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**UNPREDICTABLE DOOM AND LETHAL INJUSTICE: AN  
ARGUMENT FOR GREATER TRANSPARENCY IN DEATH  
PENALTY DECISIONS**

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## I. INTRODUCTION

It was the ugly specter of race-based death penalty decisions in the sanctum of the jury room that sparked the Supreme Court to strike at the potential for jury arbitrariness in capital cases and to mandate “guidelines” before imposing the death penalty.<sup>1</sup> *Furman v. Georgia*<sup>2</sup> sought to limit “uncontrolled discretion” in the death penalty process<sup>3</sup>—a discretion exercised outside the public view and with few if any “standards [to] govern the selection of the penalty.”<sup>4</sup> In the wake of *Furman* and its progeny,<sup>5</sup> the thirty-seven states that maintain the option of capital punishment have, of course, revised their statutes to implement “standards.”<sup>6</sup> However, there has arisen new concern over whether the sentencing arbitrariness condemned by *Furman* has been replaced by *prosecutorial* arbitrariness at the charging stage.<sup>7</sup> The potential for arbitrariness in charging decisions may be the by-product of current death penalty schemes that are so expansive that virtually any murder could be filed as a capital case.<sup>8</sup> If that is so, have we come full circle? Should our previous concern about the arbitrariness of jury decisions imposing death verdicts at the conclusion of the trial be

1. See Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1, 28–31 (2007) (discussing history of racially discriminatory application of death penalty as backdrop to *Furman* decision); see generally *Furman v. Georgia*, 408 U.S. 238, 249–50 (1972) (Douglas, J., concurring).

2. 408 U.S. 238 (1972) (per curiam).

3. *Furman*, 408 U.S. at 253 (Douglas, J., concurring). Justice Douglas, concurring in the per curiam opinion, stated, “we deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants . . . should die or be imprisoned. . . . People live or die, dependent on the whim of one man or of 12.” *Id.*

4. *Id.*

5. See *infra* Part II for a discussion of *Furman v. Georgia* and its progeny.

6. After *Furman*, thirty-eight states enacted death penalty statutes that set standards to guide juries and judges. Rob Warden, *Illinois Death Penalty Reform: How It Happened, What It Promises*, 95 J. CRIM. L. & CRIMINOLOGY 381, 386 (2005). In 2004, the New York Court of Appeals struck down New York’s law. *Id.* at 386 n.27.

7. Sentencing schemes that purported to end discretion only “shift[ed] that discretion to other parts of the process,” namely, prosecutorial charging and plea-bargaining discretion. STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 273 (2002).

8. For instance, in California there are twenty-two death penalty qualifying circumstances. CAL. PENAL CODE § 190.2(a) (West 2009). In Delaware, there are twenty-three, and in Colorado there are twenty-two. See *infra* notes 91 and 99 for citations to the aggravating factors in Delaware and Colorado.

replaced by a concern about practices that permit arbitrary determinations by prosecutors in commencing capital cases?

Our focus on this potential for arbitrary death penalty charging crystallized two years ago. We, professors at Pepperdine University School of Law, were asked by the California Commission on the Fair Administration of Justice (the "Commission") to survey all fifty-eight county district attorneys to ascertain the process and criteria each office uses when deciding whether a murder case should be prosecuted as a death penalty case.<sup>9</sup> We prepared a survey that would elicit the necessary information, which we distributed to each office, planning to evaluate the results and prepare a report with our findings and recommendations for the Commission.<sup>10</sup> In addition, we thought it important to publish our findings so the data would be available to a larger audience.<sup>11</sup> Little did we suspect that our efforts would be met by reluctance, resistance, and even outright refusal. Of the fifty-eight counties, fourteen expressly refused to tell us how they determine which cases to file as capital cases, twenty offices responded with only cursory information, and only fifteen completed the survey.<sup>12</sup> We were stunned.

Given this anemic response, we were unable to offer any definitive findings as to how such decisions are made.<sup>13</sup> The refusal by the overwhelming number of district attorneys to disclose their processes raised serious and troubling questions. This lack of transparency and absence of access to information, much to our surprise, has become the real story of our efforts. Why are prosecutors up and down California unwilling to disclose their internal procedures involving issues of such paramount public concern and interest, not to mention matters of life and death?

Is this lack of transparency unique to California? This question motivated us to broaden our inquiry to other states. To do so, we developed a means of surveying the death penalty decision-making process in other states, and Part IV of this Article summarizes the fruits of that labor, which have only deepened our concern over the potential for abuse at the charging stage of potential capital cases.

With this concern in mind, this Article is devoted to several ends. First, we thought it important to return to the roots, so to speak, in an effort to evaluate whether the death penalty process in California and across the nation has drifted from the commands of *Furman*. In Part II we briefly address the history and lessons of *Furman* and examine its practical implications and interpretations. In Part III, we offer as a microcosm a report on our California survey and the minimal results and qualified conclusions that we could draw. Next, in Part IV, we provide the results of our state-by-state survey of the thirty-seven capital punishment states, in which we examined their death penalty schemes and the number of "capital eligible" cases prosecuted as capital cases. For the purpose of comparative analysis, in Part V we examine the federal death penalty scheme and the federal protocol for filing capital cases within that framework. Given our findings, we then explore in Part VI the theoretical and practical

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9. H. MITCHELL CALDWELL ET AL., DEATH PENALTY SURVEY REPORT 1 (2007), <http://www.ccfaj.org/documents/reports/dp/expert/Pepperdine-Caldwell%20Research.pdf>.

10. *Id.*

11. *Id.*

12. *Id.* at 1–2.

13. *See id.* at 2 (describing limited response to survey).

justifications for more openness and accountability by prosecutors as they make their capital filing decisions. We conclude in Part VII with some strategies for increasing accountability and rationality for the momentous decision of when to seek the death penalty.

II. *FURMAN V. GEORGIA* AND CONSTITUTIONAL LIMITS ON DISCRETION IN IMPOSING THE DEATH PENALTY

In 1972, the Supreme Court put a halt to capital punishment in the United States—albeit a temporary halt—due to concerns over the arbitrary and capricious manner in which the death penalty was imposed. The case, *Furman v. Georgia*,<sup>14</sup> was a consolidation of three cases—two rape cases and one murder case—in which the defendants were sentenced to death.<sup>15</sup> While there were nine separate opinions—five concurring and four dissenting—the Court issued a brief per curiam opinion holding “that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.”<sup>16</sup> Two of the concurring opinions expressed the view that any imposition of the death penalty violates the cruel and unusual punishment clause.<sup>17</sup> Justice Douglas stopped short of reaching that conclusion, but considered that the degree of sentencing discretion (both by judges and jurors) permitted by the challenged statutes rendered them unconstitutional in their operation.<sup>18</sup> He summed up the problem succinctly, noting that

we deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12.<sup>19</sup>

Justices Stewart and White also expressly declined to hold the death penalty per se unconstitutional; however Justice Stewart noted that the specific death sentences that were before the Court were unconstitutional because the petitioners were “among a capriciously selected random handful”<sup>20</sup> of similarly situated offenders that were sentenced to death. He concluded “that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.”<sup>21</sup> Justice White, too, concluded that the way in which judges and juries exercised their discretion in the cases before the Court violated the Eighth Amendment,<sup>22</sup> and in a most insightful and often quoted

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14. 408 U.S. 238 (1972) (per curiam).

15. *Furman*, 408 U.S. at 239.

16. *Id.* at 239–40.

17. *Id.* at 305 (Brennan, J., concurring); *id.* at 370–71 (Marshall, J., concurring).

18. *Id.* at 256–57 (Douglas, J., concurring).

19. *Id.* at 253.

20. *Id.* at 309–10 (Stewart, J., concurring).

21. *Id.* at 310.

22. *Id.* at 314 (White, J., concurring).

passage wrote that “there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.”<sup>23</sup>

The shared commonality in the five concurring opinions, and the proposition for which *Furman* has come to stand, is that the Eighth Amendment’s prohibition against cruel and unusual punishment is violated when insufficient standards for the imposition of the death penalty render its imposition arbitrary and capricious or unequal in application.<sup>24</sup>

In the three consolidated cases under review in *Furman*, the state statutes at issue left the determination of whether the penalty should be death or a lesser punishment to the discretion of the jury.<sup>25</sup> This unfettered discretion, and the likelihood of arbitrary death penalty decisions, was at the center of the Court’s concern. Such unguided, standardless decisions are as apt to be made for unjust reasons as they are to be based upon appropriate ones. As it was put by Justice Douglas:

It would seem to be incontestable that the death penalty inflicted on one defendant is “unusual” if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices.<sup>26</sup>

It is apparent throughout several of the opinions that racial disparity in the imposition of the death penalty was a significant factor fueling the *Furman* decision. Justice Douglas’s opinion cites a study of capital cases in Texas that noted a statistically higher execution rate for black offenders.<sup>27</sup> That same study noted that the majority “of those executed were poor, young, and ignorant.”<sup>28</sup> Justice Brennan recognized that the jury that sentenced Furman to death knew very little about him: they knew he was black, he was twenty-six years old, and he worked at an upholstery shop.<sup>29</sup> Justice Stewart noted that race seemed to be the deciding factor in selecting the few, among the many eligible, who were sentenced to die.<sup>30</sup> Justice Marshall expressed similar concerns and noted that “[blacks] were executed far more often than whites in proportion to their percentage of the population.”<sup>31</sup>

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23. *Id.* at 313.

24. *Id.* at 256–57 (Douglas, J., concurring) (“[T]hese discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on ‘cruel and unusual’ punishments.”); *id.* at 305 (Brennan, J., concurring) (citing among reasons for invalidating death penalty “strong probability that it is inflicted arbitrarily”); *id.* at 310 (Stewart, J., concurring) (“I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.”); *id.* at 314 (White, J., concurring) (ruling that way in which judges and juries exercised their discretion in cases before Court violated Eighth Amendment); *id.* at 364–66 (Marshall, J., concurring) (noting that capital punishment is imposed discriminatorily and that burden of punishment falls largely upon poor, illiterate, and underprivileged).

25. *Id.* at 240 (Douglas, J., concurring).

26. *Id.* at 242.

27. *Id.* at 250–51.

28. *Id.*

29. *Id.* at 295 n.48 (Brennan, J., concurring).

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

31. *See id.* at 364 (Marshall, J., concurring) (noting that capital punishment is discriminatorily imposed on poor, illiterate, underprivileged, and minority groups).

Ultimately, the Court struck down the then-current death penalty sentencing schemes across the nation after recognizing the reality that the death penalty was falling most heavily upon people of color, the poor, the uneducated, and the downtrodden, rather than being imposed in a principled way upon those who were the “worst” of the eligible offenders.<sup>32</sup>

Given the concern attending the arbitrary and capricious imposition of the death penalty at the sentencing phase of a capital case, should we not be equally concerned that the initial decision to seek the death penalty may be made arbitrarily or capriciously? Just as a jury decision whether a convicted defendant shall live or die may be based upon race, religion, economic status, social position, or other improper motive, so too can the initial prosecutorial determination to seek the death penalty. It is, of course, the initial decision to file a case as a capital case that opens the door for the jury to recommend, and a judge to impose, the death penalty. Although the Court has given little, if any, attention to limiting the discretion involved in the decision to seek the death penalty at the outset of a death-eligible case, individual Justices have not been entirely silent on this issue. As Justice Brennan noted in his dissent from the Supreme Court’s denial of certiorari in *DeGarmo v. Texas*,<sup>33</sup> “discrimination and arbitrariness at an earlier point in the selection process nullify the value of later controls on the jury. The selection process for the imposition of the death penalty does not begin at trial; it begins in the prosecutor’s office.”<sup>34</sup>

When we set out some thirty-five years after *Furman* to study the manner in which the prosecuting authorities’ decisions to seek the death penalty were administered in California, we expected to see that there existed criteria and processes that would enable the prosecuting authority in each jurisdiction to make a principled distinction between cases for which capital punishment would be sought and those for which it would not. We also hoped to gather statistical information that would support that result. However, as detailed in Section III below, we were surprised, disappointed, and deeply troubled by the results of our study.

### III. CALIFORNIA STUDY

#### A. *The Survey*

In August 2006 we undertook, on behalf of the California Commission for the Fair Administration of Justice, to study the process by which the various district attorneys’ offices in California make the decision to file capital charges.<sup>35</sup> In California, the death penalty is an option that can be pursued by the district attorney for

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32. *See id.* at 238 (reversing application of death penalty in cases before the Court).

33. 474 U.S. 973 (1985).

34. *DeGarmo*, 474 U.S. at 975 (Brennan, J., dissenting); *see also* *Callins v. Collins*, 510 U.S. 1141, 1143 (1994) (Blackmun, J., dissenting) (expressing “hope that the prosecution, in urging the penalty of death, will have exercised its discretion wisely, free from bias, prejudice, or political motive, and will be humbled, rather than emboldened, by the awesome authority conferred by the State”).

35. *See generally* CALDWELL ET AL., *supra* note 9.

any first-degree murder case in which a special circumstance is alleged.<sup>36</sup> After completing preliminary research, we prepared a survey which we sent to the district attorneys in each of California's fifty-eight counties. This section of the Article summarizes our efforts and their results. The full text of our final report to the Commission can be found on the California Commission website,<sup>37</sup> and a copy of our survey is on file with the authors.

The survey sought two types of information. First, it sought information concerning the process by which each office determines whether to file a case as a capital case. Second, for each potential death penalty case handled by the office, it sought statistical information, including the characteristics of the defendant and the crime, whether the death penalty was sought, and the ultimate case disposition. This survey was designed to reveal the initial processes that each district attorney's office uses to make capital filing decisions and further to show whether certain types of special circumstance cases are more likely than others to be filed as capital. It would also show whether certain characteristics of defendants, victims, or the crimes alleged were more likely to result in a capital charge. We also hoped to gather information concerning the outcomes of those cases to see if we could discern what percentage of capital cases actually resulted in a sentence of death.

Several former and current state prosecutors provided comments as we developed the survey, and we revised our survey to incorporate their suggestions.<sup>38</sup> Upon completion of our survey in January 2007, we mailed a copy with a cover letter to the office of each district attorney in California.<sup>39</sup> Initially, we received very few responses. After following up with multiple telephone calls, as well as resending the survey by fax and email, we prepared our final report to the California Commission in November 2007.

#### B. Survey Results

We received some type of response from less than two-thirds of the counties in California; despite our repeated entreaties, twenty counties never responded. Of those counties that did respond, the response of fourteen was that they expressly declined to participate.<sup>40</sup> Five offices responded by indicating that they had not filed any capital cases during the time period covered by the survey (January 1, 1996 – December 31,

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36. CAL. PENAL CODE § 190.2 (West 2009). In California, special circumstances exist if, for example, the killing "was intentional and carried out for financial gain," the defendant has a prior conviction for first- or second-degree murder, or the "murder was especially heinous, atrocious, or cruel." *Id.* § 190.2(a)(1), (2), (14).

37. CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, REPORT AND RECOMMENDATIONS ON THE ADMINISTRATION OF THE DEATH PENALTY IN CALIFORNIA (2008), <http://www.ccfaj.org/documents/reports/dp/official/FINAL%20REPORT%20DEATH%20PENALTY.pdf>.

38. CALDWELL ET AL., *supra* note 9, at 1.

39. *Id.*

40. It is our belief that some offices may have acted in concert in deciding to refuse participation. Indeed, several offices which declined to participate used identical or nearly identical language, suggesting some agreement among the offices as to how to respond to the survey, stating "[w]ith all due respect, I must decline to answer the questions in Part I of your survey. However, I can assure you that my decision to file a capital charge is based on my sound discretion, as vested pursuant to Government Code section 26500." *Id.* at 2.

