lists; he must not by his ardor induce the jury to join in a hue and cry against the accused. Prosecution and judgment are two quite separate functions in the administration of justice. They must not merge.'" Monroe Freedman, *Evaluating Sirica's Watergate Legacy*, LEGAL TIMES, Sept. 7, 1992, at 7 (quoting *United States v. Marzano*, 149 F.2d 923, 926 (2d Cir. 1945)).

208. See *supra* note 50 and accompanying text.

209. For example, the Legislature could provide that a special panel of judges would be provided to review the decision whether to seek the death penalty, thus alleviating concerns about maintaining the neutral role of judges. In addition, the Legislature could provide that judicial review of the decision would be an *ex parte* proceeding or even limit it to *in camera* review, thus ensuring that the confidentiality of the prosecutor's decision-making would be protected.

mus" are tremendous.<sup>210</sup> Second, given the great deference granted to prosecutorial decision-making, judicial review would only overturn the most extreme decisions. Accordingly judicial review would provide only a minimal benefit, while placing a tremendous burden upon the criminal justice system subjecting all prosecutorial decision-making to scrutiny. Finally, even if one allowed for judicial review of a prosecutor's decision to seek the death penalty, virtually no standards exist under which to review the decision.<sup>211</sup>

Judicial controls could prove quite useful, however, if, rather than reviewing the substantive aspects of the decision-making process employed by prosecutors when deciding whether to seek the death penalty, they instead were limited to reviewing whether the procedural requirements of a control over the decision were followed. As such, the judicial controls would focus on an area well-suited for judicial review.

#### 4. *Administrative controls*

The argument that an administrative death penalty committee<sup>212</sup> would provide the panacea to the dangers inherent in a prosecutor's decision to seek the death penalty fails on four primary grounds. First, the manner in which the committee is composed is problematic. Second, even though the decision to seek the death penalty is made by a committee and not the district attorney, it remains equally political. Third, the legitimacy of the decision-making process likely will not be increased by the committee's appointment of a seventh member. Fourth, the decisions made by the committee will not necessarily be more consistent than those made by prosecutors.

The composition of the death penalty committee is likely to reflect the views espoused by the individuals who select members. If, for instance, the district attorney and governor both believe in the

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210. Vorenberg, *supra* note 18, at 1542. It would be an extremely rare case where a prosecutor explicitly conveyed an inappropriate purpose. *See id.*

211. *See* Gershman, *The New Prosecutors*, *supra* note 138, at 435-36 ("One of the most disturbing developments in criminal justice over the last two decades has been the judiciary's failure to provide clear standards that would place some rational limits on the prosecutor's discretion. The decisions are increasingly ad hoc, and do not lend themselves to systematic analysis. They appear to allow the exercise of virtually unlimited prosecutorial discretion, and drastically curtail the ability of defendants to prove the existence of prosecutorial abuses.").

212. It is important to note that this section focuses on the administrative death penalty committee envisioned by John Horowitz. *See* discussion *supra* Part II.D and accompanying notes.

aggressive utilization of the death penalty, the committee members they appoint will probably share their pro-death penalty sentiments. If the governor and district attorney oppose the utilization of the death penalty, the converse would be true. In addition, when the governor and district attorney have differing views regarding the appropriateness of the death penalty as a means of punishment, the committee may become embroiled in what amounts to a bi-partisan feud between competing pro- and anti-death penalty factions.<sup>213</sup> Thus, the policies regarding whether to seek the death penalty would vary from county to county, depending upon the relation of the respective district attorney's view to the view of the governor.

This, in itself, would appear to undermine one of the principle reasons advocated for removing district attorneys from making the decision whether to seek the death penalty; namely, the risk of disproportionate application of the death penalty throughout the state.<sup>214</sup> In addition, the dangers inherent in having a committee that is composed of warring factions are significant. A situation as politically charged as the decision to seek the death penalty could degrade into a quagmire of political and ideological infighting that leads to nothing more than delay and public dissatisfaction with the process.<sup>215</sup>

There also are practical difficulties in the appointment of the members of the committee. There are sixty-two counties within

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213. Of course, this assumes that the governor and district attorney would appoint members sharing their views regarding the appropriateness of the death penalty as a method of punishment.

214. See Horowitz, *supra* note 150, at 2579-80, 2600 (arguing that the risk of disproportionate application of the death penalty across the state under the current system is a reason to implement his administrative death penalty committee).

215. In the context of the House ethics committee's review of Newt Gingrich's filing of false information to the House ethics committee, the four person bi-partisan committee was noted for its bickering and leaking of information. See Adam Clymer, *The Gingrich Case: When Politics Divides Process*, N.Y. TIMES, Jan. 16, 1996, at B9. Dennis Thompson, a professor of government at Harvard, stated that the use of bi-partisan committees is something akin to the following situation. See *id.* "[I]f on the eve of the Super Bowl there is a question of the quarterback of one team having violated some league rule, and you had a committee of both teams trying to decide what to do." *Id.* While the example of a bi-partisan committee's review of the Speaker of the House is not the same as the use of a death penalty committee with appointed members, the decision whether to seek the death penalty is a matter of great controversy that has the inherent possibility to turn into this type of situation. See also Joseph DioGuardi, *Independent Ethics Review Board Needed*, GANNET SUB-URBAN NEWSPAPER, Jan. 17, 1997, at 3A (arguing that a nonpartisan, independent ethics review committee is required to ensure fair and proper investigations of ethical violations by members of the United States House of Representatives).

