

DEATH-WORTHINESS AND PROSECUTORIAL DISCRETION IN CAPITAL CASE CHARGING

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INTRODUCTION

Prosecutorial discretion in deciding whether to seek the death penalty, either at the initial charging stage or thereafter in plea negotiations to withdraw the death notice in exchange for some quid pro quo,¹ is a longstanding right and practice arguably essential to the continued function of the criminal trial process in most jurisdictions.² Without it, courts would be overwhelmed with lengthy, costly trials.³ Yet the implementation of a reasoned policy of discretion in the capital case decision process (if such an achievement is even possible) is no guarantee of proper

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1. Examples of such a quid pro quo would be a guilty plea for a life-without-parole (or lesser) sentence; to secure testimony from one defendant against another; and/or in exchange for the waiver of some legal claim or constitutional right, such as trial by jury.

2. For a general overview of the history of prosecutorial authority in the charging process, see Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 728-41 (1996).

3. In the period 1990-2002, murder charges in the nation's seventy-five most populous counties were resolved by guilty pleas in sixty percent of the cases. Brian A. Reaves, Ph.D., BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: VIOLENT FELONS IN LARGE URBAN COUNTIES 7 (2006), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/vfluc.pdf> (describing, in Figure 3, "[l]egal representation of violent felons in the 75 largest [urban] counties, at the time of conviction, by type of adjudication"). In terms of the time committed to trial of homicide cases (capital and non-capital), a study of capital cases in Kansas concluded that trials involving a death sentence averaged twenty-eight days, including jury selection while non-death trials averaged about nine days in length. LEGISLATIVE DIVISION OF POST AUDIT, STATE OF KANSAS, COSTS INCURRED FOR DEATH PENALTY CASES: A K-GOAL AUDIT OF THE DEPARTMENT OF CORRECTIONS 15 (2003), available at http://www.kslegislature.org/postaudit/audits_perform/04pa03a.pdf; see Death Penalty Information Center, <http://www.deathpenaltyinfo.org/node/1955> (last visited Feb. 10, 2010) (summarizing the Kansas Legislative Division of Post Audit's findings). This twenty-eight day period is in addition to the pre-trial delay that occurs in murder cases, another cause of significant backlog in the criminal justice system. As was reported in one city (Oakland, California) in April 2009, "[a] typical murder trial usually takes at least two years to complete; if it is a death-penalty case, it could take as long as four years before a jury renders a verdict." Paul T. Rosynsky, *System Mired in Murder Cases*, OAKLAND TRIB., May 21, 2008 (updated Apr. 7, 2009), available at http://www.insidebayarea.com/oaklandhomicides/ci_9338732.

application and outcome, which is represented by seeking the death penalty only for those who meet the constitutional criteria of being the “worst of the worst.”⁴

The dilemma that bedevils prosecutorial discretion is that it is but one aspect of a multi-faceted dynamic of capital cases. With the metric of “success” being the application of the death penalty only to those most deserving, even the most rigorously-fair discretionary prosecution scheme cannot succeed unless each of two additional system components works.⁵ Those are: 1) the provision of effective representation of the capital (or potential capital) defendant; and 2) the cooperation of defendants who will then avail themselves of what may be a fair and just non-capital resolution of criminal charges. Cooperation from and acceptance by an accused is itself a function of counsel’s effectiveness, for without competent counsel whom the client trusts there will never be a likelihood of a successful negotiation. Yet another factor, the age of the accused, impedes the potential efficacy of prosecutorial discretion to ensure just application of capital punishment.

This Article commences with an overview of Supreme Court jurisprudence identifying who are appropriately capital-sentenced defendants and the constitutionality of prosecutorial discretion in capital sentencing eligibility decisions. It then turns briefly to the dilemma occasioned by a no-discretion framework for handling capital cases, before examining the literature that surveys persistent and problematic flaws in discretionary schemes, particularly in terms of geographic and racial disparities. The Article then turns to the impediments faced by even the best-intended discretionary review process: the failure to ensure effective representation; the risk of limited ‘buying in’ by the ultimate consumer, the all-too-often young and immature homicide defendant; and the distorting impact caused by certain victim-survivor constituencies. The conclusion is simple—without a commitment of significant financial assistance for criminal defense, even the best-designed and best-intended prosecutorial discretion model is bound to fail. Even with adequate resource allocation, because the population of homicide defendants is disproportionately young and impulsive, it is highly likely that non-death-worthy offenders will face capital sentencing, at least some of the time, because of the emotional and intellectual limitations of youthful murder defendants to rationally assess options.

I. THE COURT’S METRIC FOR DEFINING WHO IS THE “APPROPRIATE” CAPITAL DEFENDANT

The last thirty-plus years of capital case holdings from the United States Supreme Court have slowly, and not uniformly, moved toward a metric of who is

4. In one of the many clarifications to its death penalty jurisprudence, the Court has made clear that the death penalty is constitutional when it is applicable to those denominated “the worst of the worst.” *Kansas v. Marsh*, 548 U.S. 163, 206 (2006) (Stevens, J., dissenting). This definition/measure and its application to assessing the value of prosecutorial discretion protocols and practices are discussed *infra*, at Section I.

5. The third complicating factor, the power of certain victim-survivor constituencies (such as survivors in police killing prosecutions), is not precisely a system component, notwithstanding victims’ rights legislation, but also may negatively impact the exercise of prosecutorial discretion.

“death-worthy.” Initially, the determination of who should receive capital punishment was seen largely as the prerogative of legislatures, with the Court’s role limited to ensuring that narrowing criteria were deployed and that a form of guided juror discretion was applied.⁶

The Court was first confronted with the issue of whether a particular defendant was death-worthy in *Lockett v. Ohio*,⁷ but the question was avoided.⁸ Sandra Lockett, sentenced to death as a minimal participant in a robbery in which a death resulted, contended inter alia that “it violates the Eighth Amendment to impose the penalty of death without a finding that the defendant possessed a purpose to cause the death of the victim.”⁹ Rather than address this, the Court’s lead opinion attacked the procedures used to impose the sentence of death, invalidating the sentence “because the statute under which it was imposed did not permit the sentencing judge to consider, as mitigating factors, her character, prior record, age, lack of specific intent to cause death, and her relatively minor part in the crime.”¹⁰ For Sandra Lockett on re-trial, the issue of death-worthiness would be informed by expanding legislated definitions of mitigation, but with no substantive death-worthiness limit imposed by the Court.¹¹

Death-worthiness slowly infiltrated the Court’s jurisprudence. The Court first made clear that (in the absence of other aggravating factors) heinousness in excess of that inherent in all unlawful murder was required for a defendant to be death eligible, i.e., to even be subject to a jury determination of whether execution was

6. *Jurek v. Texas*, 428 U.S. 262, 270-72 (1976); *Proffitt v. Florida*, 428 U.S. 242, 258 (1976) (“[T]he requirements of *Furman* are satisfied when the sentencing authority’s discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.”); *infra* Part II. Whether this has eliminated arbitrariness in application of the death penalty is doubtful. As Professor McCord concluded after a study of news reports of homicide cases and an assessment of the facts of each, the news reports raise a strong inference that more than three decades after *Furman*, death sentences are still being imposed on a “capriciously selected random handful,” as was Justice Stewart’s concern in *Furman*. David McCord, *Lightning Still Strikes: Evidence from the Popular Press that Death Sentencing Continues to be Unconstitutionally Arbitrary More Than Three Decades After Furman*, 71 BROOK. L. REV. 797, 802 (2005) (quoting *Furman v. Georgia*, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring)). Professor McCord also concluded, “Justice White’s description of the system’s operation is just as apt today as it was in 1972: ‘[T]he death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.’” *Id.* (quoting *Furman*, 408 U.S. at 313 (White, J., concurring)) (alteration in the original).

7. 438 U.S. 586 (1978).

8. *Id.* at 589. One year earlier, the Court determined that some crimes could not merit the death penalty, holding in *Coker v. Georgia* that a death sentence was disproportionate under the Eighth Amendment, for the rape of an adult woman. 433 U.S. 584, 600 (1977). This categorical exclusion of crimes has been extended to all “nonhomicide crimes against individual persons.” *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2660 (2008). *Coker* did not involve a discussion of death-worthiness of the perpetrator, but rather of disproportionality. 433 U.S. at 597 (“[D]eath is indeed a disproportionate penalty for the crime of raping an adult woman.”).

9. 438 U.S. at 624 (White, J., concurring in part, dissenting in part).

10. *Id.* at 597 (plurality opinion).

11. *Id.* at 606-09 (plurality opinion).

the proper sentence.¹² Next, in *Enmund v. Florida*¹³ the Court condemned the death penalty as disproportionate for a participant in a felony murder who neither killed nor attempted to take a life, and who neither intended nor “contemplated that life would be taken.”¹⁴

The application of the principle of death-worthiness took on a new dimension as the Court expanded the categorical exclusion of certain murderers from death eligibility, first with mental retardation¹⁵ and then with age.¹⁶ Critical to this Article’s thesis is the Court’s linking of those exclusions to a metric of death-worthiness. As explained in *Atkins v. Virginia*,¹⁷

[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution. Thus, pursuant to our narrowing jurisprudence, which seeks to ensure that only the most deserving of execution are put to death, an exclusion for the mentally retarded is appropriate.¹⁸

This narrowing principle of death-worthiness has not informed the Court’s death jurisprudence consistently. In *Kansas v. Marsh*,¹⁹ the Court upheld Kansas’ death penalty statute, which required a sentence of death if aggravating and mitigating factors were of equal weight, i.e., in “equipoise.”²⁰ The Court majority made no reference to the need to identify the “worst of the worst,” or whether that could be accomplished when there was mitigation equal to the aggravating factor(s), a point emphasized by the dissent.²¹ Rather, for the majority, all that mattered was adherence to procedural protections: proof of an aggravating factor, and the right of jurors to hear and give weight to mitigation evidence.²² As the majority concluded, “Kansas’ weighing equation merely channels a jury’s discretion by providing it with criteria by which it may determine whether a

12. *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980) (“The petitioner’s crimes cannot be said to have reflected a consciousness materially more ‘depraved’ than that of any person guilty of murder.”).