2006) and were either silent as to whether they had a procedure in place to determine whether to file death penalty cases or stated that they had no such procedure in place.<sup>41</sup> Four offices sent summary responses in letters or by email, which addressed some of the questions contained in our survey, but failed to answer many others.<sup>42</sup> One district attorney answered portions of the survey by telephone; those answers were recorded onto a survey form.<sup>43</sup> Only fourteen out of the fifty-eight offices substantially completed the written survey.<sup>44</sup>

### 1. Significant Results as to Process

Of the fourteen responding offices, we learned that most of the responders use a panel or committee to review whether to seek the death penalty in a “special circumstances” homicide.<sup>45</sup> In all the responding larger counties, and in some of the responding smaller counties, the panels are typically appointed by the district attorney using criteria such as seniority, job title, management, or supervisory authority.<sup>46</sup> Some smaller counties include all prosecutors in the review panel.<sup>47</sup> “Other counties indicated that the review is conducted by the elected District Attorney . . . .”<sup>48</sup> Most of the counties that use review panels employ them to make a recommendation to the District Attorney, who then makes the final decision.<sup>49</sup> One county makes the recommendation to a Special Circumstances Committee.<sup>50</sup> In response to an inquiry about whether the personal views of the members of the committee concerning the death penalty are considered in selecting participants, none indicated that this is a criteria for service on the committee; however, one responded “different views,” which seems to suggest that the committee includes people with different views on the death penalty.<sup>51</sup>

The responses revealed that consideration of whether to seek the death penalty is “typically” initiated at the request of the filing attorney,<sup>52</sup> but it can also be initiated by the mere filing of a case with special circumstances.<sup>53</sup> Further, in some cases “the ‘trigger’ occurs when the District Attorney [personally] makes an initial determination” to seek the death penalty.<sup>54</sup> “There is no consensus as to the stage in the proceeding that the decision to file a death penalty case is ‘typically’ made,” but “[i]n most counties the ultimate decision usually occurs after the post-preliminary hearing information is

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41. *Id.* at 3.

42. *Id.* at 4.

43. *Id.*

44. *Id.*

45. *Id.* at 5.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*



filed.”<sup>55</sup> “However[,] a noticeable minority of counties make the decision prior to the preliminary hearing.”<sup>56</sup>

Most of the responding offices indicated that they do not have written guidelines governing the decision to seek the death penalty.<sup>57</sup> Some counties acknowledged that they have written guidelines, but did not actually provide them.<sup>58</sup>

Finally, as noted in our report:

[T]he offices differed as to their use of information from the defense in their decision to seek the death penalty. Several indicated that they consider information [from the defense] “informally” if the defense [presents such] information. . . . Others indicated that they “formally” invite input from the defense, either by a personal presentation or by written submission. Two counties . . . indicated that they do not solicit information from the defense, and two other counties . . . indicated that they do not [even] consider information from the defense. The remaining county . . . did not disclose its policies concerning consideration of information from the defense in determining which cases to file as capital cases. [One county] noted that it also seeks input from the victim’s family.<sup>59</sup>

## 2. Significant Responses as to Death Penalty Statistics

Because of the relatively small group of offices that provided information and the incomplete nature of much of the information, the data received was “too minimal and incomplete to form the basis for any statistical analysis.”<sup>60</sup> Some counties indicated that they simply do not maintain the statistics or the statistics otherwise were not available.<sup>61</sup> “A few had no death penalty cases.”<sup>62</sup> “The most populous responding counties with the greatest number of death penalty cases . . . do not maintain [the type of] statistical information [we sought] concerning particular characteristics” of the crime, including the particular special circumstances that result in a capital case.<sup>63</sup> Neither do they maintain statistics concerning the age or race of the defendants, nor the race of the victims. “Where this information was provided by other counties . . . the number of death penalty cases was so small that it would be irresponsible to use this data as the basis for drawing any general conclusions.”<sup>64</sup>

“Similarly, our requests for information concerning how significant a role” the particular listed factors (i.e., a defendant’s prior criminal history, evidence of or absence of remorse) play in the decision-making process “did not yield any helpful

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55. *Id.*

56. *Id.* (citation omitted).

57. *Id.*

58. Memorandum Regarding Compilation of Survey Responses (October 4, 2007) (on file with authors).

59. CALDWELL ET AL., *supra* note 9, at 6 (citations omitted).

60. *Id.*

61. *Id.*

62. *Id.* (citation omitted).

63. *Id.*

64. *Id.*

results, as the responses showed little consensus.”<sup>65</sup> “Some offices indicated that the significance of those factors varied with the circumstances of the particular case, while others stated that they could not quantify [the importance of] the factors.”<sup>66</sup> As our report noted:

There [were] several factors that an appreciable minority of responding offices indicated do not play a significant role in determining whether to seek the death penalty, and not surprisingly those factors include “budgetary concerns” (4), gender (6), socio-economic status (6), and the defendant’s willingness to plead guilty (4). A number of other factors were rated “significant” or “very significant” by at least six counties, and those factors included [the] defendant’s mental health (6), prior criminal history (7), absence of remorse (6), remorse (6), victim family wishes (6), strength of prosecution evidence (6), and likelihood that jury will impose death (6).<sup>67</sup>

C. *Why the Reluctance to Disclose?*

We struggled with the possible reasons why so many of California’s chief prosecutors refused to complete our survey, and several possible explanations surfaced. Perhaps the prosecutors did not trust efforts undertaken by the California Commission on the Fair Administration of Justice. Perhaps there was concern that the responses to the survey might adversely impact ongoing or anticipated litigation concerning California’s death penalty. Perhaps there was a concern that full disclosure may expose an abuse of discretion or the results might lead to public criticism of how death penalty filings differ from county to county within California. Or, perhaps there was a concern that exposure of survey results might lead to recommendations for more statewide uniformity resulting in diminished county autonomy. Finally, since each county district attorney is elected by the constituents of her county, perhaps there might be a sense that each prosecutor needs to answer to no one other than those constituents. Without greater openness from a majority of California’s elected district attorneys, these questions remain unanswered.

#### IV. SURVEY OF THE THIRTY-SEVEN DEATH PENALTY STATES

A. *The Survey*

Our unsatisfying experience in surveying California’s prosecutors propelled us to expand our inquiry into the capital filing schemes and death penalty statistics of the other thirty-six death penalty states. Specifically, we sought to determine the relationship in each state between the number of statutory death qualifiers—circumstances that allow a prosecutor to seek the death penalty—and the number of capital filings, in an effort to ascertain the statistical likelihood or percentage of capital filings when qualifying circumstances were present in particular cases. Identifying each

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65. *Id.*

66. *Id.*

67. *Id.* at 6–7.

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state's statutory scheme setting forth its criteria for seeking the death penalty can aid in determining whether the potential exists for prosecutorial abuse in capital filing decisions. Indeed, the more expansive the list of criteria that qualify a defendant for the death penalty, the greater potential for abuse of discretion in determining whether to file the case as a capital case. Should that potential for abuse be found to exist, data as to the number of capital cases filed as compared to the number of death-eligible crimes (crimes for which death is a prescribed penalty) would allow insight into whether the potential for abuse has led to actual abuse.

We limited our inquiries to the same eleven-year window used in our California survey: January 1, 1996 through December 31, 2006. We hoped to obtain from each state the number of capital cases filed and the number of "foundational crimes"<sup>68</sup> filed. This data would have allowed us to know the potential number of cases that *could have been filed* as capital cases contrasted with the number that were actually filed seeking a death sentence. This information, while in no way conclusive, would have afforded significant statistical evidence as to the level of discretion accorded prosecutors and some insight as to whether the decision to seek the death penalty was being made in the type of arbitrary or capricious manner that *Furman* condemned.

Harkening back to our California survey experience, we were not surprised to learn that virtually none of the surveyed jurisdictions keep records or are able (or willing) to supply data about the number of capital cases that were actually filed.<sup>69</sup> They could, for the most part, tell us the number of death sentences that were meted out, but not the number of cases for which their prosecutors attempted to gain death verdicts. The other significant data that would have proven useful was likewise not forthcoming: the number of death-eligible cases filed. We recognized from the outset that death-eligible case statistics probably were not the type of data that most jurisdictions were likely to compile. However, without the number of capital cases filed and without the number of death-eligible cases filed, it would be impossible to ascertain the percentage of death-eligible cases filed as capital cases. Thus this avenue, which well might have shed light on prosecutorial discretion, was not available.

Given that reality, we set our sights on what we hoped were more pragmatic and obtainable data. Since the number of capital filings was, with few exceptions, unavailable, we would attempt to ascertain the number of individuals sentenced to death or serving a life term without the possibility of release. We believed that this would give us an approximate sense of the number of capital filings—approximate in that not all cases initially filed as capital cases result in death sentences or a life without the possibility of parole sentences. Such data would not account for acquittals or dispositions to non-capital sentences. Furthermore, we found that eleven states provide only two sentencing options for premeditated murder: death or life without the

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68. The term "foundational crimes" is intended to identify those crimes which, when coupled with each state's qualifying other circumstance(s), allow the potential for capital punishment. For instance, in most jurisdictions the "foundational crime" is premeditated murder. To escalate the premeditated murder to a capital offense, the statutorily authorized additional circumstance must also be pled. In most jurisdictions, for example, multiple murder is such a circumstance.

69. See *infra* Part IV.C for a discussion of the results of the state-by-state survey.

possibility of parole.<sup>70</sup> In these instances, our assumption that a life without possibility of parole sentence was originally filed as a capital case is rendered meaningless because the prosecutor may have chosen to pursue life from the beginning instead of life being the result of an unsuccessful death penalty prosecution. Nonetheless, we have assumed that, given the gravity of the punishment, capital cases would only be filed after thoughtful consideration and, as such, most capital filings likely would remain capital cases. We further assumed that most capital cases would result either in a death sentence or a life sentence without possibility of parole, and that those numbers are available in most of the thirty-seven states.<sup>71</sup> Likewise, since the number of death-eligible cases filed was not obtainable, we were also forced to make a number of concessions and assumptions here as well. We sought to ascertain the number of people serving prison sentences for crimes that would be “foundational” for capital punishment. Most often, the foundational crime was premeditated murder. As with capital filings, the number sentenced is different from the number filed. With this more modest data, coupled with the state’s statutory death scheme, we hoped we could arrive at some meaningful conclusions.

As previously noted, our survey of the thirty-seven death penalty states contained a number of limitations. Despite repeated attempts, we were unable to gather some of the most basic information. In most states, the various prison officials attempted to comply with our requests; however, in at least a quarter of the states, the people who administer the prisons were unwilling or unable to assist. In those states where the prison bureaucracy was not helpful, we attempted to elicit data from other agencies, including the state attorney generals, state public defenders, state supreme courts, state judicial councils, offices of management and budget, reports of death penalty commissions, deans and professors from various schools in many states, a governor, and even a couple of newspaper reporters. Through persistence, we were able to ascertain most of the data we sought. We found that only a very small number of states kept records of all the numbers we were looking for.

*B. Statutory Schemes: Circumstances Qualifying for the Death Penalty*

The breadth of each state’s statutory scheme is, of course, the fountainhead of all that follows. A scheme with a greater number of circumstances qualifying for the death penalty naturally vests greater discretion than a more restrictive scheme. California, for instance, with its twenty-two “special circumstances,” has generated the peculiar situation wherein nearly every premeditated murder involves circumstances authorizing the death penalty.<sup>72</sup> Scholars of death penalty jurisprudence could most likely draft a hypothetical first-degree murder involving no death penalty special circumstances, but

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70. As of 2010, those eleven states are: Colorado, Delaware, Florida, Georgia, Missouri, Nebraska, North Carolina, Ohio, Oklahoma, Pennsylvania, and Virginia.

71. See *infra* Part IV.C for a discussion of data from each state surveyed.

72. See *infra* notes 87–90 and accompanying text for a discussion of California statistics resulting from the survey and relevant California state statutes. “Special circumstances” qualifying for the death penalty include, for example, when the murder is intentional and for profit, or when it is committed by discharging a firearm from within a vehicle with the intent to harm another. See CAL. PENAL CODE § 190.2 (listing twenty-two special circumstances).

the accomplishment would come at considerable effort. In California, at least, the proliferation of death qualifiers creates the potential for prosecutorial abuse in capital filings. Potential is a far cry from the reality; but without the potential, actual abuse could not exist. Furthermore, as is evident from our survey,<sup>73</sup> all thirty-seven death penalty states have multiple “death qualifiers.”

### C. Survey Results

With the foregoing caveats and limitations in mind, here are the results of our state-by-state survey:

State	State Pop. and Ranking <sup>74</sup>	Foundational Death Qualifiers	Sentenced to Death	Sentenced to LWOP	Sentenced for Premeditated Murder
Ala.	4,447,100 (23 <sup>rd</sup> )	18 <sup>75</sup>	97 <sup>76</sup>	290 <sup>77</sup>	1597 <sup>78</sup>
Ariz.	5,130,632 (20 <sup>th</sup> )	18 <sup>79</sup>	42 <sup>80</sup>	UNA <sup>81</sup>	UNA <sup>82</sup>
Ark.	2,673,400 (33 <sup>rd</sup> )	20 <sup>83</sup>	18 <sup>84</sup>	223 <sup>85</sup>	836 <sup>86</sup>

73. See *infra* Part IV.C for a discussion of the survey results. For example, in Alabama “death qualifiers” include a capital offense committed by an incarcerated person, a capital offense committed in the course of a series of intentional killings, and a capital offense that is “especially heinous, atrocious, or cruel compared to other capital offenses.” ALA. CODE § 13A-5-49(1), (8), (10) (Lexis Nexis 2005).

74. U.S. CENSUS BUREAU, 2000 U.S. CENSUS TABLE 1: STATES RANKED BY POPULATION, <http://www.census.gov/population/www/cen2000/briefs/phc-t2/tables/tab01.pdf>.

75. See ALA. CODE § 13A-5-40 (providing eighteen capital offenses).

76. Email from Bennet Wright, Staff Statistician, Ala. Sentencing Comm’n, Ala. Dep’t of Corr., to Christina Gaudern, research assistant to author (August, 2008) (on file with authors).

77. *Id.*

78. *Id.* The information sought from each state contacted was for the eleven year period from 1996–2006.

79. See ARIZ. REV. STAT. ANN. § 13-1105 (2009) (providing eighteen circumstances that would allow the prosecutor to seek the death penalty).

80. Arizona Department of Corrections, ADC Inmate Datasearch, [http://www.adc.state.az.us/inmate\\_datasearch/index.aspx](http://www.adc.state.az.us/inmate_datasearch/index.aspx) (last visited May 19, 2010).

81. Data unavailable despite extensive research.

82. Data unavailable despite extensive research.

83. See ARK. CODE ANN. § 5-10-101 (2009) (detailing ten eligibilities for capital murder); *id.* § 5-4-604 (providing ten aggravating circumstances). In addition, the death penalty may also be imposed for a conviction of treason. *Id.* § 5-51-201.

84. See Arkansas Department of Corrections, Inmate Population Information Search, [http://www.adc.arkansas.gov/inmate\\_info/](http://www.adc.arkansas.gov/inmate_info/) (last visited May 19, 2010) (providing amount of inmates sentenced for first-degree murder and capital murder).

85. *Id.*

86. *Id.*

Cal.	33,871,648 (1 <sup>st</sup> )	34 <sup>87</sup>	UNA <sup>88</sup>	UNA <sup>89</sup>	UNA <sup>90</sup>
Colo.	4,301,261 (24 <sup>th</sup> )	22 <sup>91</sup>	1 <sup>92</sup>	313 <sup>93</sup>	316 <sup>94</sup>
Conn.	3,405,565 (29 <sup>th</sup> )	15 <sup>95</sup>	5 <sup>96</sup>	35 <sup>97</sup>	1425 <sup>98</sup>
Del.	783,600 (45 <sup>th</sup> )	22 <sup>99</sup>	13 <sup>100</sup>	90 <sup>101</sup>	103 <sup>102</sup>
Fla.	15,982,378	19 <sup>103</sup>	188 <sup>104</sup>	1063 <sup>105</sup>	1251 <sup>106</sup>

87. See CAL. PENAL CODE § 189 (West 2009) (providing one eligibility for first-degree murder); *id.* § 190.2 (providing twenty-one special circumstances); *id.* § 190.3 (listing eleven aggravating or mitigating circumstances).

88. Data unavailable despite extensive research.

89. Data unavailable despite extensive research.

90. Data unavailable despite extensive research.

91. See COLO. REV. STAT. ANN. § 18-3-102 (West 2009) (providing eight eligibilities for first-degree murder); *id.* § 18-1.3-1201(5) (listing seventeen aggravating factors). In addition, the death penalty may also be imposed for convictions of first-degree kidnapping resulting in death, and treason. *Id.* §§ 18-3-301, 18-11-101.

92. Bureau of Justice Statistics Publications, available at <http://www.ojp.usdoj.gov/bjs/pubalp2.htm#cp> (p. 5 of each report).

93. Despite a number of phone calls and e-mails, this number was not made available by the Colorado Department of Corrections. Because the only two sentences available for first-degree murder are life imprisonment and death, the number of defendants sentenced to life was obtained by subtracting the number sentenced to death from the total number sentenced to first-degree murder. COLO. REV. STAT. ANN. § 18-1.3-401. The number does not include sentences for kidnapping or treason. Under the Colorado statute, the sentence imposed is life imprisonment, not life without parole. *Id.* § 18-1.3-401.