New York State.<sup>216</sup> If the governor must appoint three committee members for each county, this amounts to a colossal undertaking. Given the considerable ramifications that could result if a suspect individual<sup>217</sup> was appointed through a haphazard process, as it would be impossible to remove the appointee from the committee as long as the governor remained in office,<sup>218</sup> a thorough appointment process must be ensured. The question then becomes whether the appointment of committee members is the best utilization of time for a political officer as important as the governor. This dilemma could be rectified by the delegation of the power to a committee chosen by the governor. However, this would further attenuate both the political check upon the decision by constituents and the accountability of the governor for the appointments.

Another difficulty with the proposed death penalty committee is that its members would not be immune to public opinion. It is erroneous to state that members of such a death penalty committee would be immune to public and political pressure simply because they are "one layer removed" from the political process. An excellent example of the fallibility of this purported immunity occurred when a federal judge in the Southern District of New York reversed an earlier, controversial decision in the wake of public and political pressure.<sup>219</sup> Prior to the reversal, President Clinton stated

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216. See *Johnson v. Pataki*, 229 A.D.2d 242, 246, 655 N.Y.S.2d 463, 466 (1997).

217. In the context of this Note, the term "suspect individual" is used to describe one who is either not qualified for the position, or whose ideological makeup, with respect to the death penalty, is not completely known.

218. See *supra* note 196.

219. Judge Harold Baer Jr. initially ruled that a quantity of cocaine seized from the trunk of a car was suppressed because police officers did not have reasonable suspicion to pull over the driver of the car. See Alison Mitchell, *Clinton Pressing Judge To Relent: President Wants a Reversal of Drug Evidence Ruling*, N.Y. TIMES, Mar. 22, 1996, at A1, B3. Judge Baer held that there was not reasonable suspicion even though the police officers had witnessed four individuals place several bags in the trunk of the car at approximately 5 A.M. See *id.* at A1. Judge Baer also ruled that running from the police was not "suspicious behavior in Washington Heights" because of the reputation that police had in that area for corruption and violence. See *id.* at B3. President Clinton asked Judge Baer to reverse his decision or the President might ask for his resignation. See *id.* at A1. Subsequently, the Judge did reverse his decision. See Don Van Natta Jr., *Under Pressure, Federal Judge Reverses Decision in Drug Case: His Original Ruling 'Demeaned' Police, He Says*, N.Y. TIMES, Apr. 2, 1996, at B3. The Judge stated that the reversal of the decision was based largely upon the testimony of the second police officer at the scene, which led to a change in his view about the credibility of both sides. See *id.* Barry Kamins, a past president of the Brooklyn Bar Association, stated that it was "strange for an officer who appeared to be lacking in credibility to now have the mantle of believability . . ." See *id.* Mr. Kamins stated he hoped that "the judge hadn't bowed to political pressure [but rather] decided this case on the facts." See *id.*



that if the judge did not reverse his decision, he might be asked to resign.<sup>220</sup> Even though President Clinton could only request that the judge resign—because there were no grounds for impeachment—the judge relented in a ruling described by outside experts as “extraordinary.”<sup>221</sup>

Significant implications exist where a judge who has life tenure, and is thus more insulated from public and political pressure than the members of a death penalty committee, can be pressured into reversing an unpopular decision.<sup>222</sup> Individuals remain committee members only so long as their appointers remain in office.<sup>223</sup> Assuming that the committee members are interested in keeping their positions, they accordingly would have a vested interest in doing what is politically popular with the constituents of their respective appointers. Even if this is not the case, the previous example demonstrates how public pressure can influence a public official’s ability to decide controversial issues, even in the face of absolute job security.

The claim that the presence of a “moderate” seventh member appointed by the committee after the “negotiation” of its members will further enhance the legitimacy of the committee’s decisions and will ensure a “thoughtful and even-handed decision” is similarly misplaced.<sup>224</sup> There is no guarantee that the seventh member, chosen by the other six members of the committee, will indeed be a true moderate, ideologically falling between the competing factions of the committee. For example, if the district attorney and the governor share the same viewpoints, it is very likely that the “moderate” member will embrace the view of the rest of the committee.

Moreover, even if the committee members appoint a true moderate, there is no guarantee that this member will employ moderate decision-making. To support this conclusion, one need look no further than several recent Supreme Court nominations. Prospective Supreme Court justices were nominated under the assumption that they would embrace a specific ideology in their decision-making.

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220. Mitchell, *supra* note 219, at A1, B3. This statement was made after Republicans had made it clear that the matter would be a “major issue in the Presidential race.” *Id.* at A1.