13. 458 U.S. 782 (1982).

14. *Id.* at 801. The *Enmund* limiting principle does not apply to a “defendant whose participation is major and whose mental state is one of reckless indifference to the value of human life” but who did not himself cause the death. *Tison v. Arizona*, 481 U.S. 137, 152 (1987).

15. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

16. *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

17. 536 U.S. 304 (2002).

18. *Id.* at 319. This same narrowing principle was expressed in *Roper*, where the majority emphasized that “the death penalty is reserved for a narrow category of crimes and offenders” and that “juvenile offenders cannot with reliability be classified among the worst offenders.” *Roper*, 543 U.S. at 569.

19. 548 U.S. 163 (2006).

20. *Id.* at 166.

21. “The statute produces a death sentence exactly when a sentencing impasse demonstrates as a matter of law that the jury does not see the evidence as showing the worst sort of crime committed by the worst sort of criminal, in a combination heinous enough to demand death.” *Id.* at 206-07 (Souter, J., dissenting).

22. *Id.* at 176.

sentence of life or death is appropriate [and thus] provides the type of 'guided discretion' we have sanctioned."²³

Whether or not this is a temporary retreat cannot be said, as the issue of narrowing was a core factor in the Court's subsequent decision prohibiting the death penalty in child rape cases where no death resulted.²⁴ A specific concern in banning capital punishment in such cases was the inability to ensure that only the death-worthy would be so sentenced: "[B]eginning the same process for crimes for which no one has been executed in more than 40 years would require experimentation in an area where a failed experiment would result in the execution of individuals undeserving of the death penalty."²⁵ What is clear is that even if not an enforceable standard, i.e., one where a particular death sentence could be set aside because that defendant was not among the "worst of the worst,"²⁶ this metric stands as the philosophical and moral substructure of modern death penalty analysis and should therefore serve as the measure against which the efficacy of prosecutorial discretion practices are assessed.²⁷

Determining that the death penalty is to be reserved for the "worst of the worst" is inadequate unless that term is not mere nomenclature but instead has a

23. *Id.* at 177 (citations omitted). In some ways this follows from the Court's repudiation of the claim that capital sentencing schemes are unconstitutional unless they mandate appellate proportionality review, e.g., an inquiry as to "whether the penalty is nonetheless unacceptable in a particular case because disproportionate to the punishment imposed on others convicted of the same crime." *Pulley v. Harris*, 465 U.S. 37, 43 (1984). In *Pulley*, the Court reasoned (as in *Marsh*) that California's capital sentencing statute, albeit without proportionality review, sufficiently narrowed the class of death-eligible defendants to comport with Eighth Amendment requirements. *Id.* at 53-54; see *Marsh*, 548 U.S. at 165-66 (holding that the Kansas statute did not violate the Constitution). The *Pulley* holding does not detract from the validity of the death-worthiness metric proposed here for two reasons: *Pulley* preceded the emergence of the Court's death-worthiness analysis; and comparative proportionality asks not whether a defendant sentenced to death is death-worthy per se, but whether the imposition of death is arbitrary in light of similarly-situated defendants receiving a lesser sentence.

24. *Kennedy*, 128 S. Ct. at 2646, 2658-62.

25. *Id.* at 2661.

26. See Dora W. Klein, *Categorical Exclusions from Capital Punishment: How Many Wrongs Make a Right?*, 72 BROOK. L. REV. 1211, 1212-13 (2007) (noting the Court's "failure to articulate any defining principles for the 'worst of the worst' category of offenders").

27. This metric of death-worthiness comports with theories espousing a "deserts" standard as the baseline for Eighth Amendment restrictions in capital punishment. Scott W. Howe, *Furman's Mythical Mandate*, 40 U. MICH. J.L. REFORM 435, 461-63 (2007) (stating that "[t]he deserts-limitation builds on the idea that the Eighth Amendment proscribes disproportional punishments as well as punishments deemed altogether inhumane" and, with consideration of mitigation evidence, can "help ensure that only those who deserve the death penalty receive that sanction"); Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147, 1176-78 (1991) (explaining that "*Furman, Gregg, Woodson and Lockett* . . . work[] towards the same end of identifying the group of defendants most deserving of death such that its imposition is not cruel and unusual punishment" and that an expansive standard for mitigation evidence "is directly tied to the ultimate issue of whether the defendant deserves the death penalty"). In *Moral Accuracy and "Wobble" in Capital Sentencing*, Professor Sundby poses "the moral accuracy question[] looks at the moral judgment of the jury and asks whether the jury's decision that a particular defendant deserves to live or die is accurate." 80 IND. L.J. 56, 56 (2005). His concern is that "wobble" in the system precludes such verdict consistency. *Id.* at 56-57.

definition.²⁸ Albeit imprecise, this term applies not merely to the crime, or the negative background of the perpetrator, but instead requires an assessment of deservedness in light of all *mitigating* background.

That this is clear comes from the Court's early and consistent mandate that no death penalty be returned unless a jury could first consider and give meaningful weight to mitigating circumstances, and its more recent holdings developing categorical exclusions from death sentence eligibility. As explained in *Lockett*, the Court's 1976 holdings invalidating mandatory penalty schemes were premised on the requirement that "the sentencing process must permit consideration of the character and record of the individual offender and the circumstances of the particular offense . . . in order to ensure the reliability . . . of the determination that death is the appropriate punishment in a specific case."²⁹ While intended more as an assurance of process than a substantive limitation on eligibility,³⁰ the core notion that death-worthiness cannot be assessed without considering mitigating factors remains vital.

This is made manifest in the mental retardation and youth ineligibility cases. In *Atkins*, the Court deemed the mentally retarded ineligible for a death sentence, regardless of the ability to form criminal intent and the aggravated nature of the crime, because "the severity of the appropriate punishment necessarily depends on the culpability of the offender."³¹ This lesser culpability of the mentally retarded warranted exclusion precisely because it eliminated death-worthiness, or as the

28. The problem of defining who is deserving of the death penalty is well-recognized. In proposing that juries determine whether to impose a capital sentence by focusing on a principle of "deserts-limitations," i.e., focusing on whether this particular individual deserves death rather than assessing whether a death sentence in this case is consistent with others similarly situated, Professor Howe acknowledges the amorphousness of this concept, saying, "The principal problem for the Court in using the deserts-limitation to regulate capital sentencing trials is the absence of any apparent agreement about how to measure deserts. While a societal consensus surely exists that only the deserving should receive the death penalty, the agreement does not proceed all the way down to specific rules about how to determine deserts." Howe, *supra* note 27, at 466 (quotations omitted).

29. *Lockett*, 438 U.S. at 601 (citations and internal quotations omitted).

30. The Court has made clear that there is no constitutional right to proportionality review, i.e., a determination that the sentence in a particular case matches those in similar ones. *Pulley*, 465 U.S. at 43-44. Scholars disagree on the merits of proportionality review, either comparative [across a determined universe of cases] "inherent" [determining a standard based on the crime and features of the perpetrator, regardless of inconsistency from case to case], or "specific" [considering whether the punishment of death is appropriate given the particular facts of his case]. Compare Barry Latzer, *The Failure of Comparative Proportionality Review of Capital Cases (with Lessons from New Jersey)*, 64 ALB. L. REV. 1161, 1162 (2001) ("[C]omparative proportionality review is constitutionally unwarranted, methodologically unsound, and theoretically incoherent, and, therefore, should be abolished."), with Evan J. Mandery, *In Defense of Proportionality Review*, 65 ALB. L. REV. 883, 934 (2002) (finding that proportionality review is necessary to achieve retributive justice). Professor Mandery's entire article is devoted to analyzing and disagreeing with Professor Latzer's view on the merits of proportionality review and discussing the types of proportionality review. Mandery, *supra* note 30, at 883-934. See *A Reply to Professor Mandery* for Professor Latzer's response to Professor Mandery's critique. Barry Latzer, *A Reply to Professor Mandery*, 65 ALB. L. REV. 935, 938 (2002) ("[Mandery] is pushing his luck when he claims that the *Pulley* Court endorsed specific review.").

31. *Atkins*, 536 U.S. at 319.

Court described it, “that only the most deserving of execution are put to death.”³² In *Roper v. Simmons*,³³ the Court emphasized an array of defendant-character issues that made youths outside the “narrow category of crimes and offenders”:³⁴ immaturity and impulsiveness, susceptibility to negative influences and pressure, and a less-well-formed personality, all of which “render suspect any conclusion that a juvenile falls among the worst offenders.”³⁵

In sum, death-worthiness requires a holistic assessment of crime, record, background and mitigation.³⁶ Because a prosecutor has a universe of murder cases to compare, she or he is much better suited to applying a “worst of the worst” metric than a jury analyzing a single crime and individual in isolation. It is in this factual and legal framework that prosecutorial discretion is exercised.

II. THE SUPREME COURT AND PROSECUTORIAL DISCRETION

In *Furman v. Georgia*,³⁷ capital punishment as then practiced in the United States was held unconstitutional. While only two Justices concluded that capital punishment pursuant to any legislative scheme was unconstitutional per se,³⁸ three more found unconstitutional the various statutes before the Court because these were “sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.”³⁹ According to Justice White, “there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.”⁴⁰ Justice Stewart wrote more pithily that the death sentences under review were “cruel and unusual in the same way that being struck by lightning is cruel and unusual . . . [and 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.”⁴¹

States responded by crafting new penalty statutes,⁴² and in 1976 the Court held

32. *Id.*

33. 543 U.S. 551 (2005).

34. *Id.* at 569.

35. *Id.* at 569-70.

36. Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 FORDHAM L. REV. 21, 26-27 (1997).

Deathworthiness is broad enough to include all of the factors relevant to the sentencing decision: the defendant's culpability for the crime, as well as his character, record, and background, and the circumstances and character of the murder. Deathworthiness appropriately refocuses the inquiry from whether the defendant is blameworthy—the question resolved at the guilt phase—to whether the defendant is worthy of being sentenced to death—the judgment made at the punishment phase.

Id.

37. 408 U.S. 238 (1972).

38. *Id.* at 305-06 (Brennan, J., concurring); *id.* at 358-359 (Marshall, J., concurring).