94. KRISTI L. ROSTEN, COLORADO DEPARTMENT OF CORRECTIONS: STATISTICAL REPORT 36, tbl.29 (2004), available at [http://www.doc.state.co.us/sites/default/files/opa/StatRprt\\_FY04\\_2.pdf](http://www.doc.state.co.us/sites/default/files/opa/StatRprt_FY04_2.pdf).

95. See CONN. GEN. STAT. ANN. § 53a-54b (West 2009) (providing eight types of capital felonies); *id.* § 53a-46a(i) (listing eight aggravating factors).

96. Email from Tom Myers, Technical Analyst, Conn. Criminal Records, Conn. State Police Bureau of Identification of the Conn. Dep't of Public Safety, to Christina Gaudern, research assistant to authors (August 4, 2008) (original email no longer available).

97. *Id.*

98. *Id.*

99. See DEL. CODE ANN. tit. 11, § 636 (2008) (providing one eligibility for capital felony); *id.* § 4209(e) (listing twenty-two aggravating factors).

100. Letter from Philisa Weidlein-Crist, Research Analyst, Del. Statistical Analysis Ctr., to Christina Gaudern, research assistant to authors (August 12, 2008) (on file with authors).

101. *Id.*

102. *Id.*

103. See FLA. STAT. ANN. § 782.04 (West 2009) (providing two eligibilities for first-degree murder); *id.* § 921.141(5) (listing fifteen aggravating circumstances). In addition, the death penalty may also be imposed for convictions of capital drug trafficking, *id.* § 893.135, and capital sexual battery, *id.* § 794.011.

104. Florida Department of Corrections, Death Row Roster, <http://www.dc.state.fl.us/activeinmates/deathrowroster.asp> (last visited May 19, 2010).

105. This number was not available. The only two sentences available for first-degree murder are death and life imprisonment. The number of people sentenced to life imprisonment was ascertained by subtracting

	(4 <sup>th</sup> )				
Ga.	8,186,453 (10 <sup>th</sup> )	12 <sup>107</sup>	49 <sup>108</sup>	236 <sup>109</sup>	285 <sup>110</sup>
Idaho	1,293,953 (39 <sup>th</sup> )	17 <sup>111</sup>	5 <sup>112</sup>	26 <sup>113</sup>	99 <sup>114</sup>
Ill.	12,419,293 (5 <sup>th</sup> )	21 <sup>115</sup>	57 <sup>116</sup>	418 <sup>117</sup>	3920 <sup>118</sup>
Ind.	6,080,485 (14 <sup>th</sup> )	17 <sup>119</sup>	7 <sup>120</sup>	70 <sup>121</sup>	1127 <sup>122</sup>
Kan.	2,688,418	15 <sup>123</sup>	9 <sup>124</sup>	2 <sup>125</sup>	30 <sup>126</sup>

the number sentenced to death from the total number sentenced to first degree murder. (This number only includes sentences for murder one.)

106. This number only includes convictions for murder one. Despite numerous attempts to obtain information, the numbers for capital drug trafficking and capital sexual battery were not available. The numbers for capital murder were obtained from the Florida Summary Reporting System. Florida State Courts, Trial Court Statistics, <http://trialstats.flcourts.org/TrialCourtStats.aspx> (last visited May 19, 2010).

107. *See* GA. CODE ANN. § 17-10-30 (2009) (listing eleven aggravating factors). In addition, the death penalty may be imposed for convictions of kidnapping with bodily injury or ransom when the victim dies, *id.* § 16-5-40, aircraft hijacking, *id.* § 16-5-44, and treason, *id.* § 16-11-1.

108. *See* Georgia Department of Corrections Offender Search, <http://www.dcor.state.ga.us/GDC/OffenderQuery/jsp/OffQryForm.jsp> (last visited May 19, 2010) (providing number of inmates sentenced for murder).

109. *Id.*

110. *Id.*

111. *See* IDAHO CODE ANN. § 19-2515 (2009) (listing four eligibilities for first-degree murder); *id.* § 19-2515 (providing eleven aggravating circumstances). In addition, the death penalty may be imposed for convictions of first-degree kidnapping, *id.* § 18-4505, and perjury resulting in execution of an innocent person, *id.* § 18-5411.

112. Email from Greg Sali, Senior Research Analyst, Idaho Dep't of Corr., to Christina Gaudern, research assistant to authors (July 28, 2008) (on file with authors).

113. *Id.*

114. *Id.*

115. *See* 720 ILL. COMP. STAT. 5/9-1(b) (West 2008) (listing twenty-one aggravating factors).

116. Mark Powers, Research Analyst, Ill. Criminal Justice Info. Auth. (on file with authors) (numbers only include 1996 through the first half of 2004).

117. *Id.*

118. *Id.*

119. *See* IND. CODE ANN. § 35-41-1-1 (West 2009) (providing two eligibilities for murder one); *id.* § 35-50-2-9(b) (listing sixteen aggravating circumstances).

120. Indiana Department of Correction (July 17, 2008). Offender Information System Admission Files 1997–2007. Email from A. Copeland, Executive Dir. of Research & Tech., Ind. Dep't of Corr., Dep't of Planning & Research, to Christina Gaudern, research assistant to authors (July 24, 2008) (on file with authors).

121. *Id.*

122. *Id.*

123. *See* KAN. STAT. ANN. § 21-3439 (West 2008) (providing seven eligibilities for capital murder); *id.* § 21-4625 (listing eight aggravating circumstances).

124. Email from Cheryl Cadue, Publications Editor, Kan. Dep't of Corr., to Christina Gaudern, research assistant to authors (August 2008) (on file with authors).

	(32 <sup>nd</sup> )				
Ky.	4,041,769 (25 <sup>th</sup> )	10 <sup>127</sup>	21 <sup>128</sup>	254 <sup>129</sup>	776 <sup>130</sup>
La.	4,468,976 (22 <sup>nd</sup> )	15 <sup>131</sup>	72 <sup>132</sup>	UNA <sup>133</sup>	UNA <sup>134</sup>
Md.	5,296,486 (19 <sup>th</sup> )	13 <sup>135</sup>	4 <sup>136</sup>	655 <sup>137</sup>	1170 <sup>138</sup>
Miss.	2,844,658 (31 <sup>st</sup> )	18 <sup>139</sup>	38 <sup>140</sup>	883 <sup>141</sup>	1038 <sup>142</sup>
Mo.	5,595,211 (17 <sup>th</sup> )	17 <sup>143</sup>	43 <sup>144</sup>	503 <sup>145</sup>	546 <sup>146</sup>
Mont.	902,195	12 <sup>147</sup>	1 <sup>148</sup>	44 <sup>149</sup>	626 <sup>150</sup>

125. *Id.*

126. *Id.*

127. *See* KY. REV. STAT. ANN. § 532.025(2)(a) (West 2009) (stating eight aggravating circumstances). In addition, the death penalty may be imposed for convictions of fetal homicide in the first degree, *id.* § 507.020 and kidnapping, *id.* § 509.040.

128. Email from Tammy Collins, Ky. Dep't of Corr., to Christina Gaudern, research assistant to authors (August 20, 2008) (on file with authors).

129. *Id.*

130. *Id.*

131. *See* LA. REV. STAT. ANN. § 14:30 (2009) (creating one type of eligibility for first-degree murder); LA. CODE CRIM. PROC. ANN. art. 905.4(A) (2009) (listing twelve aggravating circumstances). In addition, the death penalty may be imposed for convictions of aggravated rape, LA. REV. STAT. ANN. § 14:42, and treason, *id.* § 14:113.

132. Bureau of Justice Statistics Publications, *supra* note 92.

133. Data unavailable despite extensive research.

134. Data unavailable despite extensive research.

135. *See* MD. CODE ANN., CRIM. LAW § 2-201 (West 2008) (creating three eligibilities for first-degree murder); *id.* § 2-303(g)(1) (listing ten aggravating circumstances).

136. Email from Thomas Stough, Office of Planning and Statistics, Dep't of Public Safety and Corr. Servs., to Christina Gaudern, research assistant to authors (August 2008) (on file with authors); *see also* Md. Div. of Corr.'s Offender Based State Corr. Info. Sys.

137. *Id.*

138. *Id.*

139. *See* MISS. CODE ANN. § 97-3-19 (West 2008) (creating eight eligibilities for murder); *id.* § 99-19-101(5) (listing eight aggravating circumstances). In addition, the death penalty may be imposed for a conviction of aircraft piracy. *Id.* § 97-25-55.

140. Email from Suzanne Singletary, Dir., Office of Commc'ns, Miss. Dep't of Corr. to Christina Gaudern, research assistant to authors (July 29, 2008) (on file with authors). This number includes sentences for murder and homicide. There were no convictions for aircraft piracy during the relevant time period.

141. *Id.*

142. *Id.*

143. *See* MO. ANN. STAT. § 565.032.1 (West 2009) (providing seventeen aggravating circumstances).

144. Email from Brandon Crosser, Mo. Dep't of Corr. Internal Data, to Christina Gaudern, research assistant to authors (July 22, 2008) (on file with authors).

145. *Id.*

146. *Id.*



	(44 <sup>th</sup> )				
Neb.	1,711,263 (38 <sup>th</sup> )	12 <sup>151</sup>	8 <sup>152</sup>	1910 <sup>153</sup>	1918 <sup>154</sup>
Nev.	1,998,257 (35 <sup>th</sup> )	18 <sup>155</sup>	37 <sup>156</sup>	UNA <sup>157</sup>	UNA <sup>158</sup>
N.H.	1,235,786 (41 <sup>st</sup> )	16 <sup>159</sup>	0 <sup>160</sup>	19 <sup>161</sup>	19 <sup>162</sup>
N.J.	8,414,350	14 <sup>163</sup>	8 <sup>164</sup>	36 <sup>165</sup>	460 <sup>166</sup>

147. See MONT. CODE ANN. § 45-5-102 (2009) (providing one eligibility for deliberate homicide); *id.* § 46-18-303 (listing eleven aggravating circumstances). In addition, the death penalty may be imposed for a conviction of sexual intercourse without consent. *Id.* § 45-5-503.

148. Email from Dewey Hall, Data Quality & Reporting Manager, Heath, Planning Mgmt. & Info. Servs. Div., Mont. Dep't of Corr., to Christina Gaudern, research assistant to authors (July 24, 2008) (on file with authors).

149. *Id.*

150. *Id.*

151. See NEB. REV. STAT. § 28-303 (2009) (listing three eligibilities for first-degree murder); *id.* § 29-2523 (creating nine aggravating circumstances).

152. NEB. DEP'T OF CORR., INMATES SENTENCED TO DEATH ROW IN NEBRASKA (2007), <http://www.corrections.state.ne.us/policies/files/DeathRowHistory2-3-07.pdf>.

153. B.J. Spring, Internet Tech. Bus. Analyst, Dep't of Corr. Servs., Planning & Research Accreditation, Neb. Dep't of Corr. (on file with authors).

154. If one is convicted of first-degree murder, one will receive either life without the possibility of parole or be sentenced to death. NEB. REV. STAT. §§ 28-105, -303. Adding these numbers together reveals the total number of those convicted of first-degree murder to be 1918.

155. See NEV. REV. STAT. ANN § 200.030 (Lexis 2007) (creating four eligibilities for first-degree murder); *id.* § 200.033 (creating fourteen aggravating circumstances).

156. Bureau of Justice Statistics, *supra* note 92.

157. Data unavailable despite extensive research.

158. Data unavailable despite extensive research.

159. See N.H. REV. STAT. ANN. § 630:1-a (2008) (creating four eligibilities for first-degree murder although death penalty cannot be sought for first-degree murder alone); *id.* § 630:1 (listing six eligibilities for capital murder); *id.* § 630:5 (listing ten aggravating circumstances).

160. No person has been executed in New Hampshire since 1939 although two people have been sentenced to death during that time, in 1959 and 2008. Editorial, *Life Without Parole Is Serious Punishment*, CONCORD MONITOR, Jan. 26, 2007, at B4.

161. Telephone Interview with Jeff Lyons, Pub. Info. Officer, N.H. Dep't of Corr., in N.H. (July 23, 2008).

162. This number is an aggregate of the number of people sentenced to death without the possibility of parole (which is possible only if convicted of first-degree murder or capital murder). The last person prosecuted for Capital Murder was Gordon Perry, for killing a police officer in 1997. Annmarie Timmins, *Capital Murder Cases Pose Challenge—Death Penalty Applies Only in Rare Instances*, CONCORD MONITOR, Oct. 18, 2006, at A1.

163. See N.J. STAT. ANN. § 2C:11-3(a) (West 2009) (creating two eligibilities for capital punishment if first-degree murder is committed with other listed crimes); *id.* § 2C:11-3(b)(4) (listing twelve aggravating circumstances).

164. E-mail from Deirdre Fedkenheuer, Coordinator of Media Affairs, N.J. Dep't of Corr. to authors (Aug. 20, 2008, 11:53am EST) (on file with authors) (providing numbers from 1997 to 2006).

165. *Id.*

	(9 <sup>th</sup> )				
N.M.	1,819,046 (36 <sup>th</sup> )	10 <sup>167</sup>	1 <sup>168</sup>	189 <sup>169</sup>	193 <sup>170</sup>
N.C.	8,049,313 (11 <sup>th</sup> )	14 <sup>171</sup>	132 <sup>172</sup>	3408 <sup>173</sup>	3540 <sup>174</sup>
Ohio	11,353,140 (7 <sup>th</sup> )	15 <sup>175</sup>	75 <sup>176</sup>	876 <sup>177</sup>	951 <sup>178</sup>
Okla.	3,450,654 (27 <sup>th</sup> )	13 <sup>179</sup>	67 <sup>180</sup>	309 <sup>181</sup>	376 <sup>182</sup>
Or.	3,421,399 (28 <sup>th</sup> )	15 <sup>183</sup>	18 <sup>184</sup>	86 <sup>185</sup>	267 <sup>186</sup>
Pa.	12,281,054	19 <sup>187</sup>	86 <sup>188</sup>	1527 <sup>189</sup>	1042 <sup>190</sup>

166. *Id.*

167. *See* N.M. STAT. ANN. § 30-2-1 (West 2003) (stating three eligibilities for first-degree murder); *id.* § 31-20A-5 (creating seven aggravating circumstances).

168. Rosi Celi, N.M. Dep't of Corr., Pub. Info. Office (on file with authors).

169. *Id.*; *see also* N.M. STAT. ANN. § 31-18-14 (stating that defendants convicted of capital felonies can be sentenced to life imprisonment or life imprisonment without possibility of parole).

170. Rosi Celi, *supra* note 168.

171. *See* N.C. GEN. STAT. ANN. § 14-17 (2007) (providing three eligibilities for first-degree murder); *id.* § 15A-2000 (listing eleven aggravating circumstances).

172. North Carolina Department of Correction, Offenders on Death Row, <http://www.doc.state.nc.us/DOP/deathpenalty/deathrow.htm> (last visited Nov. 12, 2010).

173. Despite a series of phone calls and emails to the North Carolina Department of Corrections, the department did not provide the number. We derived this number by subtracting the number of individuals sentenced to death from the number of individuals convicted of a foundational crime. Under the statutory scheme, life imprisonment is the only alternative to death in a first-degree murder case. N.C. GEN. STAT. ANN. § 14-17.

174. North Carolina Department of Correction, *supra* note 172.

175. *See* OHIO REV. CODE ANN. § 2903.01 (West 1989) (providing five eligibilities for aggravated murder); *id.* § 2929.04 (listing ten aggravating circumstances).

176. E-mail from Brian Martin, Assistant Bureau Chief, Bureau of Research, Ohio Dep't of Corr. to authors (July 25, 2008, 3:54pm EST) (on file with authors).

177. *Id.*

178. *Id.*

179. *See* OKLA. STAT. ANN. tit. 21, § 701.7 (West 2010) (creating five eligibilities for first-degree murder); *id.* § 701.12 (listing eight aggravating circumstances), *invalidated in part by* *Maynard v. Cartwright*, 486 U.S. 356, 360 (1988) (holding that one aggravating circumstance was unconstitutionally vague).

180. E-mail from Michael Connelly, Adm'r of the Evaluation & Analysis Unit, Okla. Dep't of Corr. to authors (Aug. 22, 2008, 9:02am EST) (on file with authors).