221. Van Natta Jr., *supra* note 219, at A1, B2.

222. It may be that Judge Baer’s initial decision was incorrect, and that the reversal of his prior ruling resulted in the correct decision being issued. However, regardless of the legitimacy of Judge Baer’s second ruling, the reversal is still troubling because it resulted in the appearance of impropriety.

223. *See supra* note 194.

224. *See supra* note 194.

Once they became members of the Supreme Court, however, these same members adopted a form of decision-making inconsistent with what their nominators anticipated.<sup>225</sup> In the context of the administrative death penalty committee, the lack of direct constituent control over that committee member, quite unlike the direct political control constituents have over a district attorney, compounds the problem.

While it has been argued that the publication of a memorandum describing the committee's rationale for reaching a decision would serve as informal precedent to guide future decisions and ensure consistent treatment of factually similar circumstances,<sup>226</sup> this does not follow if one examines the use of precedent in judicial decision-making. If this history shows us anything, it is that, with the ebb and flow of legal, political and social views, or a change in the ideological composition of a court, precedent is often reinterpreted, or even ignored, to allow for the imposition of the embraced views of that time. The possibility of this occurring would be even greater

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225. For example, Justice O'Connor, who had previously "criticized the reasoning and judicial activism" underlying *Roe v. Wade*, affirmed that decision in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) because she believed it necessary "to preserve the right-to-choice precedent." Christopher E. Smith & Kimberly A. Beuger, *Clouds in the Crystal Ball: Presidential Expectations and the Unpredictable Behavior of Supreme Court Appointees*, 27 AKRON L. REV. 115, 126-27 (1993). "The co-authored opinion placed great emphasis on the need to maintain stare decisis in order to protect the high court's image and legitimacy by avoiding the perception that an alteration of *Roe* by the Rehnquist Court was based merely on political changes in the Court's composition. These were arguments that [Justices] Kennedy and O'Connor had not raised when they participated in the criticism of *Roe* in earlier abortion decisions." See *id.* at 127.

This opinion, co-authored by Justice Kennedy and Justice Souter, who along with Justice O'Connor were appointed by President Reagan and President Bush, reaffirmed *Roe*, the decision their appointee's found so objectionable. See *id.* Thus, the Justices had defeated the preferred policy of their appointing Presidents. See *id.* at 128.

Justice Harry Blackmun provides an even more dramatic example of a Supreme Court Justice adopting a form of decision-making inconsistent with what was anticipated by his nominator. When President Nixon nominated Blackmun for the Supreme Court in 1970, he stated that "he was fulfilling his pledge to nominate a conservative strict constructionist." *Id.* at 121. Early in his term on the Supreme Court, Justice Blackmun consistently allied himself with Chief Justice Burger, a conservative member of the Supreme Court, and thus fulfilled President Nixon's expectations. See *id.* Within a few years, however, Justice Blackmun had become a consistent "ally of the Court's liberals." *Id.* By 1991, "Blackmun's movement away from judicial conservatism was so substantial that . . . [he] joined the Court's most liberal justice, John Paul Stevens, in over seventy-seven percent of nonunanimous [sic] cases while agreeing with the Court's most conservative justices, Antonin Scalia and Clarence Thomas, in less than thirty percent of such cases." *Id.*

226. See *supra* note 195 and accompanying text.

in the context of the administrative death penalty committee, where the precedential value of decisions by prior death penalty committees would not be binding.

In the end, the fundamental flaw with this administrative panel is the belief that the danger inherent in the decision to seek the death penalty is a prosecutor's exercise of discretion, and not discretion itself. In attempting to rectify the perceived source of this problem, the author advocates the removal of prosecutors, the very individuals who have expertise in making these types of decisions, from the decision-making process and places this discretion in the hands of a seven member committee subject to the same public and political pressure. The panel is just as likely to allow personal views to intrude upon their decision-making on an individual level while attenuating the constituent check on the decision. This proposal, however, does involve one element that can be utilized to form a more effective control of prosecutorial discretion; that is the idea of mitigating the impact of arbitrariness, bias, and personal views upon the decision whether to seek the death penalty by involving more than one person. This element of a death penalty committee is only able to overcome strong countervailing interests, however, when the members of that panel are prosecutors experienced in the administration of criminal justice policies.<sup>227</sup> It follows that while the utilization of administrative controls in the context of the death penalty decision can be effective, the version previously proffered is seriously flawed.

### **B. The Focus of Controls Must be to Improve the Decision-making Process**

Because the decision to seek the death penalty may be subject to arbitrariness and bias, it is vitally important that it is sought against only those who truly deserve it. Despite the grave implications of the decision to seek the death penalty, there are no effective controls over the decision, which is virtually immune from judicial review, to ensure this.<sup>228</sup> While it is arguable that the jury system

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227. As used in this Note, the term "experienced prosecutors" describes prosecutors who have prosecuted multiple homicides.