39. *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (explaining the holding in *Furman*).

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

41. *Id.* at 309-10 (Stewart, J., concurring).

42. *Gregg*, 428 U.S. at 179-81 (noting that at least thirty-five states had passed new death penalty legislation in response to *Furman*).

the death penalty constitutional when juror discretion was properly cabined.⁴³ Of importance to this Article is the Court's response to the argument that the arbitrariness and caprice condemned in *Furman* had merely shifted from jurors to prosecutors, who had unbridled discretion in designating cases as capital or non-capital.⁴⁴ The Court's rejection of this claim, albeit conclusive in terms of the number of votes, was not spoken with one voice and, indeed, presented two potentially conflicting analyses.

In the opinion announcing the judgment of the Court, joined by Justices Powell and Stevens, Justice Stewart emphasized that the exercise of prosecutorial discretion was constitutional because it *reduced* the pool of potential death-eligible defendants.⁴⁵ He described it as a stage in the process where "an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty"⁴⁶ and distinguished this *eligibility* determination from the ultimate *selection* one, where the jury would determine, applying standards such as those approved in *Gregg*, whether this defendant should in fact be sentenced to death.⁴⁷

By contrast, three other members of the Court approved a death penalty scheme with prosecutorial discretion by assuming that prosecutors would apply discretion with uniformity, not as individual mercy dispensations. Justice White, with Chief Justice Burger and then-Justice Rehnquist, concluded that the prosecution and jury assessments would be the same:

[I]t cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts. Unless prosecutors are incompetent in their judgments, the standards by which they decide whether to charge a capital felony will be the same as those by which the jury will decide the questions of guilt and sentence.⁴⁸

Rather than mercy, a moral or values-based determination of whether seeking the death penalty is appropriate, Justice White and his colleagues assumed the determining factor to be the likelihood of jury acceptance of a particular sentence, itself no guarantee of sentence *appropriateness*.⁴⁹ Importantly, absent from either

43. *Id.* at 195-96 n.47. In related cases, the Court struck down death penalty statutes that made a sentence of death automatic upon the proof of certain triggering factors. *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) (plurality opinion); *Roberts v. Louisiana*, 428 U.S. 325, 333-34 (1976) (plurality opinion); *see also Blystone v. Pennsylvania*, 494 U.S. 299, 304 (1990) (summarizing the various holdings).

44. The Court in *Gregg* identified the claim as being that "the state prosecutor has unfettered authority to select those persons whom he wishes to prosecute for a capital offense and to plea bargain with them." 428 U.S. at 199.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 225 (1976) (White, J., concurring).

49. *See* Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557, 1560 (1998) (detailing how studies showed

analysis is an explanation of how, without being capricious, the prosecutor is to determine whether in fact any particular defendant is to be removed from the pool of death-eligible defendants because that determination cannot be made without an assessment of mitigating evidence, evidence often not available to (or not sought out by) the prosecutor. The metric of successful discretion—be it a mercy-tempered or likelihood-of-prevailing discretion—never addressed the separate and critical determination of whether the particular defendant was death-worthy.⁵⁰

Gregg did not end the Court's examination of prosecutorial discretion in capital charging. In *McCleskey v. Kemp*,⁵¹ the Court confronted a claim that race was a controlling factor in capital sentencing in Georgia, in terms of both prosecutorial discretion and jury verdict. As to the former, the statistical study presented showed that prosecutors sought the death penalty in 70% of the cases involving black defendants and white victims; 32% of the cases involving white defendants and white victims; 15% of the cases involving black defendants and black victims; and 19% of the cases involving white defendants and black victims.⁵²

For purposes of resolving *McCleskey's* claim, the Court accepted these statistics as accurate, at least as showing that there was a risk of race playing a role in capital sentencing.⁵³

The Court's first holding was that only a showing of intentional discrimination would suffice to establish an Equal Protection violation,⁵⁴ and it quickly concluded that the statistical survey was insufficient to meet that threshold.⁵⁵ The Court emphasized two facts—that *McCleskey's* conduct made him *eligible* for the death penalty (as opposed to *deserving* of the same) and that "discretion is essential to the criminal justice process."⁵⁶

The Court found equally unavailing *McCleskey's* Eighth Amendment claim. Here, the Court again exalted the need for discretionary authority in the charging authorities as "essential to the criminal justice process" even though it carries with it the "power to discriminate."⁵⁷ An overarching concern of the Court was that even if *McCleskey* were correct that race impacted the decision in his case, the criminal justice system would not be able to operate if such race-based claims were

that for jurors who sat on and resolved capital cases "the defendant's degree of remorse significantly influences a jury's decision to impose the death penalty"). These findings are elaborated on and further developed in Sundby's in-depth study of the jury in two capital cases—*A LIFE AND DEATH DECISION: A JURY WEIGHS THE DEATH PENALTY* (Palgrave MacMillan 2005).

50. The Court's elaboration of when a particular defendant is deserving of death, referenced above as when she or he is among "the worst of the worst," was not developed at the time of *Gregg*.

51. 481 U.S. 279 (1987).

52. *Id.* at 287.

53. *Id.* at 291 n.7 ("As did the Court of Appeals, we assume the study is valid statistically . . . [but the study] can only demonstrate a *risk* that the factor of race entered into some capital sentencing decisions and a necessarily lesser risk that race entered into any particular sentencing decision.").

54. *Id.* at 292 ("[T]o prevail under the Equal Protection Clause, *McCleskey* must prove that the decisionmakers in *his* case acted with discriminatory purpose.").

55. *Id.* at 297.

56. *Id.*

57. *McCleskey*, 481 U.S. at 312 (internal quotations omitted).

accepted: "The Constitution does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in order to operate a criminal justice system that includes capital punishment."⁵⁸

Thus, the Court accepted that some racial bias might have to be tolerated, in part to permit the well-regarded process of prosecutorial discretion to prevail. In historical perspective, twenty-plus years after the decision, *McCleskey*'s impact has been described as having "nearly eliminated the incentive of federal and state courts and legislatures to address meaningfully the issue of racial discrimination in the administration of the death penalty and has provided them with a political and legal framework for denying and avoiding the issue."⁵⁹

Since *McCleskey*, the Court has not returned to the issue of discretion in the capital charging process, although it has been heavily engaged in scrutinizing prosecutorial discretion in jury selection when issues of race arise.⁶⁰ What is clear is that absent a particularly overt racial motivation,⁶¹ the prosecutor's right to determine who should face the death penalty, presuming eligibility under the particular jurisdiction's scheme, is essentially unlimited.⁶²

58. *Id.* at 319.

59. David C. Baldus, George Woodworth & Catherine M. Grosso, *Race and Proportionality Since McCleskey v. Kemp (1987): Different Actors with Mixed Strategies of Denial and Avoidance*, 39 COLUM. HUM. RTS. L. REV. 143, 144 (2007) [hereinafter Baldus, *Race and Proportionality*]. That there has been and remains substantial criticism of *McCleskey* cannot be questioned. See, e.g., *Symposium on Pursuing Racial Fairness in Criminal Justice: Twenty Years After McCleskey v. Kemp*, 39 COLUM. HUM. RTS. L. REV. 285 (2007) (collecting articles). Unlike the Symposium, this Article addresses *McCleskey* descriptively, not critically, to contextualize the history and current status of prosecutorial discretion in capital-eligible prosecutions.

60. *Snyder v. Louisiana*, 552 U.S. 472 (2008); *Miller-EI v. Dretke*, 545 U.S. 231 (2005). Cf. *Rice v. Collins*, 546 U.S. 333 (2006) (holding that a racially-influenced jury selection did not lead to an unreasonable determination of the facts, thus precluding the defendant from federal habeas relief). As to whether this scrutiny has effected meaningful change at the level of individual trials, see Stephen B. Bright, *The Failure to Achieve Fairness: Race and Poverty Continue to Influence Who Dies*, 11 U. PA. J. CONST. L. 23, 29 (Dec. 2008) (contending that "for the most part, prosecutors get away with removing members of racial minorities from juries"). Concerns about race in jury selection persist today. See Jennifer Emily, *Dallas County Judge Orders Seating of Black Juror in Broadnax Murder Case*, DALLAS MORNING NEWS, July 31, 2009, available at <http://www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/073109dnmetjuryrace.43a40e9.html> (reporting that a trial judge, disturbed by the prosecution's having struck all African-American venirepersons, placed a struck black venireperson on the jury to prevent an all-white panel).

61. See *United States v. Bass*, 536 U.S. 862, 864 (2002) (reversing the Sixth Circuit's holding that statistical evidence of a disparate racial impact in the application of the federal death penalty statute is adequate to authorize discovery as to a claim of race's being a deliberate motivation for a prosecution decision to seek a death sentence).

62. North Carolina has recently acted to limit the role of race in death penalty charging and verdicts. That state's Racial Justice Act, signed into law in August, 2009, permits a capital defendant to seek to prove that "race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed," and where this is proved "the court shall order that a death sentence not be sought, or that the death sentence imposed by the judgment shall be vacated." North Carolina Racial Justice Act, ch. 15A, sec. 1, § 15A-2012, available at <http://www.ncga.state.nc.us/Sessions/2009/Bills/Senate/HTML/S461v6.html>.

III. THE FAILURE OF THE NO-DISCRETION APPROACH

The Court's invalidation of mandatory death penalty schemes,⁶³ i.e., statutes requiring that death be imposed by the fact-finder in any case where a certain triggering fact (such as the death of a police officer) has been proved, does not bar prosecution no-discretion policies for *seeking* a death sentence in all cases where an aggravating factor is arguably present. Yet the Court's rationale compellingly calls into question such policies as incompatible with the goal of ensuring that only the "worst of the worst" be subject to death.

In *Woodson*, the Court examined the history of mandatory death sentences, found that the need to invalidate them arose from their over-inclusiveness, and described these sentences as "unduly harsh and unworkably rigid."⁶⁴ While the Court articulated this in terms of its distorting effect of a mandatory punishment on the guilt-innocence determination, worrying that jurors would acquit rather than impose an unfair sentence,⁶⁵ the emphasis on such a regime's being "unduly harsh" is ultimately one of death-worthiness. A prosecutorial no-discretion charging scheme runs the same risks—undue harshness, and over-inclusiveness.