181. *Id.*

182. *Id.*

183. *See* OR. REV. STAT. ANN. 163.115 (West 1990) (defining three eligibilities for murder); *id.* § 163.095 (listing twelve circumstances for aggravated murder).

184. Michael Wilson, Economist, Or. Criminal Justice Comm'n (on file with authors).

185. *Id.*

186. *Id.*

	(6 <sup>th</sup> )				
S.C.	4,012,012 (26 <sup>th</sup> )	13 <sup>191</sup>	59 <sup>192</sup>	596 <sup>193</sup>	1144 <sup>194</sup>
S.D.	754,844 (46 <sup>th</sup> )	14 <sup>195</sup>	4 <sup>196</sup>	26 <sup>197</sup>	31 <sup>198</sup>
Tenn.	5,689,283 (16 <sup>th</sup> )	18 <sup>199</sup>	50 <sup>200</sup>	250 <sup>201</sup>	300 <sup>202</sup>
Tex.	20,851,820 (2 <sup>nd</sup> )	12 <sup>203</sup>	340 <sup>204</sup>	88 <sup>205</sup>	1886 <sup>206</sup>
Utah	2,233,169	21 <sup>207</sup>	3 <sup>208</sup>	UNA <sup>209</sup>	UNA <sup>210</sup>

187. See 18 PA. CONS. STAT. ANN. § 2502(a) (West 2010) (creating one eligibility for intentional killings labeled first-degree murder); 42 PA. CONS. STAT. ANN. § 9711 (West 2010) (defining eighteen aggravating circumstances).

188. E-mail from William R. Parkes, Recidivism Analyst, Statistics & Grants, Pa. Dep't of Corr. to authors (Aug. 14, 2008, 11:59am EST) (on file with authors).

189. *Id.* A life sentence without the possibility of parole is not limited to first-degree murder in Pennsylvania. For instance, a habitual violent offender may receive a life sentence without the possibility of parole if the evidence shows that twenty-five years is not sufficient to protect public safety. 42 PA. CONS. STAT. ANN. § 9714.

190. E-mail from William R. Parkes to authors, *supra* note 188.

191. See S.C. CODE ANN. § 16-3-10 (2008) (creating one eligibility and defining murder as killing with malice aforethought); *id.* § 16-3-20 (listing twelve aggravating circumstances).

192. E-mail from Sherry Rhodes, S.C. Dep't of Corr., Pub. Info. Officer to authors (Aug. 14, 2008, 6:10am EST) (on file with authors).

193. *Id.*

194. *Id.*

195. See S.D. CODIFIED LAWS § 22-16-4 (2009) (creating three eligibilities for first-degree murder); *id.* § 23(A)-27(A)-1 (defining ten aggravating circumstances); *id.* § 22-19-1 (imposing death penalty for aggravated kidnapping).

196. Jill Gusso, Dir., S.D. Unified Judicial Sys. (on file with authors).

197. *Id.*

198. *Id.*

199. See TENN. CODE ANN. § 39-13-202 (2006) (creating three eligibilities for first-degree murder); *id.* § 39-13-204(i) (defining fifteen aggravating circumstances required for either death penalty or life imprisonment without possibility of parole and otherwise imposing life imprisonment).

200. Aaron Conklin, Assistant Gen. Counsel, Admin. Office of the Court (on file with authors).

201. *Id.*

202. *Id.*

203. See TEX. PENAL CODE ANN. § 19.02 (West 2009) (defining three eligibilities for murder); *id.* § 19.03(a) (listing nine eligibilities making murder a capital felony).

204. E-mail from Alicia Frezia-King, Open Records Coordinator, TDCJ – Executive Servs. (on file with authors).

205. *Id.*

206. *Id.*

207. See UTAH CODE ANN. § 76-5-202 (Lexis 2009) (imposing death penalty for aggravated murder, which is intentionally or knowingly causing death of another with one of approximately twenty-one additional circumstances).

208. Bureau of Justice Statistics, *supra* note 92.

	(34 <sup>th</sup> )				
Va. <sup>211</sup>	7,078,515 (12 <sup>th</sup> )	20 <sup>212</sup>	19 <sup>213</sup>	380 <sup>214</sup>	125 <sup>215</sup>
Wash.	5,894,121 (15 <sup>th</sup> )	17 <sup>216</sup>	11 <sup>217</sup>	336 <sup>218</sup>	524 <sup>219</sup>
Wyo.	493,782 (51 <sup>st</sup> )	15 <sup>220</sup>	3 <sup>221</sup>	13 <sup>222</sup>	40 <sup>223</sup>

209. Data unavailable despite extensive research.

210. Data unavailable despite extensive research.

211. Virginia Department of Corrections was only able to provide information for the years 1999 and 2001–2006.

212. See VA. CODE ANN. § 18.2-31 (2009) (providing that fifteen separate offenses constitute capital murder); *id.* § 19.2-264.4 (imposing death penalty for capital murder if two very broad circumstances are probable, given the evidence).

213. VA. DEP'T OF CORR., STATE RESPONSIBLE OFFENDER POPULATION TREND FY 2004 – FY 2008 (2008), [http://www.vadoc.virginia.gov/about/facts/research/new-statsum/offenderpopulationtrends\\_fy04-fy08.pdf](http://www.vadoc.virginia.gov/about/facts/research/new-statsum/offenderpopulationtrends_fy04-fy08.pdf).

214. See Virginia Department of Corrections, Community Corrections, <http://www.vadoc.state.va.us/community/> (last visited May 19, 2010) (stating that parole for felonies was abolished in Virginia in 1995). Additionally, lesser crimes than capital murder are eligible for life imprisonment. VA. CODE ANN. § 18.2-10(b).

215. VA. DEP'T OF CORR., *supra* note 213.

216. See WASH. REV. CODE ANN. § 9(A).32.030 (West 2009) (creating three eligibilities for first-degree murder); *id.* § 10.95.020 (listing fourteen aggravating circumstances).

217. E-mail from Bradley A. Dudley, Research Analyst, Dep't of Corr., Planning & Research, to Jason Vaner, research assistant to the authors (on file with authors).

218. *Id.*

219. *Id.*

220. See WYO. STAT. ANN. § 6-2-101 (2009) (listing three eligibilities for first-degree murder); *id.* § 6-2-102(h) (creating twelve aggravating circumstances).

221. Melinda Brazzale, Pub. Info. Officer, Wyo. Dep't of Corr. (on file with authors).

222. *Id.*

223. *Id.*

## V. THE FEDERAL PROTOCOL IN FILING DEATH PENALTY CASES

### A. *The 1995 Protocol and the U.S. Attorneys' Manual*

From the results of our California survey and from our survey of the other thirty-six death penalty states, one central truth emerged: there is a lack of a consistent protocol free from local “idiosyncrasies” that would ensure that each capital filing decision is made in a manner consistent with the dictates of *Furman*. In contrast, the federal death penalty protocol, with its requirements of transparency and accountability, may well be a model for the various state jurisdictions. In 1994, Congress enacted the Federal Death Penalty Act (“FDPA”).<sup>224</sup> The FDPA authorized the death penalty for entirely new federal offenses as well as for pre-existing offenses that had not previously been death-penalty eligible, which resulted in a substantial increase in the availability of the death penalty for federal offenders.<sup>225</sup> The FDPA

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224. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, 1959 (codified as amended in scattered sections of 18 and 42 U.S.C.). From the mid-1970s to the late 1980s, no federal death penalty cases were tried because federal death penalty statutes did not meet the constitutional standards set forth in *Gregg* and *Furman*. MOLLY TREADWAY JOHNSON & LAURAL L. HOOPER, RESOURCE GUIDE FOR MANAGING CAPITAL CASES, VOLUME I: FEDERAL DEATH PENALTY TRIALS 1 (2004). The Anti-Drug Abuse Act was passed in 1988, reinstating the death penalty for a few crimes. The 1994 FDPA later authorized the death penalty for fifty additional crimes. *Id.* The FDPA was favored by the Senate and was a “compromise between moderate Democrats and Republicans” in the House. Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 FORDHAM URB. L. J. 347, 385–87 (1999).

225. Little, *supra* note 224, at 390–91. The number of federal offenses made death-eligible under the FDPA is at least forty-four, but this number is “open to interpretation.” *Id.* at 391 & n.242. In addition to treason and aiding a foreign government,

(a) A defendant who had been found guilty of—

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(2) any other offense for which a sentence of death is provided, if the defendant, as determined beyond a reasonable doubt at the hearing under section 3593—

(A) intentionally killed the victim;

(B) intentionally inflicted serious bodily injury that resulted in the death of the victim;

(C) intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim died as a direct result of the act; or

(D) intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim died as a direct result of the act,

shall be sentenced to death if, after consideration of the factors set forth in section 3592 in the course of a hearing held pursuant to section 3593, it is determined that imposition of a sentence of death is justified, except that no person may be sentenced to death who was less than 18 years of age at the time of the offense.

18 U.S.C. § 3591 (2006). Notably, the FDPA also authorized imposition of the death penalty for two non-homicide crimes. Little, *supra* note 224, at 389. These two offenses involved large-scale drug dealing and major CCE (“continuing criminal enterprise”) offenders. U.S. DEP’T OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: A STATISTICAL SURVEY (1988–2000) (2000), [http://www.justice.gov/dag/pubdoc/dp\\_survey.html](http://www.justice.gov/dag/pubdoc/dp_survey.html) [hereinafter STATISTICAL SURVEY]. The Court had not approved the death penalty for a defendant

defines death-eligible crimes, lists the mitigating factors and aggravating factors for the jury to consider in deciding whether death should be imposed, and provides for a special hearing before a jury to determine whether the sentence of death is justified.<sup>226</sup> Further, the FDPA requires the government to serve the defendant a written notice of intent to seek the death penalty “within a ‘reasonable time before trial,’” specifying aggravating factors the government intends to prove.<sup>227</sup> These aspects of the FDPA are consistent with the vast majority of state death penalty schemes. However, it is through the policy guidelines adopted in 1995 that the federal process may prove to be most instructive.

In January 1995, the Department of Justice adopted detailed policy guidelines (the “1995 Protocol”)<sup>228</sup> in an effort to provide clear and uniform standards for decisions about whether to seek the death penalty.<sup>229</sup> Even though the 1995 Protocol has no binding effect on the Attorney General, it clearly sets out specific steps, documents, and time frames to govern capital cases.<sup>230</sup> Pursuant to the 1995 Protocol, the U.S. Attorney is “strongly advised, but not required, to consult with the Capital Case Unit” (“CCU”) before seeking an indictment for an offense subject to the death penalty.<sup>231</sup> The 1995 Protocol advises that, prior to obtaining an indictment charging a capital offense, the U.S. Attorney should make a preliminary determination as to whether to

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who did not “take human life” since it held in *Coker v. Georgia* that the death penalty could not be applied for the rape of an adult woman. Little, *supra* note 224, at 389 (citing *Coker v. Georgia*, 433 U.S. 584, 598 (1977)). The Supreme Court has recently confirmed that the death penalty may not be applied for any crime against an individual in which a life was not taken. *Kennedy v. Louisiana*, 128 S.Ct. 2641, 2665 (2008).

226. 3 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 528.1 (3d ed. 2004) (citing 18 U.S.C.A. § 3591 (defining crimes); 18 U.S.C.A. § 3592 (providing mitigating and aggravating factors); 18 U.S.C.A. § 3593 (detailing criteria for special hearing)); see also U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL 9-10.060, [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/10mcrmm.htm#9-10.060](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/10mcrmm.htm#9-10.060) (last visited May 19, 2010) [hereinafter U.S.A.M.] (detailing special findings required in federal indictment when seeking death penalty).

227. Little, *supra* note 224, at 392–93 (quoting 18 U.S.C. § 3593(a) (Supp. II 1996)). The government is limited to arguing the aggravating factors set forth in the notice of intent to seek the death penalty, but courts have split on whether it may be amended. *Id.* at 393. The time requirements of a written notice of intent to seek the death penalty are also concerns addressed in the Department of Justice’s Protocol. The Assistant U.S. Attorney (“AUSA”) must make submissions to the Assistant Attorney General (“AG”) within certain time limits to allow the notice to be timely filed, and an AUSA who seeks approval for a plea agreement must do so ninety days before the notice of intent to seek the death penalty is due. U.S.A.M., *supra* note 226, at 9-10.080; 9-10.110.

228. STATISTICAL SURVEY, *supra* note 225, at 2.

229. “The Department strictly adheres to this protocol because of the unparalleled degree of transparency it affords to the reviewing attorneys and the attorneys litigating for both the government and the defense.” *Oversight of the Federal Death Penalty: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 110th Cong. 4-297 (2007) [hereinafter *Hearings*] (written statement of Barry Sabin, Deputy Assistant Att’y Gen., Criminal Division), available at <http://purl.access.gpo.gov/GPO/LPS112781>.

230. See *Walker v. Reno*, 925 F. Supp. 124, 134 (N.D.N.Y. 1995) (finding no basis for judicial review of whether Attorney General followed protocol because protocol is not legally binding).

231. U.S.A.M., *supra* note 226, at 9-10.050. The U.S. Attorney must notify the CCU (“Capital Crimes Unit”) when a capital offense is charged. *Id.* The CCU is comprised of seven career attorneys, whose tasks are to thoroughly review death-penalty eligible offenses, provide training and informed expert assistance to federal prosecutors, and provide other guidance on an as-needed basis (drafting documents, participating at trial or in post-conviction litigation, etc). *Hearings*, *supra* note 229, at 296–97 (testimony of Barry Sabin).

recommend the death penalty.<sup>232</sup> The CCU is kept informed throughout the litigation.<sup>233</sup> If the U.S. Attorney is considering whether to seek the death penalty post-indictment, the U.S. Attorney must give the defense attorney a reasonable opportunity to present any facts, including mitigating factors, for consideration.<sup>234</sup> In addition, the U.S. Attorney should consult with the family of the victim, if possible, concerning the decision to seek the death penalty.<sup>235</sup>

For every capital offense or offense alleging conduct that could be punished by death, the U.S. Attorney also must submit a memorandum to the Assistant Attorney General for the Criminal Division,<sup>236</sup> which addresses each of the following: unusual circumstances, a narrative delineation of facts and separate delineation of supporting evidence, pertinent prosecutorial considerations, a death penalty analysis, the background and criminal record of the defendant, the background and criminal record of the victim, a victim impact statement, a discussion of the federal interest in prosecuting the case, information about foreign citizenship, relevant court decisions, and a recommendation of the U.S. Attorney on whether death should be sought.<sup>237</sup>

This recommendation is then forwarded to the CCU. For any case where the U.S. Attorney or a member of the Capital Review Committee (“Committee”) recommends the death penalty, a CCU attorney must confer with the U.S. Attorney’s Office and defense counsel to schedule a hearing before the Committee.<sup>238</sup> It is the function of the Committee to gather information and make recommendations. The defendant must be afforded the opportunity to present evidence and a mitigating argument at this meeting, or a decision to seek the death penalty is not permitted.<sup>239</sup> The Committee reviews materials submitted by the U.S. Attorney and any materials submitted by the defense, and makes a recommendation to the Attorney General through the Deputy Attorney General.<sup>240</sup>

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232. U.S.A.M., *supra* note 226, at 9-10.050.

233. For instance, CCU must be notified of the deadline for filing the notice of intent to seek the death penalty, any developments that could affect the ability to file a notice of intent to seek the death penalty, and any verdict and sentence reached. *Id.* at 9-10.170. The CCU must also be notified when the government intends to accept a guilty plea to a capital offense when, but for the plea, there would be insufficient evidence to charge the offense as a capital case. *Id.* In that case, the CCU may authorize the U.S. Attorney to proceed with the plea without the review process, or may request an expedited review. *Id.* Expedited review may also be requested by the U. S. Attorney in other specified situations, but all requests must be screened by the CCU. *Id.* at 9-10.100.

234. *Id.* at 9-10.050.

235. *Id.* at 9-10.070.

236. This memorandum must be submitted no later than ninety days before the notice of intent to seek the death penalty is due to be filed; or if no such notice is required, then 150 days prior to trial. *Id.* at 9-10.080.

237. *Id.*

238. Members of the Committee are assigned on a rotating basis from two pools: (1) Assistant U.S. Attorneys with capital trial experience from about six U.S. Attorneys’ offices around the country, and (2) selected attorneys from the Office of the Deputy Attorney General. One representative from each pool is named to the committee for every case. There are also two standing members: (1) a Deputy Assistant Attorney General (or other senior attorney from the criminal division) and (2) the career chief of the CCU. *Hearings, supra* note 229, at 296–97 (statement of Barry Sabin).