228. It could be argued that an effective control over the decision to seek the death penalty is utilized in the jurisdictions that allow a judge to set aside a jury's decision to seek the death penalty as improper based upon the evidence. This control helps to ensure that a defendant is subject to the death penalty only if that defendant committed a crime that is within the spectrum of conduct proscribed by a death penalty statute; this Note, however, focuses on improving the consistency and uniformity of the decision to seek the death penalty against defendants who are properly within the

provides a degree of control over an inappropriate decision<sup>229</sup> to seek the death penalty,<sup>230</sup> a prosecutor's ability to select a "conviction-prone jury" lessens this protection.<sup>231</sup> Moreover, when a defendant is removed inappropriately from consideration for the imposition of the death penalty, there is no jury control over the decision because the death penalty is no longer an available sentence. Thus, it is necessary to look to other potential controls to ensure that the death penalty is sought against only those who truly deserve it.

Most attempted controls of the exercise of prosecutorial discretion in the decision whether to seek the death penalty are not worthy of adoption. These controls, at their very essence, remove this discretion from the district attorney and place it with persons with neither the district attorney's experience or expertise regarding the criminal justice system and its administration, nor direct accountability to the public for their criminal policies.<sup>232</sup> Moreover, these individuals are subject to numerous illegitimate influences. Thus, the removal of this discretion from a district attorney, whose expertise and direct accountability help to overcome these illegitimate influences, in favor of one with less expertise and subject to less political control, is highly questionable. Additionally, because prosecutorial discretion is such an essential part of the criminal justice system, any control that seeks to significantly limit its exercise will fail. Therefore, any control that has a realistic possibility of implementation and effectiveness must, at least in the present criminal justice system, seek to improve the process by which discretion is exercised in decision-making.

In creating an effective control that focuses on improving the decision-making process, it is beneficial to incorporate the elements

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spectrum of conduct proscribed by a death penalty statute, and not on ensuring that the death penalty is sought against only those defendants who are properly subject to the death penalty because of the crimes they have committed. Thus, this potential control is of little practical effect upon in the context of this Note.

229. In this context, "inappropriate decision" is meant to refer to a decision to seek the death penalty that is legally justified, but involves a defendant who would not be subject to the death penalty if uniform policies were employed in reaching the decision.

230. For example, a jury could check an inappropriate decision to seek the death penalty by rejecting the death penalty as a form of punishment for a defendant.

231. Gershman, *The New Prosecutors*, *supra* note 138, at 422 ("[T]he prosecutor's ability to obtain a capital conviction has been enhanced by his ability to select a conviction-prone jury.").

232. Internal guidelines, unlike the other previously proffered controls, do not remove discretion from the district attorney and place it with another. *See* discussion *supra* Parts II.A., III.A.1.

of administrative, internal, judicial and legislative controls previously noted. The useful element of the administrative death penalty committee is that it sought to limit the influx of arbitrariness, bias and personal views into the decision whether to seek the death penalty by increasing the number of people entrusted with making the decision.<sup>233</sup> In addition, the administrative death penalty committee, along with internal guidelines, provide guidance about the most effective manner to shape the decision-making process, namely, by allowing prosecutors to utilize their experience and expertise in criminal justice to reach decisions without unnecessary intrusion by outsiders.<sup>234</sup> Judicial controls prove helpful, when utilized in a very limited manner, to allow for the review of the structural components of the process employed in making the decision.<sup>235</sup> Finally, legislative controls allow for the enactment of laws and guidelines that prosecutors are bound to follow.<sup>236</sup> These elements can be incorporated to form a more effective control utilized by other prosecutorial offices,<sup>237</sup> albeit in a less formal and

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233. See discussion *supra* pp. 807.

234. See discussion *supra* pp. 799-800.

235. See discussion *supra* p. 802.

236. See discussion *supra* p. 801.

237. The New York County District Attorney's Office has a death penalty committee composed of six senior prosecutors who review death penalty eligible cases. See Samuel Maull, *Life Sentence Sought for Royster; Prosecutors Reject Death Penalty Bid*, THE RECORD, Nov. 13, 1996, at A6. The United States Attorney's Office in the Southern District of New York also employs a death penalty committee. Benjamin Wiser, *Pondering Death, by Committee: What Is a Capital Crime? Federal Panel Decides Case by Case*, N.Y. TIMES, June 26, 1997, at B1, B2, B4. The death penalty committee consists of six senior prosecutors that collectively review individual cases that are eligible for the death penalty and then provide Mary Jo White, the United States Attorney for the Southern District of New York, with their recommendation regarding whether the death penalty should be sought. *Id.* The stated objective of the committee is both to determine whether it would be appropriate to seek the death penalty in particular cases, and to improve the consistency of the decisions whether to seek the death penalty. See *id.* at B4 (quoting Mary Jo White) ("Clearly the objective of this process is to not only decide what cases are appropriate to seek [the death penalty] in, but that we are consistent. I regard it as the opposite of being arbitrary.").