This conclusion arises first from the correlation among poverty, race, inadequate lawyering, and resulting death sentences. As Professor Klein articulates and substantiates, "defendants who are poor, or black, or whose victims were white, are disproportionately likely to be sentenced to death."⁶⁶ Increasing the pool of capital defendants simply increases the risk that those not death-worthy will receive a capital sentence.

An examination of two jurisdictions where de facto mandatory death policies were pursued by prosecutors—Maricopa County, Arizona, and Philadelphia, Pennsylvania—confirms that there is a substantial risk that non-death-worthy defendants are placed at risk of receiving a capital sentence.

In Maricopa County, the rate at which first degree murder cases were charged capitally expanded from thirty percent prior to 2005 to fifty percent by 2007.⁶⁷ The direct consequences of such a skyrocketing capital docket were immediate—an inability to find competent counsel for representation.⁶⁸ The concern over the absence of adequate counsel has spawned litigation seeking relief such as a bar to

63. *Woodson v. North Carolina*, 428 U.S. 280, 293 (1976).

64. *Id.*

65. The Court noted: "At least since the Revolution, American jurors have, with some regularity, disregarded their oaths and refused to convict defendants where a death sentence was the automatic consequence of a guilty verdict." *Id.*

66. Klein, *supra* note 26, at 1211. That there continues to be a problem with inadequate representation in capital cases is clear. A review of 368 capital cases filed in federal district courts between 2000 and 2002 showed a reversal rate of 1 in 8, or 12%, for the 267 of those cases completed by 2006. NANCY J. KING, FRED L. CHEESMAN II, & BRIAN J. OSTROM, *HABEAS LITIGATION IN U.S. DISTRICT COURTS 10* (2007). This rate of granting relief was thirty-five times higher than the rate in non-capital cases. *Id.* at 9-10.

67. Jahna Berry, *Death-Penalty Backlog Strains Justice System*, THE ARIZONA REPUBLIC, Feb. 22, 2007, available at <http://www.azcentral.com/arizonarepublic/news/articles/0222deathpenalty0222.html>.

68. The Office of Contract Counsel reported an inability to secure counsel with adequate training to serve as first chair [lead] counsel in these cases. "With so many cases coming in, it's nearly impossible to find lawyers with the training needed to be the 'first chair' or lead attorney for the cases." *Id.*

the seeking of a capital sentence, but while such a remedy has been denied,⁶⁹ the absence of trained and well-funded counsel remains.⁷⁰

Maricopa County's capital case prosecution numbers are extraordinary, both absolutely and in comparison to other counties in that state. As of August 31, 2008, Maricopa County had 136 capital cases pending, while the rest of the state had one fifth that number,⁷¹ raising at least the specter of uneven application of the death penalty based solely on geography.⁷²

The financial impact of such practices is enormous. "According to estimates of the Office of Public Defense Services, capital cases, which make up less than one-quarter of 1% of all criminal cases in Maricopa County, chew up 26.8% of the budget, at an estimated cost in excess of \$14 million."⁷³ As a direct consequence of the financial strain, the system is unable to ensure that mitigation evidence is developed (and thus that the death penalty is limited to those truly death-worthy). As found as a fact in litigation seeking to bar the death penalty in Maricopa County, "there currently is not a sufficiently adequate, cohesive approach to assure the timely appointment of high quality defense counsel in capital cases."⁷⁴ The problem was particularly pernicious with conflict counsel, meaning counsel not in an institutional office such as a Public Defender, but rather appointed to capital cases in multiple defendant prosecutions or where the Public Defender capital attorneys are at maximum caseload. As described by the trial court in *Martinez*,

69. See, e.g., *State v. Gilbert Martinez*, CR 2006-007790-001DT, minute entry (Aug. 3, 2009) (dealing with the Defendant's Motion to Reconsider a previously filed Motion to Strike the Death Penalty) (copy on file with author).

70. See A.B.A., *EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE ARIZONA DEATH PENALTY ASSESSMENT REPORT* xiii (2006) (concluding, inter alia, that "Arizona's indigent defense services is a mixed and uneven system that lacks level oversight and standards and that does not provide uniform, quality representation to indigent defendants in all capital proceedings across the State").

71. Robert L. Gottsfield & Marianne Alcorn, *The Capital Crisis in Maricopa County: What [Little] We Can Do About It*, *THE ARIZONA LAWYER*, 22 (2009) [hereinafter *Capital Crisis*], available at <http://www.azattorney.com/azattorney/200904/?pg=22#pg22>. The balance of the state had capital cases in the following numbers: "There were 24 capital cases in other Arizona counties as of June 30, 2008 (one in Apache County, two in Mohave, three in Pinal, 10 in Pima, three in Yavapai and five in Yuma County)." *Id.*

72. Maricopa County's population is roughly sixty percent of that of the state of Arizona. U.S. Census Bureau, *State and County Quick Facts*, <http://quickfacts.census.gov/qfd/states/04/04013.html> (last visited Feb. 12, 2010).

73. *Martinez*, CR 2006-007790-001DT, minute entry at 4 (dealing with the Defendant's Motion to Reconsider a previously filed Motion to Strike the Death Penalty and reciting capital case statistics in Maricopa County) (copy on file with author).

74. *Id.* at 5.

As of January, 2007, [the office of conflict counsel] was . . . a sump pump for capital defense in Maricopa County. There was no true quality assurance process, as had been agreed to by Maricopa County, no quality compliance monitoring, no proactive management arrangement by Maricopa County of the contract counsel in the timely appointment of a capital defense team, material inadequacies which continue to this date . . .⁷⁵

Equally problematic is the fact that over-inclusiveness risks capital sentences for non-death-worthy individuals. "The percentage of jury verdicts voting for a death sentence in capital cases tried between 2004 and 2007 is 71%. The last eleven verdicts in Maricopa County as of October 1, 2008 resulted in eight death sentences."⁷⁶ Additionally, those cases where death is the sentence result in reversal at a rate of fifty percent.⁷⁷ These numbers, while not conclusive, certainly are consistent with two discrete phenomena—the 'acquittal' rate in capital sentences may show the over-inclusiveness of the initial decision to seek death, and the high reversal rate may be proof of the failure of the prosecution and trial systems to ensure that only those who are death-worthy in fact are sentenced capitally.⁷⁸

The Philadelphia experience preceded—and mirrors—that of Maricopa County. For years it was the deliberate policy of the District Attorney of Philadelphia to issue a formal notice of the intent to seek the death penalty in any and every case in which at least one aggravating factor⁷⁹ was arguably present.⁸⁰

75. *Id.* at 6.

76. *Capital Crisis*, *supra* note 71, at 24.

77. *Id.* This contrasts with a reversal rate of one percent for murder convictions with a resulting life sentence. *Id.*

78. Another test for over-inclusiveness, albeit an imperfect one, is found in juxtaposing the seventy-one percent death verdict rate with that in other jurisdictions. Without further facts regarding each case, any differential in juror response cannot be attributed with certainty to over-inclusiveness. Nonetheless, it is telling that Maricopa County's death verdict rate is significantly (fifty percent) higher than that reported by the federal government, which found that as of 2001 "the jury returned a verdict for the death penalty in about half of the cases in which the Department sought it . . ." DEP'T OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: SUPPLEMENTARY DATA, ANALYSIS AND REVISED PROTOCOLS FOR CAPITAL CASE REVIEW n.20 (June 6, 2001), available at <http://www.justice.gov/dag/pubdoc/deathpenaltystudy.htm>. Similarly, juries returned sentences of death in forty-two percent of cases that went to penalty trials in Maryland. RAYMOND PATERNOSTER ET AL., AN EMPIRICAL ANALYSIS OF MARYLAND'S DEATH SENTENCING SYSTEM WITH RESPECT TO THE INFLUENCE OF RACE AND LEGAL JURISDICTION: EXECUTIVE SUMMARY 11 (Jan. 2003), available at <http://www.newsdesk.umd.edu/pdf/exec.pdf>. If federal juries refuse to return death sentences in half of the cases after the prosecution has limited those for whom such a penalty is sought, the higher Maricopa County rate, with no or limited pre-trial exclusion of defendants from the eligibility pool, strongly suggests an over-inclusiveness, rather than limiting the punishment to the "worst of the worst."

79. Pennsylvania now has eighteen aggravating factors, the presence of at least one making a person eligible for a death sentence. 42 PA. CONS. STAT. § 9711(d) (2008).

80. In 1995, the then-Chief of the Homicide Division of the Philadelphia District Attorney's Office explained that his office is disinclined to use prosecutorial discretion that might narrow the law's scope: "If the law created aggravating circumstances and we don't use them consistently, people will say you seek it in some cases and not others. If there are aggravating circumstances, we file notice. If they are not there, we don't." Tina Rosenberg, *The Deadliest D.A.*, N.Y. TIMES (magazine), July 16, 1995, available at <http://www.nytimes.com/1995/07/16/magazine/thedeadliestda.html?scp=2&sq=%22the%20deadliest%0d.a.%22&st=cse>.

There, again, the outcome was stark. First, Philadelphia has contributed nearly half of the inmates sentenced to Pennsylvania's death row, 106 of 221,⁸¹ although it has only 12% of the state's population.⁸² While Philadelphia was the site of nearly one half of Pennsylvania's reported murders in 2008, and in the period 2002-2008,⁸³ the number of inmates sentenced to death remained disproportionately high if contrasted with that of Allegheny County, the state's other major urban region and one of similar population.⁸⁴ That county had roughly 12% of the state's homicides over the 2002-2008 period, but contributed less than 5% of the death row population.⁸⁵ Had the two secured death sentences at an equivalent rate based upon the incidence of homicides, Allegheny County should have contributed 12% of the death row population, or twenty-nine death-sentenced inmates.