239. U.S.A.M., *supra* note 226, at 9-10.120.

240. *Id.* A majority vote of the Committee determines the recommendation to be made, but dissenting members can include a minority viewpoint discussion in the memorandum. *Hearings, supra* note 229, at 298

Upon consideration of these materials and recommendations, the Deputy Attorney General will make a recommendation to the Attorney General,<sup>241</sup> who will make the final decision whether the Government will file a notice of intent to seek the death penalty.<sup>242</sup> If the Attorney General has authorized filing a notice of intention to seek the death penalty, the U.S. Attorney may not file that notice until the CCU has approved it.<sup>243</sup> Notice shall be filed as soon as possible after the Attorney General's decision, and the Assistant U.S. Attorney should promptly inform the district court and counsel for defense.<sup>244</sup> The federal guidelines state that the victim's family must be notified of all final decisions.<sup>245</sup>

The Attorney General may authorize exceptions to any of these provisions "[t]o ensure the proper administration of justice."<sup>246</sup> The Protocol creates no substantive or procedural rights.<sup>247</sup>

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(statement of Barry Sabin). If the Committee's decision differs from the U.S. Attorney's, the U.S. Attorney may still recommend the death penalty and may respond to the Committee's analysis in a memorandum to the Deputy Attorney General. U.S.A.M., *supra* note 226, at 9-10.120.

241. U.S.A.M., *supra* note 226, at 9-10.120.

242. *Id.* Standards for reaching determinations in these cases include fairness, national consistency, adherence to statutory requirements, and law enforcement objectives. *Id.* at 9-10.130.

243. *Id.* at 9-10.140.

244. *Id.*

245. *Id.* at 9-10.070.

246. *Id.* at 9-10.190.

247. *United States v. Lee*, 274 F.3d 485, 493 (8th Cir. 2001). Lee and his co-defendant were convicted of murder in aid of racketeering, and the U.S. Attorney filed a notice to seek the death penalty for both. *Id.* at 488. At the co-defendant's separate penalty phase, the co-defendant received life in prison without parole. *Id.* The U.S. Attorney informed the court that she wanted to withdraw the death notice on Lee's case. *Id.* Attorney General Janet Reno was unavailable, so Deputy Attorney General Eric Holder convened the review committee and concluded that the death notice would not be withdrawn. *Id.* at 489. The jury returned a verdict of death, and Lee moved for a new penalty phase hearing, arguing that the Government had breached the Department of Justice ("DOJ") death penalty protocol. *Id.* at 491. The district court granted Lee's motion for a new penalty phase hearing, holding that Lee had a right to force DOJ to comply with the death penalty protocol, and the Government appealed. *Id.* at 491-92. "[T]he *Accardi* doctrine bars administrative agencies from taking action 'inconsistent with their internal regulations when it would affect individual rights,' but . . . '[n]o case has ever held that the *Accardi* doctrine applies to the internal regulations of the DOJ.'" *Id.* at 492 (second alteration in original) (quoting *In re United States*, 197 F.3d 310, 315 (8th Cir. 1999)) (citing *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954)). Prosecutorial discretion is treated differently than other types of agency discretion, and this is why *Accardi* has not been applied to criminal law enforcement procedures. *Id.* The 1995 Protocol specifically states that "[t]he Manual provides only internal [DOJ] guidance" and does not create any rights enforceable at law by any individual, nor are limitations placed on lawful prerogatives of the DOJ. *Id.* at 493 (quoting U.S.A.M., *supra* note 226, at 1-1.100). The court held that individuals have no enforceable rights under the death penalty protocol, reversed the district court's order for a new penalty hearing, and re-instated the death sentence. *Id.* at 496-97. Many courts have held that the DOJ protocol does not create substantive or procedural rights. *E.g.*, *Nichols v. Reno*, 124 F.3d 1376, 1377 (10th Cir. 1997) (holding that DOJ protocol does not create substantive or procedural rights); *United States v. Haynes*, 242 F. Supp. 2d 540, 541 (W.D. Tenn. 2003) (holding that DOJ protocol does not create substantive or procedural rights for individuals); *United States v. Williams*, 181 F. Supp. 2d 267, 299 (S.D.N.Y. 2001) (rejecting defendant's claim that DOJ protocol created right to discoverable information because protocol did not create substantive or procedural rights); *United States v. Church*, No. 1:00CR00104, 2001 WL 1661706, at \*6 (W.D. Va. Dec. 27, 2001) (finding government's failure to comply with protocol created neither substantive nor procedural rights for defendant); *United States v. Feliciano*, 998 F. Supp. 166, 169 (D. Conn. 1998) (holding that protocol does not provide substantive rights or rights to specific discovery); *United States v. McVeigh*, 944 F. Supp. 1478,



*B. Significant Findings of the DOJ 2000 Statistical Report and the 2001 Supplemental Report*

In 2000, the Department of Justice released a detailed report (hereinafter the “2000 Statistical Report”), explaining and analyzing the Department of Justice’s decision-making process for deciding whether to seek the death penalty, and presenting statistical information on the racial/ethnic and geographical disparities of defendants and their victims.<sup>248</sup> The 2000 Statistical Report contains the type of information that the authors of this Article sought to obtain through their California District Attorneys’ Death Penalty Survey.

The results of the 2000 Statistical Report are broken down into pre-1995 Protocol and post-1995 Protocol figures,<sup>249</sup> which provide a basis for comparison of the protocol’s effects by instituting a more centralized decision-making procedure.<sup>250</sup> For statistical purposes, it is important to note that the pre-1995 Protocol pool of death-eligible cases was considerably smaller than the post-1995 Protocol pool, making racial and geographical statistics less significant.<sup>251</sup> In addition, both the pre- and post-1995 Protocol results only include the cases actually submitted by the U.S. Attorney as death penalty eligible, with a recommendation from the U.S. Attorney as to whether to seek the death penalty.<sup>252</sup> At the time, there was no process in place for collecting data on *potential* capital cases prior to the decision to submit them; therefore, those numbers are not included.<sup>253</sup>

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1483–84 (D. Colo. 1996) (denying motion to disqualify the Attorney General and DOJ officials from participation in process of deciding whether to seek the death penalty for failure to follow protocol, because protocol creates no enforceable rights).

248. STATISTICAL SURVEY, *supra* note 225, at 1.

249. *Id.* at 3. The results are also broken down by participants in the decision-making process and according to the racial/ethnic groups of defendants and victims. *Id.*

250. The “pre-1995 Protocol period” lasted from 1988 to 1994, wherein the U.S. Attorney only submitted for review recommendations to seek the death penalty. The “post-1995 Protocol period” was from 1995 to 2000, when the U.S. Attorneys were first required to submit recommendations for and against seeking the death penalty for all capital-eligible cases. *Id.* at 3 n.4.

251. Pre-1995 Protocol (1988–1994), fifty-two defendants were submitted by the U.S. Attorneys, either recommending or not recommending the death penalty, and post-1995 Protocol (1995–2000), 682 defendants were submitted by U.S. Attorneys. *Id.* at 6.

252. *Id.* at 11.

253. *Id.* at 10. Potential capital-eligible cases which were not accounted for in the 2000 Statistical Report include those where (1) the U.S. Attorney initially considered federal prosecution but deferred to state prosecution; (2) the U.S. Attorney did not charge a homicide defendant with a capital-eligible offense because he or she did not believe it would be sustained; and (3) the U.S. Attorney entered into a plea agreement with the defendant. *Id.* at 9. The subsequent 2001 report addressed this lack of data, stating that Attorney General Janet Reno directed more complete data be obtained. U.S. DEP’T OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: SUPPLEMENTARY DATA, ANALYSIS AND REVISED PROTOCOLS FOR CAPITAL CASE REVIEW 2 (2001) [hereinafter 2001 SUPPLEMENTAL REPORT], available at [http://www.usdoj.gov/dag/pubdoc/death\\_penalty\\_study.htm](http://www.usdoj.gov/dag/pubdoc/death_penalty_study.htm). The 2001 report stated that “the augmented data provides no evidence that minority defendants are subjected to bias or otherwise disfavored in decisions concerning capital punishment.” *Id.* As part of its purpose to promote public confidence and improve efficiency in the DOJ’s procedure, the 2001 revisions required U.S. Attorneys to submit racial and ethnic data about potential capital cases as well. *Id.* The current Protocol applies to cases in which the death penalty is sought, as well as in “every case in which an indictment has been or will be obtained that charges an offense punishable by death or alleges conduct that could be

While the absolute number of defendants submitted as death-penalty eligible increased in the post-1995 Protocol time frame, the percentage of defendants for which the U.S. Attorney recommended the death penalty dropped almost 75%.<sup>254</sup> Similarly, the rate of the Attorney General's authorization seeking the death penalty in submitted cases declined from 90% of cases to 27%.<sup>255</sup>

The racial percentages for defendants and victims also changed dramatically from the pre- to post-1995 Protocol time periods. Pre-1995 Protocol, African Americans comprised 75% of defendants considered for the death penalty and another 12% were from other minority groups.<sup>256</sup> Post-1995 Protocol, this percentage of black defendants diminished to 48%, but the percentage of the defendants belonging to other minority groups rose to at least 29%.<sup>257</sup> In terms of victims, 75% of the victims in pre-1995 Protocol cases in which the U.S. Attorney recommended seeking the death penalty were black, and an additional 16% of the victims were from other minority racial or ethnic groups.<sup>258</sup> Post-1995 Protocol, 58% of victims were black and 7% were from other minority racial or ethnic groups.<sup>259</sup>

Other significant post-1995 Protocol statistics include the following:

- Post-1995 Protocol, 80% of all cases submitted by U.S. Attorneys involved minority defendants, and after review by the Attorney General, 72% of cases approved for death penalty prosecution involved minority defendants.<sup>260</sup> In 2000, 79% of defendants on federal death row were minorities.<sup>261</sup>

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charged as an offense punishable by death." U.S.A.M., *supra* note 226, at 9-10.080. Thus, the Protocol's required submission of a "non-decisional [case] information form" containing ethnic and racial data is required in all potential capital cases. *Id.*

254. STATISTICAL SURVEY, *supra* note 225, at 7.

255. *Id.* Pre-1995 Protocol, U.S. Attorneys recommended the death penalty in 100% of cases and the Attorney General recommended death in 90% of all cases, and the only cases *not* recommending the death penalty were cases involving black defendants. *Id.* Post-1995 Protocol, U.S. Attorneys recommended death in 27% of cases reviewed, the Review Committee recommended death penalty in 30% and the Attorney General in 27%. *Id.*

256. *Id.* at 6.

257. *Id.* Pre-1995 Protocol, the U.S. Attorneys recommended fifty-two defendants for the death penalty, and 75% (39 of 52) were Black, 13% were White, 10% were Hispanic, and 2% were "Other." Post-1995 Protocol, 682 defendants were evaluated using the new DOJ protocol and 48% (324 of 682) defendants were Black, 20% were White, 29% were Hispanic, and 4% were "Other." *Id.*

258. *Id.* at 14. In pre-1995 Protocol cases for which the U.S. Attorney recommended the death penalty, 75% of victims were Black, 14% were Hispanic, and 2% were "Other." *Id.* In post-1995 Protocol cases for which the U.S. Attorney recommended the death penalty, 58% of victims were Black, 5% were Hispanic, and 2% were "Other." *Id.* at 15.

259. *Id.* at 15. In post-1995 Protocol cases for which the U.S. Attorney recommended the death penalty, 58% of victims were Black, 5% were Hispanic and 2% were "Other." *Id.*

260. DEATH PENALTY INFO. CTR., DPIC'S SUMMARY: "FEDERAL DEATH PENALTY SYSTEM: A STATISTICAL SURVEY (1988-2000)" (2000), <http://www.deathpenaltyinfo.org/dpic-summary-federal-death-penalty-system-statistical-survey>.

261. *Id.* As of July 2000, 68% of defendants on federal death row were Black, 5% were Hispanic, and 5% were "Other." *Id.*

- Of the post-1995 Protocol cases submitted for review, 74% were intra-racial homicides, and 26% were interracial homicides.<sup>262</sup>
- Of the 159 post-1995 Protocol cases where the Attorney General authorized seeking the death penalty, fifty-one cases were resolved by entering plea agreements (32%), and 48% of these cases involved white defendants.<sup>263</sup>
- The U.S. Attorney, Review Committee and Attorney General often agree on the decision to recommend, or not to recommend, the death penalty in individual cases.<sup>264</sup> Out of 571 cases considered post-protocol, all three parties agreed in 501 cases (88%).<sup>265</sup>

The continuing racial and geographical disparities noted in the 2000 Statistical Report were disappointing to many,<sup>266</sup> so much so that President Clinton delayed the first scheduled federal execution until the Department of Justice released a second report providing additional analysis of these disparities in the 2000 study.<sup>267</sup> Attorney General Janet Reno directed this second analysis which was published in 2001, entitled “The Federal Death Penalty System: Supplementary Data, Analysis and Revised Protocols for Capital Case Review” (“the 2001 Supplemental Report”).<sup>268</sup>

One of the most significant conclusions of the 2001 Supplemental Report was its adamant assertion that there was no possibility of racial or ethnic bias. The drafters of the report maintained that existing barriers to racial discrimination were effective, based on the federal government’s “wide range of protections and remedies . . . to guard against any influence of racial or ethnic bias.”<sup>269</sup> Further, the drafters cite to the

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262. “Intraracial” means each defendant was of the same race or ethnicity as all victims involved, and “interracial” homicides were cases where each defendant was of a different race or ethnicity than at least one victim. *Id.* When the defendant was black, U.S. Attorneys recommended death for 36% of cases when the victim was not black, and for 20% of cases when the victim was black. *Id.* When the Defendant was white, the U.S. Attorney recommended death 38% of the time when the victim was white, and 35% of the time when the victim was not white. *Id.* This means the U.S. Attorney was “almost twice as likely to recommend seeking the death penalty for a Black defendant when the victim was non-Black as when the victim was Black.” *Id.*

263. *Id.* Thus, “a White defendant was almost twice as likely to be given a plea agreement resulting in a withdrawal of intent to seek the death penalty than Black or Other defendants.” *Id.*

264. STATISTICAL SURVEY, *supra* note 225, at 38.

265. *Id.* at 38. Of the 497 cases where all parties agreed, 50% of defendants were black, and 76% of defendants were minorities. *Id.* Note that the 2000 Statistical Survey indicates that with 501 defendants all three participants agreed, but provides statistical racial and ethnic breakdowns for only 497 defendants. The authors do not know why this small disparity exists, but the percentages are nonetheless informative.

266. For instance, Deputy Attorney General Eric Holder stated, “I can’t help but be both personally and professionally disturbed by the numbers that we discuss today; no one reading this report can help but be disturbed, troubled, by this disparity.” Nicci Lovre-Laughlin, *Lethal Decisions: Examining the Role of Prosecutorial Discretion in Capital Cases in South Dakota and the Federal Justice System*, 50 S.D. L. REV. 550, 565 (2005) (quoting Death Penalty Info. Ctr., *The Federal Death Penalty*, [http:// www.deathpenaltyinfo.org/article.php?scid=29&did=147](http://www.deathpenaltyinfo.org/article.php?scid=29&did=147) (last visited Nov. 13, 2010)).

267. 2001 SUPPLEMENTAL REPORT, *supra* note 253, at 1. Note that the 2001 Supplemental Report does not contain page numbers. The authors have estimated page numbers for convenience of reference.