To best ensure that this objective is met, the committee is staffed with members representing a diverse range of views regarding the appropriateness of the utilization of the death penalty as a form of punishment. See *id.* Each member, however, must be willing to apply the death penalty in some set of circumstances. See *id.*

In reaching a decision, the committee balances aggravating and mitigating factors, legal issues, and prosecutorial strategy. See *id.* The committee also takes practical considerations into account, such as the "credibility and strength of witness testimony, a defendant's background, and the principle of treating equally culpable defendants" similarly. See *id.* In addition, the committee provides the defense with an opportunity

slightly different form, a death penalty committee comprised of prosecutors.

### 1. *Legislatively Mandating a Death Penalty Committee*

The legislature should enact a statute requiring death penalty committees comprised of experienced prosecutors to review all relevant factual, legal, and practical considerations involved in the decision whether to seek the death penalty.<sup>238</sup> Most importantly, the statute should provide that the death penalty committee shall be comprised of prosecutors with diverse views regarding the appropriateness of the use of the death penalty to ensure an ideologically balanced committee.<sup>239</sup> The statute also should provide that the committee shall not allow a defendant's race, class, gender, religion or impermissible political considerations to affect its decision.<sup>240</sup> In addition, the committee must be required to both allow defense counsel an opportunity to present arguments why the defendant is not an appropriate candidate for the imposition of the death penalty, and give those arguments due consideration before rendering a decision. Finally, the statute should provide that the committee shall be allowed to reach an independent decision free from influence by the respective district attorney or any political pressure.

To ensure that the structure of the death penalty committee mandated by the statute would be followed, such a decision would be subject to limited judicial scrutiny. For example, if the legislature chose to enact a statute that required five to nine members on the panel, but an office only had a two member panel, such a decision would be subject to judicial scrutiny. In addition, if the panel did not allow the defense to present its argument before rendering a decision, it would be reviewable. However, whether the commit-

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to make submissions about why the imposition of the death penalty would be inappropriate in that case before rendering a decision. *See id.* at B1, B4.

238. *See supra* pp. 7-8 and note 37.

239. Prosecutors who would not seek the death penalty under any conceivable set of circumstances would not be allowed to be members of the panel, along with prosecutors who were in favor of seeking the death penalty in every set of circumstances under which the death penalty is provided as a form of punishment. In both circumstances, the prosecutor is effectively refusing to exercise discretion because the prosecutor does not consider the specific facts of the case in making the decision whether to seek the death penalty. Instead, the prosecutor simply makes the decision based upon a categorical policy either to seek or not to seek the death penalty in any set of circumstances.

240. Thus, the legislature would fill the void left by the judiciary's reluctance to provide at least some form of standard to limit a prosecutor's discretion. *See Gershman, The New Prosecutors, supra* note 138.

tee was truly ideologically diverse, whether the defense counsel's presentation was given consideration, or whether impermissible considerations affected the decision would not be subject to judicial review. In addition, any challenges regarding the independence of the committee's decision-making would not be subject to judicial review. This would ensure that the actual decision-making process did not become the subject of numerous lawsuits regarding the legitimacy of the decision and thus lead to repeated intrusion into the decision-making process. Moreover, it would avoid the accompanying burden the litigation of these issues would place upon judicial and prosecutorial resources. The presence of ideological language within the statute, however, would ensure that the committee is staffed in the proper manner by capitalizing on public pressure and a district attorney's sense of duty to enforce the statute as intended.<sup>241</sup>

A recommendation to seek the death penalty would be allowed only upon a vote by the committee members in favor of the imposition of the death penalty.<sup>242</sup> Moreover, the recommendation proffered by the death penalty committee should be published in accordance with the statute. The rationale for the recommendation, however, need not be published. This would ensure that the district attorney's decision whether to accept or reject the recommendation would be under public scrutiny, while, at the same time, protecting the office's legitimate concerns regarding confidentiality and avoiding unnecessary controversy. In addition, the statute should require the district attorney to give the recommendation of the committee great weight.

The death penalty committee envisioned by this Note would provide a defendant with a limited right to be heard before the committee decided whether to seek the death penalty. The committee also would provide an improved decision-making process subject

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241. For example, Kings County District Attorney Charles J. Hynes (the "Kings County DA") already has sought the death penalty despite his personal opposition to it, and his feeling that life without parole is the more "appropriate" punishment for murder, because it was his obligation under the law. Adam Nossiter, *In New York City, a Mixed Response to Law from Prosecutors*, N.Y. TIMES, March 8, 1995, at B5 (quoting Patrick Clark, a spokesman for the Kings County DA). In addition, Queens County District Attorney Richard A. Brown has expressed doubt about the usefulness of the death penalty and its cost, but has stated that he will seek the death penalty where appropriate because "the Legislature has spoken and I have a responsibility to carry out their [sic] mandate." *Id.*

242. The required vote necessary to recommend that the respective office seek the death penalty—be it majority, super-majority, or unanimous—would be for the legislature to decide.

to less arbitrariness and bias. Additionally, this committee would leave the decision whether to seek the death penalty to those with experience and expertise in the criminal justice process and subject to relatively direct constituent control, while preventing unnecessary intrusion into the prosecutor's decision-making process that, on balance, does a great deal of harm with little accompanying benefit. The death penalty committee also allows for the removal of an appointee, if, for example, an appointee's decision-making is ideologically inconsistent with what was anticipated at the time of appointment, thereby insuring the maintenance of an ideologically diverse committee.