Relying on this geographic comparison is problematic because Philadelphia's numbers are proportionate when measured against the state as a whole, while not against a similar urban area. Thus, a geographic disparity may not be particularly telling. However, it must also be recognized that to contribute nearly half of the state's death row population, unless it is assumed that juries returned a death sentence only in those cases where a death notice was filed by the prosecution, the death penalty must have been sought against many more in the Philadelphia region. Stated differently, to achieve a rate of fifty percent of death row inmates, Philadelphia must have *sought* death in a higher proportion of cases. If juries did not correctly differentiate the death-worthy from those who were not, the result is an over-inclusive death rate. Even if it is proper for a county with half of the state's murders to be the source of half of the death row population, this in no way answers whether the absolute number of death-sentenced inmates is proper or over-inclusive.

That the death process has failed to narrow selection to those actually death-worthy is confirmed by a study of capital case reversals in Pennsylvania. As of September 15, 2008, "140 death warrants had been directed at individuals who subsequently obtained relief [and] 59 [were] directed at individuals who have since been sentenced to life or less, released, or acquitted."⁸⁶ Perhaps more starkly, of the

81. PENN. DEP'T OF CORR., PERSONS SENTENCED TO EXECUTION IN PENNSYLVANIA AS OF FEBRUARY 1, 2010 1, 1-10, available at http://www.cor.state.pa.us/portal/server.pt/community/departement_of_corrections/4604.

82. Philadelphia's population in 2008 was estimated at 1,447,395, while that of the Commonwealth of Pennsylvania was set at 12,448,279. U.S. CENSUS BUREAU, STATE AND COUNTY QUICKFACTS, PHILA. COUNTY, PA. (2009), <http://quickfacts.census.gov/qfd/states/42/42101.html> (last visited Feb. 10, 2010).

83. In 2008, Pennsylvania reported 732 cases of murder and manslaughter, with 349 from Philadelphia. PHILADELPHIA COUNTY. PENN. STATE POLICE, PA. UNIFORM CRIME REPORTING SYSTEM, <http://ucr.psp.state.pa.us/UCR/Reporting/Monthly/Summary/MonthlySumOffenseUI.asp?rbSet=4> (last visited Feb. 10, 2010). Over the period 2002-2008, the state had a total of 4824 homicide victims, with 2472 from Philadelphia County and 599 from Allegheny County. *Id.*

84. The 2008 population of Allegheny County was estimated at 1,215,103. U.S. CENSUS BUREAU, STATE AND COUNTY QUICKFACTS, ALLEGHENY COUNTY, PA. (2009), <http://quickfacts.census.gov/qfd/states/42/42003.html> (last visited Feb. 10, 2010).

85. As of February 10, 2010, Pennsylvania's death row contained ten inmates sentenced from Allegheny County, out of a total of 246. PENN. DEP'T OF CORR., *supra* note 81, at 1-10.

86. ROBERT BRETT DUNHAM, ISSUES IN INDIGNANT CAPITAL DEFENSE IN PENNSYLVANIA 1, 24

fifty-seven death sentenced inmates who received some form of relief, fifty-three were sentenced to life imprisonment or less, thirty-one by plea and agreement of the prosecution, and only four received new death sentences.⁸⁷ Death-worthiness was clearly not determinative in the initial death selection process.

While the reversal data are statewide, without a specific breakdown for Philadelphia cases, even the simplest extrapolation makes clear that the metric of death-worthiness was not met by a mandatory death-notice regime. Separately, data does show a high number of Philadelphia cases in which it was found, often with agreement from the prosecution, that capital counsel was ineffective for failing to properly investigate and/or present mitigation evidence.⁸⁸ The then-in-effect Philadelphia mandatory scheme of seeking death wherever an accused was eligible was demonstrably inequitable and over-inclusive.

IV. ACADEMIC CRITICISM OF PROSECUTORIAL DISCRETION IN CAPITAL CASE CHARGING

Substantial scholarship has been directed to the issue of whether the prosecutorial discretion model “works” in capital charging. Uniformly, the responses are critical, calling the practice into question on two issues: geographic variation and the impact of, and on, race.

A. Geography and Capital Charging

In perhaps the most trenchant of the criticisms of county-by-county disparity, Professor Gershowitz demonstrates the recurring phenomenon of intra-state variation in capital case charging.⁸⁹ While focusing on Texas, he surveys the intra-state unevenness of death penalty application nationally, with examples from New York state before its death penalty statute was struck down, Maryland (contrasting Baltimore City and the area surrounding Baltimore County), Ohio and Tennessee.⁹⁰ Perhaps most importantly, Gershowitz shows that in many instances murder rate differences between counties cannot explain the disparities, which he links in large part to the relative financial resources available in each county for the costs of capital prosecution.⁹¹ “An alternate and more plausible explanation for much of the

(Oct. 2, 2008), available at http://www.pilcop.org/Diversity%20Summit_Issues%20in%20Indigent%20Capital%20Defense%20in%20Pennsylvania.pdf.

87. *Id.* at 27.

88. What is known is that as of August 2009, in twenty-nine cases, judges of the Court of Common Pleas granted penalty-phase relief because of ineffectiveness in investigating and/or presenting mitigation evidence, with such relief occurring often by stipulation by the prosecution. ROBERT BRETT DUNHAM, CITE LIST OF PENNSYLVANIA DEATH PENALTY REVERSALS BECAUSE OF INEFFECTIVE ASSISTANCE OF COUNSEL (Aug. 30, 2009) (providing information prepared by Robert Brett Dunham, then director of education of the Capital Habeas Unit of the Defender Association of Philadelphia) (on file with author).

89. Adam M. Gershowitz, *Statewide Capital Punishment: The Case for Eliminating Counties' Role in the Death Penalty*, 62 VAND. L. REV. (forthcoming 2010) (manuscript at 1-15), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1457715.

90. *Id.* (manuscript at 7-11).

91. *Id.* (manuscript at 9-11).

variation is money.”⁹²

A study of county-by-county capital case charging practices across the state of Missouri confirmed that “place counts,” i.e., that the locus of the murder tells more about whether the case will be capitally charged than many other factors.⁹³ After categorizing over 1000 murders committed across the state, the authors first determined that while seventy-six percent of the murders were death eligible—that is, had at least one aggravating factor confirming eligibility present—by time of trial only five percent proceeded capitally, a data point confirming the wide amount of prosecutorial discretion available. After controlling for various factors, one finding was that “defendants in Missouri’s two largest cities—St. Louis and Kansas City—are less likely to face capital trials and less likely to be sentenced to death than defendants in the rest of the state.”⁹⁴

The impact of the geographic disparity was varied. In some instances, geography determined the rate of charging cases as first-degree murder; and where geography was linked to race, specific effects were demonstrated.⁹⁵ In particular “[d]efendants who face[d] almost exclusively white jury pools [were] charged with M1 more often, but [were] then convicted of M1 less often.”⁹⁶ Overall, geography impacted both charging *and* verdict: “there [were] large disparities in the decision-making process and in outcomes depending on the place of prosecution.”⁹⁷

Of particular importance, the Missouri study was able to reach its conclusion regardless of disparate homicide rates from county to county; the metric used was the *rate* at which prosecutors sought Murder One charges from the pool of intentional murder cases in each jurisdiction, a step precedent to capital charging. The variance was stark:

Jackson County prosecutors charged M1 in only 28.9% of the intentional-homicide cases they prosecuted. In contrast, prosecutors in St. Louis City charged M1 in 85.5% of their intentional-homicide cases. Apart from Jackson County, prosecutors in every other geographic category had an M1 charging rate above 50%, with a statewide average of 59.0%.⁹⁸

In South Carolina, the distinguishing factor geographically was whether the crime was committed in an urban or a rural setting.⁹⁹ After “controlling for nineteen variables related to the aggravation of each homicide and victim and defendant characteristics, [the study revealed] that murders committed in rural areas [were] 5.58 times more likely to result in capital prosecutions than urban homicides.”¹⁰⁰

92. *Id.* (manuscript at 11).

93. Katherin Barnes, David Sloss & Stephen Thaman, *Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making in Death-Eligible Cases*, 51 ARIZ. L. REV. 305, 307 (2009).

94. *Id.* at 307.

95. *Id.* at 307, 329.

96. *Id.* at 329.

97. *Id.* at 307.

98. *Id.* at 330.

99. Michael Songer & Isaac Unah, *The Effect of Race, Gender, and Location on Prosecutorial Decisions to Seek the Death Penalty in South Carolina*, 58 S.C. L. REV. 161, 196 (2006).

100. *Id.*

Geographical disparity in the charging decision was also found in a review of 211 cases from 1979 through 2007 in which New Mexico prosecutors sought the death penalty.¹⁰¹ A district-by-district analysis concluded that two of New Mexico's judicial districts filed about half of all the death penalty cases filed since 1979.¹⁰² The district attorneys in the Second Judicial District have persuaded juries to impose a total of six death sentences since 1979.¹⁰³ None of the other judicial districts have sentenced more than two defendants to death, no matter how many death penalty cases were filed in the district.¹⁰⁴

In New Mexico, the variance did not accord with population distribution. "[T]he First Judicial District, with only 10 percent of New Mexico's population, filed almost as many death penalty cases as the Second Judicial District, which is New Mexico's major metropolitan area of Albuquerque/Bernalillo County."¹⁰⁵ However, the New Mexico study fails to incorporate murder rates per district, leaving the analysis incomplete. This is tacitly acknowledged when the author discusses the increased capital charging rate in districts housing state prisons. "Prison disturbances, known colloquially and in the media as riots, have affected the number of death cases filed in the First and the Fourth Judicial Districts."¹⁰⁶ One prison riot resulted in several capitally-charged cases.¹⁰⁷ Nonetheless, geography remained a significant factor, as a review of cases statewide showed "that the number of death cases filed in a district has little to do with the number of death sentences actually imposed."¹⁰⁸ This finding establishes that the decision to charge a case as capital does not ensure consistent results statewide, and thus in at least some districts was over-inclusive.

These recurring findings of intrastate geographic disparity in capital charging decisions are significant only if one accepts the premise that because the authorization to seek death is a product of a state's legislature, the application of this power should be consistent statewide. This is a policy decision,¹⁰⁹ as there is no federal constitutional protection against county-by-county disparate application of a state punitive scheme.¹¹⁰ Yet even if one accepts such variance as inevitable, it

101. Marsha J. Wilson, *The Application of the Death Penalty in New Mexico, July 1979 Through December 2007: An Empirical Analysis*, 38 N.M. L. REV. 255, 257-58 (2008).