268. *Id.*

269. *Id.* at 8.

practice of only using paralegal assistants in the CCU to collect statistics on race and ethnicity, thus insulating the U.S. Attorneys from any racial and ethnic information.<sup>270</sup>

The 2001 Supplemental Report justified the statistical disparities on race, ethnicity and geography in the 2000 Statistical Report, based upon the higher percentage of minorities in the pool of potential capital cases in particular jurisdictions.<sup>271</sup> For instance, the 2001 Supplemental Report stated that one of the reasons for a larger pool of minority defendants in federal capital cases was the focus of the federal government in prosecuting “drug trafficking enterprises and related criminal violence,” crimes most often carried out by gangs whose members are largely made up of minorities.<sup>272</sup> The 2001 Supplemental Report also noted that within the pool of defendants recommended for the death penalty, white defendants were more likely to have the death penalty actually sought against them.<sup>273</sup>

C. *Revisions to the 1995 Protocol*

Notwithstanding the Department of Justice’s adamant position that no racial or ethnic disparities existed, the 2001 Report contained suggestions for revising the 1995 Protocol yet again, to “promote public confidence in the fairness of the process and to improve its efficiency.”<sup>274</sup> Part IV of the 2001 Supplemental Report analyzed potential changes in the 1995 Protocol, and many of those changes were adopted in the updated 2001 revision to the 1995 Protocol (“2001 Revised Protocol”). First, the 2001 Supplemental Report noted that information on race, gender of defendants and victims, charges against the defendant, and information on the reasons to seek or not seek the death penalty for actual and potential federal capital cases should be more readily available.<sup>275</sup> The 2001 Revised Protocol thus requires submission of this information.<sup>276</sup> Second, if the Attorney General approves seeking the death penalty, the U.S. Attorney must submit a notice of intent to seek the death penalty to the CCU to ensure consistent application of statutory and non-statutory aggravating factors in death penalty proceedings.<sup>277</sup> Finally, if the Attorney General approves seeking the death penalty, the Attorney General’s approval should also be required for subsequent decisions to refrain from seeking the death penalty in that particular case.<sup>278</sup> Further goals of the 2001 Revised Protocol included expediting the process and making it more efficient.<sup>279</sup>

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270. *Id.* at 6. The Supplemental Report explained that nothing in the “character, training, or background of federal prosecutors . . . would dispose them to act from such invidious motives.” *Id.* at 8.

271. *Id.* at 1.

272. *Id.*

273. *Id.* at 6–8.

274. *Id.* at 2. One way this report suggested that public confidence could be improved was by “making more complete racial and ethnic data available.” *Id.*

275. *Id.* at 19.

276. See U.S.A.M., *supra* note 226, at 9-10.080 (requiring non-decisional information form with submission).

277. 2001 SUPPLEMENTAL REPORT, *supra* note 253, at 19.

278. *Id.*

279. *Id.* at 19–20. The 2001 Supplemental Report recommended an “expedited and simplified decisional process” be authorized when the U.S. Attorney does not wish to seek the death penalty. *Id.* at 20. Expedited

The 2001 Revised Protocol was modified again in 2007 (“2007 Revised Protocol”).<sup>280</sup> The 2007 Revised Protocol “reflects the Ashcroft/Gonzales DOJ’s objective of greater nationwide uniformity in death penalty charging practices through greater centralized control.”<sup>281</sup> New confidentiality requirements seem to make the procedures less transparent and less available to the public.<sup>282</sup> All cases must be submitted to the Attorney General when a death-eligible offense is or potentially could be charged.<sup>283</sup> This addition creates even more centralization of the process.<sup>284</sup> The long list of information and documents that U.S. Attorneys must submit to the Attorney General reflects a desire to speed up the Attorney General’s review process.<sup>285</sup>

*D. The Federal “Response” to the California Survey*

The greater regularity and transparency of the federal death penalty process, especially as compared with what we were able to determine from our survey of the California district attorneys’ offices, is evident by considering how a federal prosecutor’s office would have responded to our survey. While our survey was not sent to any federal prosecutors, the answers to each of the survey questions in Part I on process are readily obtainable from the literature reviewed in Part IV, sections A, B, and C above.<sup>286</sup> For instance, our first question asked: “Who participates in the review process?” The Department of Justice (“DOJ”) utilizes the U.S. Attorney’s recommendation, as well as recommendations from a review panel, the Capital Case Unit (“CCU”), and the Assistant Attorney General; the final decision is made by the Attorney General.<sup>287</sup> Our second survey question asked: “What is the purpose of your

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review procedures were included in the 2001 Protocol revisions for certain categories of cases. U.S.A.M., *supra* note 226, at 9-10.100.

280. The Department of Justice Protocol discussed in this Article reflects these most recent revisions. See *supra* Part V for a discussion of these changes. For a more detailed summary of changes in the 2007 revision, see Memorandum from David Bruck, Fed. Death Penalty Res. Counsel (July 1, 2007), available at [http://www.capdefnet.org/pdf\\_library/Summary\\_of\\_changes\\_in\\_2007\\_DOJ\\_death\\_penalty\\_protocol.pdf](http://www.capdefnet.org/pdf_library/Summary_of_changes_in_2007_DOJ_death_penalty_protocol.pdf).

Feingold’s hearing before the Judiciary Committee also impacted the revisions of the Protocol. For example, he criticized the earlier draft that deleted the prohibition against threatening to seek or seeking the death penalty “solely for the purpose of obtaining a more desirable negotiating position.” This prohibition was reinserted after Feingold’s criticism. *Id.* at 2–3.

281. *Id.* at 1.

282. *Id.* The new revisions impose strict confidentiality requirements, the scope of which include but are not limited to “(1) the recommendations of the United States Attorney’s Office, the Attorney General’s Review Committee on Capital Cases[,] . . . the Deputy Attorney General, and any other individual or office involved in reviewing the case; (2) a request by a United States Attorney that the Attorney General authorize withdrawal of a previously filed notice of intent to seek the death penalty; (3) a request by a United States Attorney that the Attorney General authorize not seeking the death penalty pursuant to the terms of a proposed plea agreement; and (4) the views held by anyone at any level of review within the Department.” U.S.A.M., *supra* note 226, at 9-10.040.

283. Memorandum from David Bruck, *supra* note 280, at 1–2.

284. *Id.*

285. *Id.* at 2.

286. See *supra* Parts IV.A–C for a discussion of the authors’ methodology and results in surveying all thirty-seven states that use capital punishment.

287. See generally U.S.A.M., *supra* note 226, at 9-10.040 to 9-10.050, 9-10.080, 9-10.120, 9-10.160 to 9-10.190 (providing overview of determination process).

death penalty review process?" The DOJ procedure is to reach a final decision by the Attorney General, utilizing the recommendations by all other participating parties (CCU, Review Committee, U.S. Attorney, and Assistant Attorney General).<sup>288</sup> The decision of the Attorney General cannot be overridden by participating parties, but can be withdrawn by the Attorney General, and the U.S. Attorney may formally request that the Attorney General do so.<sup>289</sup> Our third question asked: "How is the death penalty review process triggered?" The DOJ manual states that preliminary consideration is in the U.S. Attorney's Office.<sup>290</sup> Fourth, we asked: "When does the ultimate decision to pursue the death penalty typically occur?" The federal protocol calls for the U.S. Attorney to make the preliminary recommendation prior to the indictment, charging a capital offense, if possible.<sup>291</sup> In the event the recommendation is not made prior to the indictment, the court will issue a deadline for filing a notice of intent to seek the death penalty.<sup>292</sup> The U.S. Attorney must submit a recommendation to the Attorney General, not fewer than ninety days before the deadline of filing notice of intent to seek the death penalty, or 150 days before a scheduled court date. Otherwise, the U.S. Attorney must "include an explanation of why the submission is untimely."<sup>293</sup> Also, expedited review is available in certain cases.<sup>294</sup>

On the issue of defense participation, our fifth survey question asked: "Does the defendant's counsel participate at any time in the review process?" In the federal system, the U.S. Attorney must give the defendant a reasonable opportunity to present any facts or mitigating factors for the U.S. Attorney to consider in her initial recommendation.<sup>295</sup> Any materials presented by the defendant must be submitted with

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288. "Once the Attorney General has authorized the [U.S.] Attorney to seek the death penalty, the [U.S.] Attorney may not withdraw a notice of intention to seek the death penalty filed with the district court unless authorized by the Attorney General." *Id.* at 9-10.150; *see also id.* at 9-10.040 (stating that Attorney General has final decision regarding whether to seek death penalty).

289. If the U.S. Attorney wishes to withdraw notice, the U.S. Attorney must notify the Assistant Attorney General. *Id.* at 9-10.150. Reviewers evaluate the withdrawal through the same process as initially determining whether to seek the death penalty, but must limit their consideration to factors that "had they been known at the time of the initial determination, would have resulted in a decision not to seek the death penalty." *Id.* The Assistant Attorney General reviews the request and makes a recommendation to the Attorney General, also being advised by the CCU. *Id.* "In all cases, the Attorney General shall make the final decision on whether to authorize the withdrawal of a notice of intention to seek the death penalty." *Id.*

290. *Id.* at 9-10.050.

291. *Id.*

292. *Id.* at 9-10.180.

293. *Id.* The FDPA requires the notice of intent to seek the death penalty to be filed within "a reasonable time before the trial." 18 U.S.C.A. § 3593 (2006). *See supra* notes 224–28 and accompanying text for a more in-depth discussion of the FDPA.

294. U.S.A.M., *supra* note 226, at 9-10.100. Expedited review is appropriate if (1) the defendant is ineligible for the death penalty because there is insufficient evidence to establish intent or an aggravating factor, (2) extradition of the defendant or a crucial witness requires the death penalty not be sought, (3) there is insufficient evidence to convict the defendant, (4) the government is seeking potential cooperation from an individual whose testimony is necessary to indict remaining offenses, and (5) in cases that have been submitted for pre-indictment review. *Id.* at 9-10.100(A). In these cases, the U.S. Attorney must indicate clearly that she seeks expedited review, and the CCU will screen to make sure it is appropriate. *Id.* at 9-10.100(B)–(C).

295. *Id.* at 9-10.050.

all other submissions to the Attorney General.<sup>296</sup> In addition, if the U.S. Attorney recommends to the Attorney General that the death penalty be sought, defense counsel must be afforded the opportunity to present evidence in mitigation and to argue against a capital filing.<sup>297</sup>

The sixth question of our survey addressed selection of the review panel members: “If a review panel or committee is used to determine whether to seek the death penalty, what groups are potential committee member selected from?” Under the federal system, members of this committee are assigned on a rotating basis from two pools: (1) U.S. Attorneys with capital trial experience from about six U.S. Attorneys’ offices around the country, and (2) selected attorneys from the Office of the Deputy Attorney General. One representative from each pool is named to the committee for every case. There are also two standing members: (1) Deputy Assistant Attorney General (or other senior attorney) and (2) career Chief of the Capital Case Unit (“CCU”).<sup>298</sup> The CCU is comprised of seven career attorneys, selected based on experience and ability to “synthesize facts and to fairly and uniformly evaluate arguments regarding the application of the Federal death penalty.”<sup>299</sup>

Finally, in an effort to ascertain the level of transparency in the process, we inquired: “[A]re there written guidelines in your office that govern the decision to seek the death penalty?” The DOJ utilizes the U.S. Attorneys’ Manual section on Capital Crimes (“U.S.A.M.”),<sup>300</sup> and we have used that manual to provide specifics about the process described in this Article. Had we been able to obtain such straightforward answers to our survey questions from California’s prosecutors, we would be in a position to do a more thorough analysis of the strengths and weaknesses of the system of capital sentencing in the state of California.

## VI. NEED FOR FULL REPORTING AND DISCLOSURE

Our survey and our conclusions may be open to criticism. Certainly, one of the more gripping criticisms is that we are arguing for some process that has not been adequately described or indeed may not be possible. After all, what does a fair, transparent, and inclusive process look like? The federal process described above provides one example for reference, but that example can be improved upon and any reform efforts should consider more sweeping change. Is there an ideal? This section of the Article attempts to answer that question.

### A. *The Evolution and Importance of Prosecutorial Discretion*

As the analysis in the preceding Part IV (“California Study”) demonstrates, from the limited data available, it seems that prosecutorial discretion is exercised in ways that lead to divergent charging decisions in death penalty litigation, both across and even within jurisdictions. Despite the fact that most of the California counties did not

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296. *Id.* at 9-10.080(F).

297. *Id.* at 9-10.120.

298. *Hearings*, *supra* note 229, at 3–4 (testimony of Barry Sabin).

299. *Id.*

300. U.S.A.M., *supra* note 226, at 9-10.010 to 9-10.190.

provide any information as to their process, we did learn that, among the responding counties, several differing methods were employed in determining when to seek the death penalty. It can only be assumed for the non-responding counties (and was explicit for several of the responding counties), the decision of whether to seek the death penalty is simply left up to the “discretion” of the district attorneys and the prosecutors within their offices.<sup>301</sup>

Prosecutorial discretion has been a hallmark of the American criminal justice system since its inception. Early in our nation’s history, federal prosecutors were directly appointed by the U.S. President. As one scholar notes, “[f]or more than forty years U.S. Attorneys functioned without supervision by an executive agency, laying the foundation for the U.S. Attorneys’ present autonomy.”<sup>302</sup> In the state systems, private prosecution<sup>303</sup> was tried for a while, until eventually local prosecutors were appointed by the executive and gradually more states shifted to electing prosecutors,<sup>304</sup> which is the most common method of prosecutorial selection at the state level today.<sup>305</sup> Elections expanded the power of prosecutors merely “because they were no longer beholden to the opinions and politics of those who had appointed them.”<sup>306</sup>

The evolution from appointment to election of state prosecutors did nothing to diminish prosecutorial discretion. Discretion remains a necessary power for prosecutors, in large part because full prosecution of all criminal conduct is not

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301. The potential problems of such discretion have been the subject of several articles, one of which explains:

[P]rosecutors are among the least accountable public officials. As a result, in evaluating prosecutors’ work, the public tends to overemphasize the measurable or obvious aspects of what prosecutors do (e.g., the number of convictions they obtain, the length of sentences, and prosecutors’ behavior in public trials) and tend to overlook more momentous decisions that occur behind the scenes.

Prosecutors’ limited public accountability might be acceptable, or at least more acceptable, if there were well-established normative standards governing prosecutors’ discretionary decision-making. In that event, the public could elect people of integrity to serve as prosecutors, or higher officials could appoint them, and then trust them faithfully to apply accepted criteria.

Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 902–03.

302. Shelby A. Dickerson Moore, *Questioning the Autonomy of Prosecutorial Charging Decisions: Recognizing the Need to Exercise Discretion—Knowing There Will Be Consequences for Crossing the Line*, 60 LA. L. REV. 371, 374 (1999).

303. Before the American Revolution, the American colonists’ legal system included the use of private prosecutions. John W. Stickels et al., *Elected Texas District and County Attorneys’ Perceptions of Crime Victim Involvement in Criminal Prosecutions*, 14 TEX. WESLEYAN L. REV. 1, 3 (2007). Victims served “as policeman and prosecutor” and chose to “initiate a prosecution . . . at their own expense.” *Id.* at 3–4. However, public prosecutors eventually replaced this system. *Id.*; see also Comment, *Private Prosecution: A Remedy for District Attorneys’ Unwarranted Inaction*, 65 YALE L. J. 209, 215–17 (1955) (discussing handful of states with statutes that permitted private prosecution in 1955).

304. Moore, *supra* note 302, at 375.

305. One report found that “[m]ore than ninety-five percent” of local prosecutors are elected officials. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 533 & n.117 (2001) (citing JOHN M. DAWSON ET AL., U.S. DEP’T OF JUSTICE, PROSECUTORS IN STATE COURTS 1992, at 2 (1993)).

306. Moore, *supra* note 302, at 375.



possible given limited resources and almost limitless criminal acts available.<sup>307</sup> Furthermore, prosecutorial discretion is necessary to combat “the trend towards legislative over-criminalization,” to account for “issues of enforceability [and] changing social mores,”<sup>308</sup> and to avoid overworking prosecutors.<sup>309</sup>

The benefits of discretion must be balanced against the benefits of transparency of the process and clarity of firm standards.<sup>310</sup> Clear standards increase public confidence in the appropriateness of prosecutorial decisions and militate against decisions reflecting differing values and experiences—as well as “prosecutorial tradition”<sup>311</sup>—which, in turn, increase the potential for unequal treatment of criminal defendants.<sup>312</sup>

### B. *How Biases Influence Prosecutorial Discretion*

Prosecutors’ own expectations, values, and attitudes influence their behaviors in a variety of ways, sometimes unconsciously.<sup>313</sup> While it is anticipated that one’s political views and one’s moral values naturally will affect how one views the propriety of seeking the death penalty in particular cases (indeed, elected officials may be elected because of such views), there are more subtle ways in which bias may influence the exercise of prosecutorial discretion, including the decision of whether to seek the death penalty. Psychological researchers refer to this process as “expectancy bias,” which predisposes people to interpret ambiguous information in a way that is consistent with, or confirms, their expectation.<sup>314</sup> Expectancy bias can be manifested in several ways, including “confirmation bias,” “hindsight bias,” and “outcome bias.”<sup>315</sup> Studies on confirmation bias show that people seek out information that confirms their hypotheses, tending to disregard or discount information that conflicts, and relying less

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307. As one scholar notes, “[t]he myth only obscures the reality of criminal justice and undermines a precursor of open democratic government.” Erik Luna, *Principled Enforcement of Penal Codes*, 4 BUFF. CRIM. L. REV. 515, 604 (2000).