## 2. *The Composition of the Death Penalty Committee*

Any attempt to staff a death penalty committee in accordance with the proposed statute will encounter pragmatic difficulties in rural counties because of the stark contrast between the personnel resources of rural and urban prosecutors' offices.<sup>243</sup> There are prosecutors' offices in rural counties that do not have the number of prosecutors in the entire office necessary to comprise an effective intra-office death penalty committee.<sup>244</sup> Moreover, even those that do have the necessary number of prosecutors within their office may not have a sufficient number of experienced prosecutors to form a committee capable of assuming the role envisioned by this Note.

In determining how to staff death penalty committees in a manner that will address this problem, it is important to reconcile the competing concerns of uniformity of decision-making and constituent control. The goal is to achieve statewide uniformity of the decision-making process utilized by district attorneys in their determination whether to seek the death penalty while maintaining the greatest possible amount of constituent control over the prosecutors who comprise the death penalty committees.

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243. The staffing of death penalty committees in New York State is a complex task because of the great differences in population and resources from region to region. The staffing of death penalty committees in other states that do not have such stark contrasts between regions may be much simpler, and thus may not require such complex solutions.

244. See Tracey Tully, *Death Penalty Bias Upstate*, TIMES UNION, July 27, 1997, at A1 (quoting Genesee County District Attorney Lawrence Friedman) ("Unlike some of the big city offices, we don't have the committee. Their committees are bigger than our staff."). In the context of this Note, an "intra-office" death penalty committee is defined as a committee comprised entirely of prosecutors from that county's district attorney's office.



The importance of ensuring constituent control over a county's criminal justice policies is underscored by the county-wide election system under which constituents elect their district attorneys.<sup>245</sup> However, uniformity of decision-making is a legitimate concern because of the great variance between individual district attorney's policies regarding the utilization of the death penalty from county to county.<sup>246</sup> Uniformity also is a concern because a dichotomy has emerged between the percentage of death penalty eligible cases pursued as death penalty prosecutions in New York City and upstate New York<sup>247</sup> since the enactment of the death penalty in 1995.<sup>248</sup> Defendants who commit death penalty eligible crimes in upstate New York are almost two times as likely to have the death penalty sought against them as defendants who commit comparable crimes in the New York City area.<sup>249</sup> The potential solutions that follow attempt to reconcile these competing concerns. While these solutions focus on New York State, they also are applicable to other states.

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245. "Prosecutorial discretion in the American legal system must be seen as part of a political tradition that is built on a preference for *local control* over political power and on an aversion to strong centralized government authority and power." Pizzi, *supra* note 16, at 1342 (emphasis in original) (citing ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA, 346-47 (Henry Reeve trans., Cambridge University Press 2d ed. 1863)). "Typically, prosecutors or 'district attorneys' run for office on a county or district basis and each district attorney is free to set policies for that office that take into account the available prosecutorial resources, as well as local crime concerns and priorities. Local unites of government, such as counties, will usually not be as diverse in terms of political values represented within these units as would be the case if the political units were larger. Such local units may thus have different objectives and priorities which may reflect differences in values, differences in the amount of resources that are available, or other local problems." *Id.* at 1343-44.

246. See generally *supra* note 16 and accompanying text.

247. In the context of this Note, upstate New York is defined as all counties except for the New York City area—the five boroughs of New York City, Long Island, and Westchester County.

248. See Tully, *supra* note 244, at A1 ("Suspects charged with capital crimes north of New York City are twice as likely to face the death penalty as those charged with comparable crimes in New York City, Long Island and Westchester County.").

249. See *id.* (Upstate district attorneys sought the death penalty in twenty-three percent of first-degree murder cases, while New York City area district attorneys only sought the death penalty in twelve percent of first-degree murder cases.). This dichotomy is based upon differing ideologies of district attorneys, the political and racial characteristics of constituents, and the desensitization of city residents to crime. See *id.*

*a. Intra- and Inter-Office Death Penalty Committees Throughout New York State*

The first potential state-wide solution would allow, in offices with the requisite number of experienced prosecutors, the district attorney to form death penalty committees comprised entirely of prosecutors from that particular office. However, those offices lacking the requisite number of experienced prosecutors would have death penalty committees comprised of experienced district attorneys from either upstate counties, a mixture of upstate and New York City counties, or district attorneys selected from throughout New York to create the most ideologically diverse committee.<sup>250</sup>

If the district attorneys were selected from offices throughout upstate New York, the elements of this death penalty committee would be identical to the legislatively mandated death penalty committee previously discussed,<sup>251</sup> with two significant differences. First, a legislative committee would select the death penalty panel.<sup>252</sup> This concession is required because it is obviously impossible for prosecutors' offices that do not have the requisite number of experienced prosecutors to create their own committees.<sup>253</sup> While this is not a completely satisfactory result given that the committee is not comprised of members from each county's prose-

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250. Undoubtedly, these solutions will present a burden upon district attorneys who are called upon to serve as both district attorneys of their respective county and as members of an administrative death penalty committee, as they have to fulfill not only all the considerable obligations of the job they were elected for, but also the obligations of their committee membership. However, this burden should be tolerable, and it is a small price to pay if the committee significantly improves the decision-making process utilized in determining whether to seek the death penalty.