102. *Id.* at 283.

103. *Id.*

104. *Id.*

105. *Id.* at 277. The second district holds roughly thirty percent of New Mexico's population. *Id.* at 278.

106. Wilson, *supra* note 101, at 278.

107. *Id.* at 278-79.

108. *Id.* at 280.

109. Professor Gershowitz defines the problem as both over- and under-utilization of the death penalty, dependent on the county's financial and capital lawyering resources. To this end, he urges a statewide force of capital prosecutors and defense counsel: "All aspects of death penalty cases—charging, trial, appeal, and everything in between—can and should be handled at the state level by an elite group of prosecutors, defense lawyers, and judges whose sole responsibility is to deal with capital cases." Gershowitz, *supra* note 89, at 3-4. The benefits he sees in such a system are the reduction of geographic disparity and "restor[ing] confidence in the system in general and individual verdicts in particular." *Id.* at 4.

110. *See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (declining to find

nonetheless raises (if not confirms) the failure to link discretion in charging to a metric of death-worthiness, a conclusion made more clear when the issue of disparate racial impact is added into the mix.

B. Race and Capital Charging

Notwithstanding the contention that the United States is approaching or in a post-racial world,¹¹¹ it remains evident that race can play a pernicious role in capital sentencing (and, frighteningly and disturbingly, in capital charging decisions). There is historic support for the claim that the death penalty was enacted to 'socialize' or replace lynching.¹¹² The pervasiveness of race as an impermissible factor in the death process is confirmed in the Court's ongoing condemnation of racial gerrymandering in jury selection.¹¹³ Racial attitudes are one of the few mandatory subjects for inquiry in jury selection in capital cases, at least where the crime is interracial.¹¹⁴ Perhaps most glaringly, the disproportional representation of minorities on death row raises disturbing questions of whether there is disparate application of this ultimate penalty.¹¹⁵

an equal protection claim arising from unequal funding for public education). In addressing the right to education, the *Rodriguez* Court noted inter alia that "the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id.* The same can be said for persons accused of murder in any particular county. While *Rodriguez* determined that education is not an enumerated right guaranteed by the Constitution, *id.* at 35-36, the right to be free from cruel and unusual punishment is constitutionally protected and at best warrants the application of strict scrutiny to the claim of unequal treatment. Given the Court's vigorous endorsement of prosecutorial discretion in charging, *see supra* Section II, and the high number of variables that may cause intrastate disparities, it is doubtful that a constitutional claim would have any likelihood of success.

111. The perception that society has progressed to a point where race should be eliminated as a factor in judicial analysis was brought to the fore by the nomination of Justice Sonia Sotomayor for a seat on the United States Supreme Court. Senator John Cornyn proclaimed that "[a]s we see people like Barack Obama achieve the highest office in the land and Judge Sotomayor's own nomination to the highest court, I think it is harder and harder to see the justifications for race-conscious decisions across the board." David D. Kirkpatrick, *Sotomayor's Focus on Race Issues May Be Hurdle*, N.Y. TIMES, May 29, 2009, available at <http://www.nytimes.com/2009/05/30/us/politics/30affirm.html>. The same article posits this as an operating principle for Chief Justice Roberts. *Id.* New York University Law School professor Samuel Issacharoff has agreed, noting the emerging theme of the Roberts Court as saying: "The time has run, things are different, change has happened." (internal quotations omitted). *Id.*

112. Timothy V. Kaufman-Osborn, *Capital Punishment as Legal Lynching*, in FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA 21, 22 (Charles J. Ogletree, Jr. & Austin Sarat eds., N.Y. Univ. Press 2006).

113. *See, e.g.*, *Snyder v. Louisiana*, 552 U.S. 472, 474 (2008) (holding that prosecutor's proffered reasons for striking black prospective juror in capital murder trial were pretext for racial discrimination); *Miller-El v. Dretke*, 545 U.S. 231, 253-60, 266 (2005) (holding that state court's factual findings as to non-pretextual nature of state's race-neutral explanations for its use of peremptory challenges to excuse ten of eleven black venirepersons were shown to be wrong by requisite clear and convincing evidence).

114. *Turner v. Murray*, 476 U.S. 28, 36 n.8 (1986) (requiring such inquiry, albeit in no more than a constricted fashion, because "it is plain that there is some risk of racial prejudice influencing a jury whenever there is a crime involving interracial violence").

115. As of July 1, 2009, blacks made up 41.6% of the death row population across the United States. DEATH PENALTY INFO. CTR., NAT'L STATISTICS ON THE DEATH PENALTY AND RACE,

This last inquiry cannot be answered by death row population alone, as such an analysis fails to address the racial imbalance in the population of homicide perpetrators. As of 2005, “offending rates for blacks [per 100,000 population] were more than seven times higher than the rates for whites.”¹¹⁶ Thus, disproportionality may be attributable, in part, to homicide patterns. Indeed, it was the disproportionate representation of minorities in the pool of capital-eligible defendants that led the Department of Justice to conclude that any racial disparity in federal death penalty application was a result of “non-invidious factors. . .” such as the fact that “organized drug trafficking is largely carried out by gangs whose membership is drawn from minority groups.”¹¹⁷ The report emphasized that “in the cases considered by the Attorney General, the Attorney General approved seeking the death penalty for 38% of White defendants, 25% of Black defendants, and 20% of Hispanic defendants.”¹¹⁸ While the assertion of race-neutrality in the federal system has not been uniformly accepted,¹¹⁹ the Government’s explanations carry some weight.

Nonetheless, overrepresentation of minorities in the population of capital-eligible defendants does not eliminate race as a “thumb on the scale,” either in jury verdict or in prosecutorial charging decisions. For the former, a recent experiment demonstrates the pervasive impact of race on culpability determinations.¹²⁰ A random sample of 276 adults (mostly white) were provided with a triple murder case file summary.¹²¹ Only two variables were introduced: the maximum sentence alternated between life without parole and death; and the suspect’s name was changed from a race-neutral one (Andrew, Frank or Peter) to one associated more

<http://www.deathpenaltyinfo.org/race-death-row-inmates-executed-1976#inmaterace> (last visited Feb. 13, 2010). By contrast, the 2008 Population Estimates prepared by the Census Bureau show blacks at approximately twelve percent of the population. U.S. CENSUS BUREAU, 2008 POPULATION ESTIMATES (2008), http://factfinder.census.gov/servlet/DTTable?_bm=y&geo_id=01000US&ds_name=PEP_2008_EST&lang=en&mt_name=PEP_2008_EST_G2008_T003_2008&-format=&-CONTEXT=dt (last visited May 12, 2010).

116. BUREAU OF JUSTICE STATISTICS, HOMICIDE TRENDS IN THE U.S.: TRENDS BY RACE, <http://bjs.ojp.usdoj.gov/content/homicide/race.cfm> (last visited Feb. 13, 2010). These trends are paralleled in studies of homicides committed by teenagers (categorically ineligible for capital punishment). “In 2000, 539 white and 851 black juveniles committed murder, according to an analysis of federal data by the authors. In 2007, the number for whites, 547, had barely changed, while that for blacks was 1,142, up 34 percent.” Erik Eckholm, *Murders by Black Teenagers Rise, Bucking a Trend* N.Y. TIMES, Dec. 29, 2008, available at <http://www.nytimes.com/2008/12/29/us/29homicide.html>.

117. U.S. DEP’T OF JUSTICE, *supra* note 78.

118. *Id.*

119. See, e.g., Kevin McNally, *Race and the Federal Death Penalty: A Nonexistent Problem Gets Worse*, 53 DEPAUL L. REV. 1615, 1619 (2004) (noting that even though the race or ethnicity of the defendant is not submitted to the Attorney General’s Capital Case Review Committee, “this information is sometimes provided by defense counsel arguing against a death penalty prosecution and is presumably sometimes evident from the paperwork normally provided by the United States Attorney’s Office as attachments to submission”).

120. JACK GLASER, KIMBERLY B. KAHN & KARIN MARTIN, POSSIBILITY OF DEATH SENTENCE HAS DIVERGENT EFFECT ON VERDICTS FOR BLACK AND WHITE DEFENDANTS 1 (2009), available at <http://ssrn.com/abstract=1428943>.

121. *Id.* at 4.

with minorities (Darnel, Lamar, Terell).¹²² The results were stark: in the life-without-parole scenario, the rate of guilty verdicts varied minimally regardless of the name of the defendant; but when the maximum sentence was death, “Black defendants were convicted at a higher rate (80.4%) than were White defendants (56.5%)”¹²³

Data derived from actual jury verdicts confirm that race is not excluded from juror consideration at the capital selection stage.¹²⁴ A study of 339 death verdict cases in Philadelphia, Pennsylvania, with verdicts recorded between 1978 and 2000, showed “the odds of receiving a death sentence at the weighing stage of the penalty trial were, on average, 3.8 times higher for black defendants than for similarly situated non-black defendants.”¹²⁵ In a Maryland study completed in 2003 and covering the period 1978-1999, the effect was not race of defendant but race of defendant *and* victim: “among all death-eligible cases, after adjustment for county of prosecution and non-racial factors, black defendants whose victims are white are 4.1 times more likely to be sentenced to death than all other similarly situated defendants.”¹²⁶

Although race-influenced decision-making by jurors cannot be eliminated by prosecutorial discretion, its impact might be limited where the charging decision is carefully cabined. However, there remains strong evidence that race also infects decision-making in charging. Indeed, Professor Baldus found this in New Jersey,

122. *Id.* at 3.

123. *Id.* at 5. This result was obtained after excluding responses from those who indicated that they do not support the death penalty. *Id.*

124. Baldus, *Race and Proportionality*, *supra* note 59, at 154-56, 160-61, 171-72. Further reviews confirm that race has played a hand in capital decision-making. See U.S. GEN. ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 1, 5 (1990) [hereinafter GAO REPORT], available at <http://archive.gao.gov/t2pbat11/140845.pdf> (finding that eighty-two percent of twenty-eight studies conducted in various states and at different time periods through 1988 showed that the race of the victim influenced that victim’s likelihood of being charged with capital murder or receiving the death penalty); David C. Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception*, 53 DEPAUL L. REV. 1411, 1479 (2004) [hereinafter Baldus, *Race Discrimination*] (“[B]lack defendants with white victims are at greater risk [of receiving capital punishment] than are white defendants with white victims and all defendants whose victims are black.”).