308. Moore, *supra* note 302, at 377.

309. *Id.* at 378.

310. The job of prosecuting “calls for the exercise of judgment at virtually every step. Society has lofty expectations for how prosecutors should make those judgments, though those expectations are vague and not universally shared in all their details.” Green & Zacharias, *supra* note 301, at 895. Note, however, that there are distinct variations, from jurisdiction to jurisdiction, in how much discretion prosecutors are afforded when determining how to prosecute death-eligible offenses. “At one extreme are jurisdictions where the elected prosecutor has the first and last word. At the other extreme are prosecutors offices with complex written policies—a few of which even allow defense lawyers to make formal presentations to prosecutors.” John Gibeaut, *Deadly Choices*, A.B.A. J., May 2001, at 38, 40.

311. Green & Zacharias, *supra* note 301, at 897.

312. For instance, “[p]rosecutors’ limited public accountability might be acceptable, or at least more acceptable, if there were well-established normative standards governing prosecutors’ discretionary decision-making. In that event, the public could elect people of integrity to serve as prosecutors, or higher officials could appoint them, and then trust them faithfully to apply accepted criteria.” *Id.* at 903.

313. Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 307–09.

314. *Id.* at 308.

315. *Id.* at 307–08.

upon logic in their evaluations of the strength of evidence when they have a preconceived notion of what the right result should be.<sup>316</sup>

People laboring under hindsight bias reevaluate the probability of a result occurring and project that re-evaluation back to an earlier time period. For example, assume that in January a prosecutor decides that the likelihood that Defendant One committed the murder with special circumstances is 50%. In February, new information is discovered, which increases the prosecutor's assessment of Defendant's culpability for a capital crime to 80%. In March, additional inculpatory evidence is obtained, increasing that probability to 90%. Then, in April, when the notice of intent to seek the death penalty is filed, the prosecutor may state (and actually believe) that he knew from the beginning of the case (since January) that the probability of Defendant One's guilt was 90%.

This revision of history results from incorporating additional evidence learned after the time of the initial assessment into one's memory as though that information were received prior to the initial assessment. That information then becomes part of the reason why the person believes she made the original decision, even though in reality, she only acquired that information after the decision was made.<sup>317</sup> The conclusion increasingly appears to have been almost preordained, the more the prosecutors work on their theories of the case.<sup>318</sup>

A related concept is outcome bias, which influences people to believe that their decision was a good or bad decision once they know the outcome.<sup>319</sup> For prosecutors, this form of bias can be manifested with a guilty verdict from the jury. The guilty verdict outcome strengthens the prosecutor's belief that the initial decision to prosecute that individual for that crime was a decision that was well-reasoned and had a solid basis, regardless of how strongly the prosecutor actually felt about the decision at the time that it was made.

Prosecutors feel pressure both to bring charges and to succeed in obtaining convictions; those pressures are exacerbated by the biases discussed above. Because the prosecutor's job is to seek justice, the prosecutor must be "convinced of the righteousness of his position,"<sup>320</sup> and therefore must be satisfied that the individual being prosecuted actually is guilty. Confirmation bias, outcome bias and hindsight bias all support the prosecutor's decision to prosecute as the right one. The psychological research indicates that prosecutors, like many people, may experience "tunnel vision" and tend to disregard information that does not confirm their hypothesis as to which individual was guilty of the crime.<sup>321</sup> Combined with typical high conviction rates, the outcome bias helps to confirm their initial charging decisions, and augment the

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316. *See generally id.* at 309–12.

317. This "process is one in which an individual reanalyzes an event so that the early stages of the process connect causally to the end." *Id.* at 317.

318. *Id.* at 319.

319. *Id.* at 320.

320. *Id.* at 329.

321. *See generally id.* at 314–16 (discussing confirmation bias).

perceived strength of those decisions due to an increased sense that there was a high probability of obtaining that conviction from the very beginning.<sup>322</sup>

C. *The Uncertain Parameters of Prosecutorial Discretion*

While there may be some general agreement on certain parameters for the exercise of prosecutorial discretion—that it be unbiased or nonpartisan, for example<sup>323</sup>—there is no firm definition for the terms used to describe these parameters.<sup>324</sup> Focusing on any one of these conceptions could provide effective guidance for the exercise of prosecutorial discretion. Unfortunately, clear definitions are at a premium and when interspersed with other goals and values, different outcomes continue to result.<sup>325</sup>

For instance, a focus on principled decision making may support a prosecution practice of discussing with the families of homicide victims whether to seek the death penalty against the alleged perpetrator.<sup>326</sup> However, if the practice is not formal *policy*, the disparate application of the *practice* may lead to selective prosecution, seeking the death penalty more frequently when the victim's family is consulted and less frequently when the family is not consulted. Angela Davis notes in her book, *Arbitrary Justice: The Power of the American Prosecutor*, that one prosecutor describes a practice of routinely seeking input about whether to pursue the death penalty from families of white, but not black, murder victims. The prosecutor notes:

[F]rom 1973 to 1990 prosecutors in the Chattahoochee, Georgia, judicial circuit routinely met with the surviving family members of white homicide

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322. *Id.* at 329–30.

323. Three conceptions of appropriate parameters are discussed by Professors Green and Zacharias: “nonbias, nonpartisanship, and principled decision-making.” Green & Zacharias, *supra* note 301, at 903.

324. There is an ephemeral quality to this apparent agreement because

there are no settled understandings, except perhaps at the most general and abstract level. All might agree that prosecutors should be “neutral,” just as they might agree that prosecutors should be “fair” or that they should “seek justice.” But none of these terms has a fixed meaning. They are proxies for a constellation of other, sometimes equally vague, normative expectations about how prosecutors should make decisions.

*Id.*

325. As Green and Zacharias explain,

As we have shown, neutrality has been used in different contexts to denote a range of expectations that can be grouped under three different conceptions: nonbias, nonpartisanship, and principled decision-making. These dimensions of neutrality, though somewhat more concrete than the umbrella term, still have variable content. Nor is it clear how the conceptions fit together. In the end, therefore, these too fall short in providing meaningful guidance for the discretionary decisions that prosecutors routinely must make.

*Id.*

326. Note that a prosecutor may feel pressured by the victim's family to seek the death penalty, despite the prosecutor's own personal feelings about whether the case itself warrants such a punishment, or about the fairness of the death penalty in general. See Gibeau, *supra* note 310, at 45 (“A former Maryland state's attorney, Andrew L. Sonner of Montgomery County, says survivors' desires provided him with a crutch that kept him from coming to grips with his developing opposition to the death penalty.”); Wayne A. Logan, *Declaring Life at the Crossroads of Death: Victims' Anti-Death Penalty Views and Prosecutors' Charging Decisions*, CRIM. JUST. ETHICS, Summer–Fall 1999, at 41, 43–45 (describing increased influence of victim's relatives in prosecutor's decision to pursue death sentence).

victims to discuss whether to seek the death penalty. They did not meet with families of black victims, many of whom were not even notified of the resolution of the cases. In that district, where African Americans were the victims of 65 percent of the homicides, 85 percent of the cases certified by the prosecutor for the death penalty were cases with white victims.<sup>327</sup>

If the process were made explicit, and the practice of seeking input from victims' families was confirmed as "policy," then there likely would be less of a disparity along racial lines. Or, if the racial disparity remained, people would be aware of that disparity, and efforts could be made to conform the practice to the policy in a less biased way.<sup>328</sup>

The absence of clear standards leads to an increase in the breadth and scope of discretionary decision making, and provides a greater opportunity for inappropriate or less defensible exercises of discretion. But how do we decide when the exercise of discretion is good? Deciding whether an exercise of discretion is proper depends on which goals we seek to serve through the mechanism of prosecutorial discretion. If neutrality is the goal, then how should we define neutrality?<sup>329</sup> Is neutrality defined as avoiding self-interest, not relying on personal beliefs, avoiding partisanship, being independent, or being objective? Without a consistent definition of neutrality, we

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327. Matthew Campbell, *Arbitrary Justice? A Prosecutor's View*, 22 CRIM. JUST., Winter 2008, at 12, 14 (reviewing ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* (2007)).

328. For example, discrimination lawsuits could be filed, although selective prosecution lawsuits have been largely unsuccessful due to the high hurdle of the discriminatory intent requirement. Moore explains that [t]he selective prosecution doctrine also developed along racial and non-racial lines. In the non-racial context, federal circuit courts were initially receptive to evidence of disproportionate impact as proof of an equal protection violation. As the law in selective prosecution cases continued to develop, however, courts rejected disproportionate impact as a means of proving discriminatory purpose. Instead, courts began to hold that in order to prevail in these types of cases, the defendant must meet a heightened standard by proving both discriminatory effect and discriminatory purpose.

Moore, *supra* note 302, at 389. Moore goes on to state that

[I]n terms of the proof required, defendants claiming racially selective prosecution in charging are treated virtually the same as those claiming abuse of prosecutorial discretion in the non-racial context and face the same burden of showing discriminatory effect and purpose. Courts have consistently held that, even in the context of race, statistical evidence is insufficient to establish intent to discriminate even though judges and prosecutors are unable to justify or explain the disproportionate impact in charging decisions on any grounds other than race. In fact, the Supreme Court has already considered and rejected the sufficiency of statistical studies to support a black defendant's equal protection challenge to the imposition of the death penalty.

*Id.* at 390.

329. As the preceding discussion has indicated,

[p]rosecutorial neutrality, as a general concept, has considerable rhetorical force. Yet, as this Article has shown, the concept has no fixed meaning or, rather, has many different meanings. At some level, each dimension of neutrality might gain broad acceptance. Most would agree, for example, that prosecutors should be nonbiased, if all that signifies is that prosecutors should not treat similarly situated defendants differently based on their race, religion or gender; that prosecutors should be nonpartisan, if that means only that prosecutors ought not invariably defer to the police or to victims; and that prosecutors should be principled, at least to the extent of consistently applying decision-making criteria. . . . But beyond the core of these dimensions, each is uncertain in theory and application. It is equally unclear how the various conceptions fit together, since there are tensions among them.

Green & Zacharias, *supra* note 301, at 895.

cannot hope to ascertain which prosecutors are exercising their discretion in a “good” (neutral) way, and which are not. For this reason, we must be careful to avoid criticizing prosecutors for lack of “neutrality” unless we are clear about the way in which we are using that term.<sup>330</sup>

Many would agree that prosecutors should not consider their self-interests—personal or economic—but this justification is subject to criticism for this simple reason: “[A]ll prosecutors inevitably have a reputational interest in all their cases, because the results reflect on their abilities.”<sup>331</sup>

Removing the influence of one’s personal beliefs from the decision-making process is another way to define neutrality, but that definition is not without pitfalls as well. Some personal beliefs may form an appropriate basis for the exercise of prosecutorial discretion. For example, consider two prosecutors, one of whom holds a personal sense that the death penalty is morally wrong and so declines to seek the death penalty for that reason, and the other who declines to seek the death penalty based on his personal belief that the specific circumstances of this particular case do not warrant the death penalty.<sup>332</sup> Both views can be characterized as personal beliefs, but the latter may form the basis for what we might agree is an appropriate “neutral” exercise of discretion, while the former may not.<sup>333</sup>

Defining neutrality as avoiding partisanship or politics may not be acceptable as a restraint on the exercise of discretion because an elected official should be expected to implement policies that were part of her policy platform in the campaign that resulted in her election to the office of district attorney. Independence also could be a form of nonpartisanship, if the prosecutor is expected to evaluate “the evidence as a judge might,”<sup>334</sup> but prosecutors also play a role as an advocate, which conflicts with the concept of neutrality.<sup>335</sup> Some may argue that the prosecutor is not intended to be neutral, but rather, an elected official who is more able to consider the desires of his constituency.<sup>336</sup> Regardless of whether they are required to be neutral, the real question is whether they should be, or at least appear, “fair and principled in their decisionmaking procedures.”<sup>337</sup> This appearance of fairness necessarily requires

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330. *Id.*

331. *Id.* at 857 (emphasis omitted).

332. *Id.* at 857–58.

333. The authors of *Prosecutorial Neutrality* explain that “the question arises of which beliefs are, and which are not, permissible sources for decision-making. As soon as one determines that ‘neutrality’ does not require the exclusion of all personal beliefs, then that concept loses force as a guide for prosecutorial conduct or as a standard for evaluating prosecutorial conduct.” *Id.* at 858.

334. *Id.* at 862.

335. As Green and Zacharias note, “[i]f the commitment to objectivity defines the appropriate prosecutorial role, why should it not apply equally at the trial stage?” *Id.* at 865–66.

336. Luna, *supra* note 307, at 573–74 (stating counter argument that “[e]xecutive officials, from the President to the county prosecutor, are political animals and are not required to be principled in their actions. The primary check of executive behavior is the ballot box, not the intrinsic merit of a just process”).

337. *Id.* at 574. Another way to justify the importance of fairness and neutrality draws upon political philosophy. For instance, Luna explains that John Rawls’s theory of what is justice is based on the importance of “political discourse,” since that discourse is necessary for the parties in the “original position,” and “[b]ehind the ‘veil of ignorance’” to ascertain what would be the most “just” rules to apply to everyone. *Id.* at 581–82 (quoting JOHN RAWLS, A THEORY OF JUSTICE 11–22, 136–42, 516–17 (1971)) (internal quotation

transparency, and enforcement of the laws is the place to begin the transition to more openness.<sup>338</sup> Public officials must be accountable for this conduct.<sup>339</sup> For all of these reasons, simply limiting prosecutorial discretion to neutrally applied principles does not solve the problem.

*D. Increased Transparency Illuminates the Proper Exercise of Discretion*

In examining how to address this problem of evaluating the appropriate exercise of discretion, both prosecutors and the public need a clearer understanding of how prosecutors make judgments. It is worthwhile to identify certain principles upon which prosecutorial decisions are to be based.<sup>340</sup> Coming to a shared understanding of the application of these principles requires an openness that does not exist in our current system.

We propose that one core value is transparency, because the legitimacy of the institution is, in part, based on the perceived fairness of the prosecuting office—fairness that cannot be evaluated fully behind closed doors. We have discussed above the inherent difficulties in defining neutrality and the various ways in which neutrality can be measured, and there are similar concerns about the term “fairness.” Nevertheless, the consistency of the mechanism by which justice is measured is an important component of what must be made transparent in an effort to satisfy concerns over the exercise of discretion in district attorneys’ offices. Only then can the public

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marks omitted). Note also that the prosecutor for Harris County, Texas, where there are a lot of death penalty cases and a lot of death sentences, says that he just uses the law and the facts of the case to make his determination, and feels that his decision-making process is appropriate because his county has “a real good track record in only seeking cases where the jury subsequently agrees with it.” Scott Baldauf, *In the Capital of Capital Punishment*, CHRISTIAN SCIENCE MONITOR, July 29, 1999, at 1 (quoting Harris County (Texas) District Attorney John Holmes, Jr., and Keno Henderson, head of the trial bureau) (internal quotation marks omitted). Henderson has stated that “[i]n 80 to 90 percent of the cases where we seek the death penalty, we get it.” Robert Bryce, *Why Texas Is Execution Capital*, CHRISTIAN SCIENCE MONITOR, Dec. 14, 1998, at 3.

338. “To achieve reflective equilibrium, Rawls’ theory of justice embraces, either explicitly or implicitly, the values of transparency.” Luna, *supra* note 307, at 582 (citing RAWLS, *supra* note 337, at 16, 133, 177–82, 454).

339. Luna notes that

[a]t a minimum, such democracy demands that official decisions be accessible to the citizenry, that elected officials be responsive to public needs, and that representatives be accountable for their actions. These criteria can only be met through visibility; secreted decisions and actions preclude the type of public scrutiny and debate necessary for the fully informed exercise of the electoral franchise. If the choice is between the false pretense of full enforcement camouflaging selective enforcement or the public admission of selective enforcement with concerted efforts to make the selection process principled, democracy demands the latter and forbids the former.

*Id.* at 604.

340. Green and Zacharias continue,

It thus is important not only to clarify first-order principles governing prosecutorial decision-making, but also to identify the second-order or subprinciples that we consider to be at their core. These likely will apply more narrowly, but they also may focus more specifically on the factors that society wishes prosecutors to implement or ignore. If, for example, we expect prosecutors to be nonbiased, nonpartisan, and principled, [we must first determine] what do each of those ideas mean and how do they interrelate?