251. See discussion *supra* Part III.B.1.

252. While politics could influence the selection process, two controls help to limit the impact of inappropriate political influence upon the death penalty committee advocated by this Note. First, the goals of an ideologically diverse panel will provide the legislative committee with specific criteria in selecting the death penalty committee and provide the public and media with a basis with which to scrutinize the selection process. Second, if an appointee fails to promote the diversity of the death penalty committee, the appointee can be removed.

It should be noted that the legislative committee would select the members of the death penalty in all circumstances unless the respective district attorney's office had the requisite number of experienced prosecutors to form an intra-office death penalty committee.

253. In addition, it may not be possible for the district attorney of a respective county to appoint the members of the committee in a manner consistent with the statutory requirements envisioned by this Note. Practical difficulties, including the considerable constraints a district attorney's normal day-to-day responsibilities impose, as well as the inherent difficulties of attempting to screen potential candidates in a timely manner, likely would prevent this from being feasible.

cutor's office, the recommendation of the committee would be presented to the local district attorney. This would ensure that the local district attorney had the final say over the decision to seek the death penalty. Thus, the individual counties would maintain a degree of control over their own affairs.<sup>254</sup>

Second, legislation should ensure the confidentiality of each committee member's vote. This would help prevent a district attorney from rejecting the recommendation of the committee by stating that the recommendations did not represent the views of that county. This is important because a decision to reject the recommendation on these grounds might be sympathetically viewed by the county's constituents. Thus, confidential voting would help prevent constituent backlash upon such a decision.

This solution would maintain the best constituent control over the death penalty committees. District attorneys in offices with a sufficient number of experienced prosecutors would choose the members of the death penalty committee, and only those offices that lack a sufficient number of experienced prosecutors would have the death penalty committee chosen by a legislative committee. This solution also would improve the consistency of the decision for all the rural counties within New York, as the same committee would make recommendations for all the rural counties within New York.<sup>255</sup> However, this solution would neither eliminate the dichotomy between the frequency the death penalty is sought by upstate New York counties and New York City counties, nor would it improve the uniformity of the policies regarding the imposition of the death penalty of the district attorneys' offices in the New York City area.

A second variation of this solution is a mixed inter-office death penalty committee for rural counties comprised of experienced dis-

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254. For example, if the respective district attorney believed that the recommendation of the death penalty committee was greatly against the county's community interest—something the district attorney would be in a much better position to understand than the district attorneys that comprise the committee—the district attorney could reject committee's recommendation. It is very important, however, that a district attorney's power to reject this recommendation be utilized in only the most extreme cases, as the abuse of this power would effectively nullify the benefits of the death penalty committee.

255. Technological advances such as teleconferencing would allow the district attorneys to "meet" and review the case over the phone, so as to waste the least amount of time and resources. In consideration of the district attorneys' legitimate interest in spending as much time as possible representing their respective county, the Legislature could require that Committee only meet to hear the presentation of defense counsel's argument regarding the inappropriateness of the death penalty in that particular case.

strict attorneys both from offices throughout upstate New York and from the five boroughs of New York City.<sup>256</sup> This would improve the consistency of the decision whether to seek the death penalty in rural counties. This solution also would lead to a uniform policy regarding the imposition of the death penalty. Moreover, by requiring that some of the members of this committee come from the five boroughs of New York City, the New York State Legislature could lessen the dichotomy between the percentage of death penalty eligible cases pursued as death penalty prosecutions in New York City and upstate New York. This would occur because the New York City district attorneys' general reluctance to seek the death penalty would counterbalance the rural New York counties district attorneys' generally aggressive pursuit of the death penalty. At the same time, this solution would ensure that a majority of the committee still was comprised of members from rural New York, with their interests in mind.<sup>257</sup>

This solution, however, decreases constituent control over the death penalty committee for rural counties. The membership of New York City district attorneys on the committee will significantly influence the criminal justice policies of upstate counties. This is problematic because "New York City views" are interjected into

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256. In the context of this mixed death penalty committee, it would be even more important that the individual votes of each member of the committee would be statutorily required to remain confidential. Otherwise, a district attorney could reject the recommendation of the committee by stating that the recommendations represented the views of New York City district attorneys and not the views of that county. This would be particularly problematic because it is likely that upstate constituents would view this even more sympathetically than the rejection of a recommendation of district attorneys from other counties. This could occur, for example, if it became a matter public knowledge that the district attorneys from upstate New York voted in favor of seeking the death penalty, only to have the New York City district attorneys vote against seeking the death penalty, thereby preventing a recommendation that the death penalty be sought.