125. Baldus, *Race and Proportionality*, *supra* note 59, at 155. These data were achieved after accounting for “twenty-nine non-racial factors, including all of the statutory aggravating and mitigating circumstances in the Pennsylvania statute, the socioeconomic status of the defendant and victim, and the time period of the prosecution.” *Id.*

126. *Id.* at 162. The same study showed a disparity between black and white defendants when the victim is white: “With respect to death sentencing among all death-eligible cases, the odds of a death sentence in Maryland are 60% lower for white defendants convicted of killing white victims than they are for black defendants convicted of killing white victims.” *Id.* Race-influenced verdicts were found when the American Bar Association assessed Tennessee’s capital punishment system. A.B.A., EXECUTIVE SUMMARY OF THE TENN. DEATH PENALTY ASSESSMENT REPORT, at v-vi (2007), <http://www.abanet.org/moratorium/assessmentproject/tennessee/executivesummary.pdf>. In cases from 1981 to 2000 it was “concluded that individuals who killed whites were more likely to receive the death penalty than those who killed blacks.” *Id.* at vi. In Georgia, both victim race and defendant race also “predict” who is sentenced to death. A.B.A., EXECUTIVE SUMMARY OF THE GA. DEATH PENALTY ASSESSMENT REPORT 1, 4 (2006), available at <http://www.abanet.org/moratorium/assessmentproject/georgia/executivesummary.doc>.

where that state's Supreme Court was aggressively involved in monitoring the death penalty process.¹²⁷ Even as the number of charged capital cases dropped significantly, a demonstrable and strong disparity was found based on victims' race, with capital charges being brought almost twice as often when the victim was white.¹²⁸

The New Jersey data do not stand in isolation. Similar results are found in New Mexico data, which show that "whites were about 30 percent of all homicide victims, but approximately 50 percent of the victims in death penalty cases."¹²⁹ These current data comport with the earlier findings of the Government Accountability Office, which surveyed the statistical studies available as of 1988 and concluded that this was a national phenomenon:

In 82 percent of the studies, the race of the victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e., those who murdered whites were found to be more likely to be sentenced to death than those who murdered blacks. This finding was remarkably consistent across data sets, states, data collection methods, and analytic techniques.¹³⁰

New studies confirm this pattern. In "Racial Disparities in Capital Punishment: Blind Justice Requires a Blindfold,"¹³¹ Professor Phillips shows that in Harris County, Texas, even when it appeared that the distribution of capital cases was equal across races,¹³² when measured against the presence of severe aggravating factors "the DA sought death against black defendants and white defendants at the same rate *despite the fact that black defendants committed*

127. Baldus, *Race and Proportionality*, *supra* note 59, at 164-75.

128. *Id.* at 174-75.

In the 1991 database (covering 1983 through 1991), the unadjusted white-victim disparity was a statistically significant twenty-four percentage points (65% for the white-victim cases and 41% for the black and Hispanic cases), with a ratio of 1.6 (65%/41%). In the latest report of the court's special master, which embraces all cases from 1983 through 2005, the unadjusted disparity declined to a statistically significant seventeen percentage points (35% for the white-victim cases and 18% for the black and Hispanic-victim cases), with a ratio of 1.9 (35%/18%).

Id. at 174.

129. Wilson, *supra* note 101, at 285. By contrast, "[t]he percentage of death penalty cases involving Hispanic victims was similar to the percentage of homicide victims that were Hispanic." *Id.* at 287.

130. GAO REPORT, *supra* note 124, at 5. This was particularly true in the charging decision. "The evidence for the race of victim influence was stronger for the earlier stages of the judicial process (e.g., prosecutorial decision to charge defendant with a capital offense, decision to proceed to trial rather than plea bargain) than in later stages." *Id.*; see also Ronald J. Tabak, *Racial Discrimination in Implementing the Death Penalty*, A.B.A., 2009, <http://www.abanet.org/irr/hr/summer99/tabak.html> (analyzing race as a factor in capital charging decisions).

131. SCOTT PHILLIPS, AM. CONSTITUTION SOC'Y FOR LAW & POLICY, RACIAL DISPARITIES IN CAPITAL PUNISHMENT: BLIND JUSTICE REQUIRES A BLINDFOLD I (2008), <http://www.acslaw.org/files/Phillips%20Issue%20Brief.pdf>.

132. The data showed that "[t]he DA sought death against 27 percent of white defendants, 25 percent of Hispanic defendants, and 25 percent of black defendants." *Id.* at 4.

less serious murders."¹³³

In South Carolina, capital charging decisions again were correlated with race, in particular the race of the victim. "[B]etween 1993 and 1998 South Carolina prosecutors processed 865 murder cases with white victims and sought the death penalty in 7.6% of the white victim cases. By contrast, prosecutors sought the death penalty in only 1.3% of the 1416 murder cases involving black victims."¹³⁴ Within the universe of white victim homicides, black defendants faced death significantly more than did whites.¹³⁵

One factor that may account for disparity in charging arises from identifying the race of prosecutors who make the charging decision. A 1998 review of data found that in the (then) thirty-eight states with capital punishment, 97.5% of the chief prosecutors were white and only 1.2% were black.¹³⁶ Clearly, there is no way to confirm that a prosecutor's race distorts her or his capital charging decisions. But one must be concerned about the risk of what Professor Pokorak labels "unconscious bias,"¹³⁷ the fear that prosecutors will have difficulty relating to the life story of perpetrators of another race, and will feel greater sympathy for victims of the same background as their own.¹³⁸

None of this is to suggest that racial disparities are inevitable. But their prevalence and chronicity show that, to date, prosecutorial discretion schemes have generally not succeeded in achieving a race-neutral system of capital case charging. Proposals that state-wide units take over the capital prosecution function¹³⁹ may

133. *Id.* at 5 (emphasis added). The multi-variate assessment that led to this conclusion focused on several factors.

Specifically, black defendants were less likely than white defendants to:

- Commit the most heinous murders as defined by the aggravating and mitigating circumstances in the case;
- Commit murders in a particularly brutal manner by beating, stabbing, or asphyxiating the victim;
- Commit murders involving a child victim, kidnapping, remuneration, or rape;
- Commit murder as an adult;
- Murder white victims, female victims, and victim who were physically vulnerable due to being especially young or old.

Id. at 4.

134. Songer & Unah, *supra* note 99, at 187.

135. *See id.* at 189 ("After controlling for the race of the victim, black defendants were 1.45 times as likely to face capital trials for killing white victims as white defendants.").

136. Jeffrey J. Pokorak, *Probing the Capital Prosecutor's Perspective: Race of the Discretionary Actors*, 83 CORNELL L. REV. 1811, 1817.

137. *Id.* at 1819.

138. *Id.* at 1818-19. The concern is not illusory. Professor Bright writes of one prosecutor whose e-mails contained racially disparaging messages and caricatures. Bright, *supra* note 60, at 25. Beyond this overt example, there remains the concern that "people's automatic and unintentional cognitive processes may . . . propagate racial disparities in the death penalty." Justin D. Levinson, *Race, Death, and the Complicitous Mind*, 58 DEPAUL L. REV. 599, 632-33 (2009) (examining social cognition research showing the persistence of racial biases and that such biases may manifest themselves even without the actor being consciously aware of their role in decision-making).

139. *See* Gershowitz, *supra* note 89, at 31-32 (urging this remedy and specifically proposing that a statewide prosecuting unit determine death eligibility by committee because it would offer "a greater chance of prosecutors choosing the 'right' cases—i.e. those that are most death-worthy—because they won't be looking at the cases in isolation . . . [and they would do so] without reference to irrelevant

offer a vehicle for such reform in the eligibility determination stage. Yet as this Article posits next, even with such a professionalized capital case office at the helm, three factors extrinsic to the prosecution will impede such an entity from ensuring that only the death-worthy face capital sentencing.

V. INSURMOUNTABLE (?) BARRIERS TO EFFECTIVE PROSECUTORIAL DISCRETION

Death-worthiness, as defined above, requires consideration not only of the murder and its attendant aggravating circumstances, but all mitigating evidence.¹⁴⁰ Such consideration could occur in a prosecutorial charging scheme that evaluates the capital charging decision either prior to the issuance of the notice of intent to seek the death penalty,¹⁴¹ or well in advance of trial in those jurisdictions where such notice is required early in the court process.¹⁴² Yet even with an appreciation of and commitment to the need to so assess death-worthiness, prosecutors will be impeded, if not thwarted, by three factors: the failures of defense counsel; the youth of the offender; and the pressure from victim survivors for death as a ‘just’ outcome.

A. Inadequate Counsel

The party responsible for identifying and presenting mitigation evidence to the prosecution as a condition precedent to an assessment of death-worthiness is defense counsel. The obligation to seek such evidence cannot be doubted,¹⁴³ and the depth of the investigation required is great.¹⁴⁴ Yet despite the clear obligation, its

factors such as race and geography”).

140. See *supra* text accompanying notes 26-36 (explaining the meaning of “death-worthiness” with respect to the “worst of the worst” and the role of mitigating factors).

141. This is part of the federal death penalty protocol which permits defense counsel to make a presentation to the committee that assesses whether to approve the seeking of death in a particular case. The protocol includes consideration of “written materials submitted by defense counsel in opposition to the death penalty” and a meeting of the review committee at which “defense counsel are afforded an opportunity to present any arguments against seeking the death penalty for their client.” U.S. DEP’T OF JUSTICE, *supra* note 78.

142. See, e.g., PA. R. CRIM. P. 802:

The attorney for the Commonwealth shall file a Notice of Aggravating Circumstances. Notice shall be filed at or before the time of arraignment, unless the attorney for the Commonwealth becomes aware of the existence of an aggravating circumstance after arraignment or the time for filing is extended by the court for cause shown.

Id.