Green & Zacharias, *supra* note 301, at 896.

determine whether the standards have been appropriately applied in the exercise of prosecutorial discretion.

In sum, transparency fosters greater accountability, which in turn leads to fewer manifestations of bias and greater opportunities to check for neutrality and to correct inappropriate conduct. These effects of transparency can then promote a more fair allocation of justice in prosecutorial decisions to seek or decline to seek the death penalty. The next section of this Article provides concrete suggestions, guidelines, and policies that we recommend be implemented to increase transparency in the initial charging decisions for potential death penalty cases.

## VII. SUGGESTIONS FOR CHANGE

As the foregoing reveals, if we are to remain true to the goals of *Furman v. Georgia*,<sup>341</sup> we must undertake efforts to ensure that the prosecutorial decision to seek the death penalty is as free from the potential for arbitrary or capricious decision making as is the sentencing decision made by the jury or judge at the conclusion of the trial. If the death penalty is to be meted out to only the “worst of the worst” offenders, and if we seek to assure ourselves that the decision as to who qualifies as one of the “worst of the worst” is to be made in a principled way, change is needed. But what reforms should be considered? Below we consider a number of suggestions for limiting the risk of arbitrariness in the decision to seek the death penalty.

### A. *Narrowing the Statutory Categories of Death-Eligible Crimes*

As noted previously,<sup>342</sup> the statutes defining the type of homicide for which a defendant is eligible to receive the death penalty have undergone an expansion so that, for example, in California—which recognizes twenty-two “special circumstances” qualifying a case as a potential capital case—nearly every first-degree murder can be charged as a capital case. If the goal is to narrow the potential for arbitrariness in a prosecutor’s exercise of discretion in seeking the death penalty, a logical starting place for reform is with the statutory schemes governing the type of case for which the death penalty is available, so that the death penalty is reserved for the relatively small class of defendants most deserving of the death penalty. As a starting point, the death penalty should be limited to those defendants who have intentionally taken a life. Yet, this is not always the case.

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341. 408 U.S. 238 (1972).

342. See *supra* Part IV.B for a discussion of the application of the death penalty.

In California,<sup>343</sup> and in many other states,<sup>344</sup> one of the circumstances that renders a defendant eligible to receive the death penalty is felony murder, which does not require proof of an intent to kill.<sup>345</sup> Moreover, a defendant can be convicted of felony murder even if that defendant neither is directly involved in the killing nor evidenced any intent to kill, as when the defendant is merely the getaway driver for a bank robbery in which a person inside the bank is accidentally killed during the course of the robbery.<sup>346</sup> The removal of felony murder as a circumstance qualifying a defendant for the death penalty is necessary to eliminate the possibility that a defendant can be sentenced to die for a killing he neither intended nor directly caused.<sup>347</sup> Felony murder is just one example of a death penalty qualifier that needs to be reconsidered by the legislatures. Nevertheless, legislative narrowing of the type of circumstances that will make a defendant eligible to be sentenced to death is a necessary starting point in a quest to tailor the most extreme of punishments to the most extreme killers.

*B. Follow Publicly Disclosed Charging Criteria and Procedures*

Arbitrariness in deciding whether to seek the death penalty may also be curtailed by requiring prosecutors to adhere to an established set of guidelines that specifies both the procedures to be followed in determining whether to seek the death penalty and the criteria to be evaluated in making such decisions. Several scholars have recommended some form of internal standardized procedures as a way to limit abuse of prosecutorial

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343. California's felony-murder statute provides that

[t]he penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special circumstances has been found under section 190.4 to be true: . . . (17) The murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit, the following felonies: [listing thirteen felonies].

CAL. PENAL CODE § 190.2(a)(17) (West 2009).

344. These states include Alabama (ALA. CODE § 13A-5-40 (LexisNexis 2005)), Arizona (ARIZ. REV. STAT. ANN. § 13-1105 (2009)), Arkansas (ARK. CODE ANN. § 5-10-101 (2009)), Colorado (COLO. REV. STAT. ANN. § 18-1.3-401 (West 2009)), Connecticut (CONN. GEN. STAT. ANN. § 53a-54b (West 2009)), Delaware (DEL. CODE ANN. tit. 11, § 636 (2008)), Florida (FLA. STAT. ANN. § 782.04 (West 2009)), Georgia (GA. CODE ANN. § 17-10-30 (2009)), Indiana (IND. CODE ANN. § 35-42-1-1 (West 2009)), Louisiana (LA. REV. STAT. ANN. § 14:30 (2009)), Maryland (MD. CODE ANN., CRIM. LAW § 2-201 (West 2008)), Mississippi (MISS. CODE ANN. § 97-3-19 (West 2009)), Montana (MONT. CODE ANN. § 45-5-102 (2009)), Nebraska (NEB. REV. STAT. § 28-303 (2009)), Nevada (NEV. REV. STAT. § 200.030 (LexisNexis 2007)), New Mexico (N.M. STAT. § 30-2-1 (West 2009)), North Carolina (N.C. GEN. STAT. ANN. § 14-17 (2007)), Oklahoma (OKLA. STAT. ANN. tit. 21, § 701.7 (West 2010)), Oregon (OR. REV. STAT. ANN. § 163.115 (West 2008)), South Dakota (S.D. CODIFIED LAWS § 22-16-4 (2009)), Tennessee (TENN. CODE ANN. § 39-13-202 (2006)), Texas (TEX. PENAL CODE ANN. § 12.31(a) (West 2009)), Washington (WASH. REV. CODE ANN. § 9A.32.030(1) (West 2009)), and Wyoming (WYO. STAT. ANN. § 6-2-101(a) (2009)).

345. Under the felony murder schemes, a killing that occurs during the course of a felony is automatically a murder irrespective of the actual intent of the felon. CAL. PENAL CODE § 190.2.

346. *Id.*

347. See, e.g., H. Mitchell Caldwell, *The Prostitution of Lying in Wait*, 57 U. MIAMI L. REV. 311, 375-76 (2003) (proposing elimination of "lying in wait" as a crime deserving death penalty).



discretion.<sup>348</sup> The adoption and public disclosure of regulations that spell out the process by which such decisions are made and limit the criteria to be considered will have two beneficial effects. The first, and most significant, is the effect it will have in limiting prosecutorial discretion in a way that will yield more principled results. The second, but not insignificant, benefit is that it will provide greater public confidence in the decision-making process.<sup>349</sup>

To promote greater transparency in prosecutorial decision making, one author has suggested that such internal prosecutorial guidelines be developed through a process that includes the opportunity for public comment on proposals.<sup>350</sup> While the prosecuting authorities are likely to resist the notion that the public should have an opportunity to comment on guidelines internal to their offices, providing this opportunity can increase the public support for the decisions that ultimately are rendered pursuant to those guidelines.<sup>351</sup>

### C. *Increased Opportunity to Review/Centralized Review*

One of the most sobering aspects of the state prosecutors' decision to seek the death penalty is the lack of any sort of review. There is no check on the type of arbitrariness that may occur as a result of local idiosyncratic values. The most obvious safeguard against arbitrariness in the filing process is some manner of independent review. In order to assure that death penalty filing decisions are made on a principled, fair, and nonarbitrary basis, some form of review by an entity detached from the charging authority should occur.<sup>352</sup> Whether the review is made by a committee of attorneys, by a supervisor within the prosecuting authority, or by an agency or committee that is independent of the prosecuting authority, the opportunity for a second independent look can help neutralize the effects of local bias, idiosyncratic values, or passion.

As is discussed above,<sup>353</sup> there are lessons to be garnered from the federal system. Acknowledging that the federal system naturally involves a greater potential for geographical disparity in the decision to seek the death penalty than exists within each

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348. See, e.g., Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010, 1042–43 (2005) (emphasizing that “[w]hatever structure the guidelines take, the touchstone value of their content should be transparency” which would make it easier for insiders and outsiders alike to anticipate or reconstruct the charges filed); Luna, *supra* note 307, at 590–605 (calling for administrative-type rulemaking in criminal law enforcement and prosecution); Moore, *supra* note 302, at 398–99 (calling for resolutions requiring prosecutors to follow internal procedures).

349. See *infra* notes 355–56 and accompanying text for a discussion of the memorandum that must be submitted to the Attorney General's Office.

350. See Luna, *supra* note 307, at 603 (discussing development of policing and prosecutorial rules).

351. At least one commentator has noted, however, that reliance upon internal guidelines or policies as a restraint on prosecutorial discretion may not be very effective, because similar guidelines developed in the past have tended to be so broad, general, or vague that they are of little value as predictors or as restraints on prosecutorial discretion. Amanda S. Hitchcock, Comment, *Using the Adversarial Process to Limit Arbitrariness in Capital Charging Decisions*, 85 N.C. L. REV. 931, 960 (2007).

352. See Findley & Scott, *supra* note 313, at 388 (noting benefits of multiple levels of case screening and inappropriate charging resulting from tunnel vision).

353. See *supra* Part V.A for a discussion of federal death penalty protocol.

state, the Federal 1995 Protocol and the U.S. Attorneys' Manual prescribe a centralized review (as opposed to the localized decision made where the offense occurred) for each death penalty case by the Capital Case Unit of the Attorney General's Office. Further, for all offenses punishable by death, the Assistant U.S. Attorney must submit a memorandum for review to the Assistant Attorney General for the criminal division.<sup>354</sup> The decision to seek the death penalty must be made or approved by the Attorney General.<sup>355</sup> In this way, the federal system minimizes the potential for disparate and arbitrary results based upon geographically based differences in values or attitudes.

While we do not advocate a national death penalty review process, which would potentially lead to complaints that state sovereignty is thereby compromised, there is a significant benefit to having a centralized review process in place within each state.<sup>356</sup> As we discovered in surveying the various counties in California, there is wide variation among the counties concerning the process and criteria for seeking the death penalty, and whether the counties even have a process or adhere to specific criteria to guide their decisions.<sup>357</sup> Of course, some prosecuting agencies may be universally opposed to seeking the death penalty no matter what the circumstances of the case or the defendant. But for those counties that choose to seek the death penalty, a centralized statewide review process would provide that measure of dispassionate independent review necessary to help ensure that death penalty decisions have come about in a principled, neutral way throughout the state.

*D. Remove the Decision to Seek the Death Penalty from Elected Officials*

One of the reasons occasionally given by local prosecutors who resist the idea of a centralized review process for determining whether to seek the death penalty is that, because they are elected locally and their constituents expect them to follow through on their political promises—including those respecting the death penalty—they must have the power to make their charging decisions in a way that reflects the values prized by the local electorate. While local prosecutors can be expected to reflect public sentiment in their decision making, a purely local view of an individual case may not provide the best perspective to judge whether a particular defendant truly is one of the worst of the worst.<sup>358</sup> A statewide committee or office charged with the authority to seek the death penalty in cases for which the local prosecutor has requested to proceed with capital charges will provide some political shelter for the local prosecutor, while also enabling the institution of a principled decision-making process that can eradicate geographical disparity.

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354. See *supra* notes 236–40 and accompanying text for a discussion of the memorandum process.

355. See *supra* notes 243–44 and accompanying text for a discussion of the Attorney General's approval requirement.

356. For an interesting discussion and critique of the proposed use of centralized review committees, see Hitchcock, *supra* note 351, at 960–62.

357. See *supra* Part III.B for a discussion of the authors' study looking at the process by which the various district attorneys' offices in California make the decision to file capital charges.

358. *Cf. Roper v. Simmons*, 543 U.S. 551, 568 (2005) (holding that capital punishment must be reserved for defendants committing most serious offenses and demonstrating "extreme culpability").

E. *Judicial Review of Charging Decisions*

One of the most innovative proposals for limiting the potential for arbitrariness in the death penalty charging process is that suggested by Professor Hitchcock: the use of adversarial judicial review.<sup>359</sup> Under this proposal, a capital defendant would bear the burden of establishing a prima facie showing that the prosecutor's capital decision was arbitrary and thus shift the burden to the prosecutor, who at an adversarial pretrial hearing would be forced to justify his decision.<sup>360</sup> Professor Hitchcock analogizes the process to that in *Batson v. Kentucky*,<sup>361</sup> which sets forth a three-step process. Under this analogy, at a pretrial motion hearing the defendant would compare the facts of his case with the record of the prosecutor's past charging decisions to make a prima facie case of arbitrariness.<sup>362</sup> If the trial court determines that the prima facie case of arbitrariness exists, then the burden shifts to the prosecutor to distinguish this case from past cases in which the death penalty was not sought.<sup>363</sup> Finally, the trial court will determine whether, given the evidence presented by both parties, the prosecutor's decision to seek the death penalty in the instant case was arbitrary.<sup>364</sup>

There are drawbacks to this approach. First, using adversarial litigation as a check on arbitrariness in death penalty decision making will be cumbersome, especially as compared with having a review committee or even a centralized review process. Second, and this is a problem recognized by Professor Hitchcock, very little of the data that would be needed in order for the defendant to be able to make a prima facie showing of arbitrariness is currently being collected.<sup>365</sup> In fact, this paucity of data was made very evident to us during the course of our California study,<sup>366</sup> as well as by our attempts to gather such information from the other thirty-six death penalty states.<sup>367</sup> There may be a concern that judicial review of a prosecutor's charging decision has the potential to improperly involve the judicial branch of government in determinations that are entrusted to the executive branch. Finally, there is also a danger that this approach would merely substitute one institutional bias (that of the court) for another (that of the prosecutor).

F. *Improve Record Keeping for Death Penalty Cases*

Whatever the procedures that ultimately may be adopted to combat arbitrariness at the charging stage of death penalty cases, one thing is absolutely clear: a greater effort must be made to keep accurate records of the pertinent data in those cases. This data is essential if we are to have any means of verifying that these important life-or-death

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359. See Hitchcock, *supra* note 351, at 969–73 (proposing adversarial process to challenge death penalty decisions).

360. *Id.* at 966–69.

361. 476 U.S. 79 (1986).

362. Hitchcock, *supra* note 351, at 970.

363. *Id.*

364. *Id.*

365. *Id.* at 967.

366. See *supra* Part III.B.2 for a discussion of the California study's death penalty statistics results and the difficulty in getting information.

367. See *supra* Part IV.C for the results of the state-by-state survey.

decisions are not being made arbitrarily or in a discriminatory way, but instead are being made based upon sound legal and factual considerations. While there are always costs associated with record keeping, if the data are collected electronically on an ongoing basis as each potential death penalty case is processed, the costs associated with this type of record keeping should not be particularly burdensome. Further, it would be useful to have the data maintained in a central location for each death penalty jurisdiction, perhaps at the state's Department of Justice or Attorney General's office.

But what kind of data should be collected? The data must include a record of each prosecution for which the death penalty *could* be sought. For each such case, the particular circumstance or facts qualifying the case for the death penalty should be noted. Any pertinent aggravating or mitigating factors should be included, including prior criminal history, remorse or lack of remorse, and history of mental instability or illness. There should be a record of whether the defense presented any information to the prosecutor prior to the penalty decision, and if so, the nature of that information. In order to focus on the types of concerns that underlay *Furman*, certain basic information about the defendant should be noted, such as the defendant's ethnicity, age, and gender, as well as available information concerning the level of education and socioeconomic background of the accused. Where available, similar information about the victim should be included. Finally, there should be a record for each case as to whether the prosecuting authority elected to seek the death penalty, and a statement of reasons in support of the decision. It would also be useful to have a record of the final disposition reached in each case, whether it was the result of a dismissal, a guilty plea, or a factual adjudication, and, if a judgment of conviction is entered, the ultimate outcome. As was discussed earlier, this type of information is routinely maintained and analyzed by the federal government in federal cases for which the defendant is eligible to receive the death penalty.<sup>368</sup>

#### VIII. CONCLUSION

It seems clear that, at a minimum, a grave risk exists that decisions to seek the death penalty are being made arbitrarily and capriciously, and that the very types of unfairness that the Supreme Court sought to eliminate by its decision in *Furman v. Georgia* may continue to infect capital cases. While we have considered several suggested remedies to increase both the transparency and the verifiability of the decision-making process, we recognize that there may be other approaches to address these issues as well. We welcome further discussion as to the type of oversight or regulation of the prosecutorial decision-making process that may be appropriate. But while that discussion is continuing, we urge an immediate effort to begin keeping and compiling the type of data that will facilitate an examination of whether decisions to seek the death penalty are being made arbitrarily and capriciously some thirty-seven years after *Furman*.

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368. See *supra* Part V.A for a discussion of federal death penalty protocol.