This Note assumes that the district attorneys from New York City may come to similar conclusions to illustrate the necessity of keeping the individual votes of the rural death penalty committee confidential.

257. While the consequences of the vote and the strong interest that there be no misgivings about the application of the death penalty remain the same, the number of votes necessary to recommend that the death penalty be sought must be decreased to ensure that the interests of rural New York counties are represented. If a unanimous vote was required, it would be possible for either of the district attorneys from New York City to effectively veto any attempt to recommend that the death penalty be sought in every case—assuming that all of the district attorneys from outside of New York City agreed that the death penalty should be sought. With the utilization of a super-majority vote, for example, the district attorneys from outside of New York City would be required to sway only one district attorney from New York City, a more feasible requirement.

the criminal justice policies of upstate New York counties in the name of uniformity without interjecting upstate prosecutors and their accompanying views into the intra-office death penalty committees of New York City district attorneys' offices.<sup>258</sup> Moreover, by effectively implementing a quota requiring the membership of New York City district attorneys on this committee, the probability of achieving the goal of a truly ideologically diverse committee is decreased because these New York City district attorneys may not constitute the best choices for membership.<sup>259</sup>

A third variation of this solution involves an inter-office death penalty committee for rural counties comprised of an ideological mix of district attorneys from all of New York State. This solution would provide the most ideologically sound decisions with respect to rural upstate counties. This solution, however, would not eliminate the dichotomy between the percentage of death penalty prosecutions sought in the New York City area and upstate New York. In addition, this solution would not increase the uniformity of the policies of the New York City district attorneys' offices regarding the imposition of the death penalty.

*b. A Single Statewide Inter-Office Death Penalty Committee*

The second potential solution is fundamentally different from the variations of the first in that there would be only one death penalty committee for all of New York State. This pure inter-office death penalty committee, comprised of an ideological mix of district attorneys from all of New York State, would best solve both levels of the problem of uniformity of decision-making in the decision whether to seek the death penalty. The committee would decide whether the death penalty would be sought in every death penalty eligible case in New York. Thus, the dichotomy between the percentage of death penalty eligible cases in which the death penalty is sought by upstate New York and New York City prosecutors' offices would be eliminated. In addition, the impact of the various policies of district attorneys' offices regarding the imposi-

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258. The only reason this is not done is because the New York City District Attorneys' Offices have enough experienced prosecutors to comprise the intra-office death penalty committee, and thus interjecting upstate prosecutors into the decision-making process would weaken constituent control over the death penalty committee; despite the stated basis for the disparate treatment, however, it is still troubling.

259. For example, the required membership of New York City district attorneys may prevent the appointment of other district attorneys that would create a more ideologically diverse committee encompassing a broad spectrum of views regarding the utilization of the death penalty as a form of punishment.

tion of the death penalty largely would be nullified.<sup>260</sup> Moreover, this solution would allow district attorneys in offices capable of forming an intra-office death penalty committee to focus on overseeing the administration of their office, as it would eliminate the need to select and maintain an ideologically diverse committee. This solution also would have the added benefit of allowing the public and media to focus their collective attention on this single death penalty committee. However, this solution would result in the greatest attenuation of constituent control over the death penalty committees. This would be particularly problematic in the large urban prosecutors' offices that have the number of experienced prosecutors necessary to comprise their own death penalty committee.

There is no clear answer to the question of what form of death penalty committee would serve most effectively to limit the potential impact of arbitrariness and bias upon the decision whether to seek the death penalty, to increase the uniformity of the imposition of the death penalty from county to county, and to eliminate the disparity between the percentage of death penalty eligible cases in which the death penalty is sought in upstate New York and New York City, while attempting to maintain relatively direct constituent control. While each of the potential solutions presents a different balance of these factors, the best solution appears to be the single statewide inter-office death penalty committee. By providing uniform statewide decision-making regarding whether to seek the death penalty, this solution best resolves the most problematic aspect of contemporary death penalty decision-making.

### Conclusion

While the utilization of a single, statewide, inter-office death penalty committee comprised of an ideological mix of district attorneys significantly limits the influence of arbitrariness and bias upon the decision whether to seek the death penalty, and increases the uniformity of its imposition, the decision is ultimately a matter of judgment. This lack of absolute objectivity in decision-making is distressing. However, given the practical reality of a criminal justice system in which broad discretion is granted to prosecutors, and

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260. While an individual district attorney's policy regarding the imposition of the death penalty likely would affect a district attorney's decision whether to accept the death penalty committee's recommendation, media scrutiny and public pressure, along with the statutory language requiring district attorneys to give the recommendation great weight, should help control any abuse of this discretion.

the extreme reluctance of the judiciary and the legislature to intrude upon the actual decision-making process of a prosecutor, it is an inescapable result of the current system. Unless one alters the criminal justice system, any attempt to implement controls that significantly limit the decision-making discretion vested in prosecutors will fail. It thus follows that, while the death penalty committee envisioned by this Note is not the perfect solution, it may be the best, especially in light of the system in which it is forced to operate.