143. This obligation, detailed in *Williams v. Taylor*, 529 U.S. 362, 394 (2000), has been emphatically affirmed by the Court. *Rompilla v. Beard*, 545 U.S. 374, 380-81 (2005); *Wiggins v. Smith*, 539 U.S. 510, 523 (2003). These decisions have been recognized as increasing the duty of counsel to investigate. Kyle Graham, *Tactical Ineffective Assistance in Capital Trials*, 57 AM. U. L. REV. 1645, 1659-60 (2008); see also Emily Hughes, *Mitigating Death*, 18 CORNELL J.L. & PUB. POL’Y 337, 339 (2009) (emphasizing that these decisions underscore the importance of thorough capital mitigation investigation).

144. In *Rompilla*, the Court made clear that this duty extended to examining prosecution evidence, in that instance prior convictions, to seek mitigating information. *Rompilla*, 545 U.S. at 385-86 (“Reasonable efforts certainly included obtaining the Commonwealth’s own readily available file on the prior conviction to . . . discover any mitigating evidence the Commonwealth would downplay.”).

implementation has been uneven and the failure rate significant. As one study noted, of the forty-two federal appellate habeas decisions in 2007 addressing ineffectiveness in mitigation, “petitioners’ ineffective assistance arguments were accepted in five cases.”¹⁴⁵ Two others were remanded; and the remainder were either denied on their merits or deemed procedurally barred.¹⁴⁶

This one-eighth failure rate does not fully tell the story. Ineffectiveness claims are resolved not merely by a showing of counsel’s inadequate preparation, but a resulting finding of “prejudice,”¹⁴⁷ deemed in this context to be the likelihood that at least one juror would have voted for a sentence of life imprisonment rather than death.¹⁴⁸ Thus, these numbers may mask decisions in which courts found the investigation inadequate but declined to find prejudice.¹⁴⁹ As well, the deferential habeas standard, which accords state court factual findings a “presumption of correctness,”¹⁵⁰ further limits federal court authority to grant relief.¹⁵¹

To the extent that habeas decisions are decided years, if not decades, after a trial, these data can be questioned in terms of their current validity.¹⁵² But there is substantial proof that these inadequacies continue today. At the “macro” level, the American Bar Association’s (ABA) 2004 “Gideon’s Broken Promise” concluded that “[f]orty years after *Gideon v. Wainwright*, indigent defense in the United States remains in a state of crisis, resulting in a system that lacks fundamental fairness and places poor persons at constant risk of wrongful conviction.”¹⁵³

145. Graham, *supra* note 143, at 1657.

146. *Id.* at 1657-58. The determination of procedural bar, i.e., that the claim cannot be reviewed on its merits, does not preclude the case involving a completely deficient mitigation investigation and presentation.

147. *Jermyn v. Horn*, 266 F.3d 257, 309 (3d Cir. 2001).

148. *See, e.g., id.*

Jermyn can show prejudice in this case if there is a reasonable probability that the presentation of the specific and disturbing evidence of childhood abuse and neglect as a mitigating factor would have convinced one juror to find the mitigating factors to outweigh the single aggravating factor the Commonwealth relied upon in this case. We believe that such a reasonable probability exists.

Id.

149. The finding of a failure to prove prejudice does not disprove the inadequacy of the mitigation investigation. *See, e.g., Crawford v. Head*, 311 F.3d 1288, 1320-1321 (11th Cir. 2002) (post-conviction relief denied, 597 S.E.2d 403 (Ga. 2004)) (“[W]e ultimately conclude that Crawford has not established that any deficient performance by his attorney prejudiced him, and that the state habeas court did not unreasonably apply *Strickland* in so holding.”); *In re Fields*, 800 P.2d 862, 872-73 (Cal. 1990) (declining to determine whether the failure to interview any family member was ineffective because the murder was particularly “aggravated,” leading to a conclusion that habeas counsel failed to prove prejudice); *see also In re Visciotti*, 926 P.2d 987, 1005 (Cal. 1996) (concluding that habeas counsel’s failure to present mitigating evidence on petitioner’s background did not prejudice petitioner because the aggravating factors were overwhelming).

150. *Foster v. Johnson*, 293 F.3d 766, 783 (5th Cir. 2002).

151. *See, e.g., id.* (“Based on our review of the affidavits in light of Foster’s arguments on appeal, we conclude that Foster has not offered the clear and convincing evidence necessary to rebut the presumption of correctness accorded to the Mississippi Supreme Court’s finding.”).

152. Two recent grants of habeas relief, for ineffectiveness in penalty phase preparation and presentation, involve trials from the early 1990s. *Libberton v. Ryan*, 583 F.3d 1147 (9th Cir. 2009); *Jones v. Ryan*, 583 F.3d 626 (9th Cir. 2009).

153. A.B.A. STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, GIDEON’S BROKEN

Specific to capital cases, the ABA Report noted that “[w]itnesses also provided vivid illustrations of inferior preparation and advocacy in death penalty cases.”¹⁵⁴ Compounding the problem, inadequate funding translates into the failure to investigate fully and develop mitigating evidence.¹⁵⁵ Both inadequate counsel and inadequate funding for competent counsel also may lead to the failure to build rapport with the capital defendant because of insufficient contact between counsel and the accused, and that lack of a bond of trust further inhibits mitigation development and the possibility of a negotiation for a sentence less than death.¹⁵⁶

From this general finding the ABA moved to the specific, sending assessment teams to eight states to evaluate each jurisdiction’s capital case process. Almost uniformly, the ABA found these states to be out of compliance with ABA capital case Guidelines.¹⁵⁷ In particular, four of the eight states were not in compliance with the ABA Guidelines calling for adequate funding and compensation, with two more in “partial compliance.”¹⁵⁸

PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE v (2004), available at <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf>.

154. *Id.* at 19.

155. Bright, *supra* note 60, at 33 (“[A]ll too often, lawyers appointed to defend poor people facing the death penalty fail to investigate, do not know the law, or are at best mediocre in their representation.”).

156. Bradley A. MacLean, *Effective Capital Defense Representation and the Difficult Client*, 76 TENN. L. REV. 661, 661 (2009) (“[E]ffective defense representation in a capital case . . . depends on the nature and quality of the relationship between the lawyer and the client.”).

157. The ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, adopted in 2003, have been accepted by the United States Supreme Court as setting acceptable thresholds for defense representation. *Rompilla*, 545 U.S. at 389 n.7. For the defense “team,” the Guideline is as follows:

Guideline 4.1 The Defense Team and Supporting Services

- A. The Legal Representation Plan should provide for assembly of a defense team that will provide high quality legal representation.
 1. The defense team should consist of no fewer than two attorneys qualified in accordance with Guideline 5.1, an investigator, and a mitigation specialist.
 2. The defense team should contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments.
- B. The Legal Representation Plan should provide for counsel to receive the assistance of all expert, investigative, and other ancillary professional services reasonably necessary or appropriate to provide high quality legal representation at every stage of the proceedings. The Plan should specifically ensure provision of such services to private attorneys whose clients are financially unable to afford them.
 1. Counsel should have the right to have such services provided by persons independent of the government.
 2. Counsel should have the right to protect the confidentiality of communications with the persons providing such services to the same extent as would counsel paying such persons from private funds.

A.B.A., GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES 28 (2003), available at [http://www.nacdl.org/sl_docs.nsf/issues/ABADPGuidelines/\\$FILE/ABA_DPGuidelines2003.pdf](http://www.nacdl.org/sl_docs.nsf/issues/ABADPGuidelines/$FILE/ABA_DPGuidelines2003.pdf).

158. ABA, DEATH PENALTY MORATORIUM IMPLEMENTATION PROJECT DEFENSE SERVICES CHART 8 (2007), available at <http://www.abanet.org/moratorium/assessmentproject/chartallstates.pdf>.

The inadequacies are revealed in greater detail in the reports from each state's team. In Pennsylvania, for example, the finding was that under Pennsylvania law, no member of the defense team is required to be qualified by experience or training to screen for mental or psychological disorders or conditions in a capital case, and many defense attorneys, including public defenders, appear not to be provided with the resources necessary to provide high quality legal representation.¹⁵⁹

The Tennessee assessment found that appointed lawyers "may be overworked and underqualified."¹⁶⁰ In Ohio, documented problems included poorly qualified counsel and counsel's having "insufficient access to experts and investigators."¹⁶¹ For Alabama, the findings were even more troubling: "the State's failure to provide statewide oversight of its indigent defense system, combined with the minimal qualifications and non-existent training required of attorneys who represent capital defendants, leads to a system where serious fairness and accuracy breakdowns are virtually inevitable."¹⁶² This "inevitability"¹⁶³ ensures the failure to fully develop mitigation evidence, and thus dooms the best-intended scheme of prosecutorial discretion.

The problem is not limited to these states. In a remarkable comment on capital case defense services, the Utah Supreme Court noted in 2007 "low levels of public funding for capital cases . . . [and] significantly diminishing numbers of qualified counsel able and willing to represent capital defendants . . ."¹⁶⁴ and warned:

If, in the future, we find that the unavailability of competent and willing counsel impedes prompt, constitutionally sound resolution in capital cases, we may be forced to hold that the lack of such counsel is sufficient grounds for outright reversal of a capital sentence and remand for the imposition of a sentence of life in prison without the possibility of parole, for which the required degree of sophistication and skill reposed in counsel is slightly less.¹⁶⁵

159. ABA, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE PENNSYLVANIA DEATH PENALTY ASSESSMENT REPORT 123 (2007), available at <http://www.abanet.org/moratorium/assessmentproject/pennsylvania/finalreport.pdf>.

160. ABA, TENNESSEE'S DEATH PENALTY PROBLEMS AND RECOMMENDATIONS I, available at <http://www.abanet.org/moratorium/assessmentproject/tennessee/factsheet.doc>

161. ABA, OHIO'S DEATH PENALTY PROBLEMS AND RECOMMENDATIONS I, available at <http://www.abanet.org/moratorium/assessmentproject/ohio/factsheet.doc>.

162. ABA, ALABAMA'S DEATH PENALTY SYSTEM IDENTIFICATION OF PROBLEMS AND RECOMMENDATIONS FOR REFORM I, available at <http://www.abanet.org/moratorium/assessmentproject/alabama/factsheet.doc>. The Alabama Report also specifically addressed that state's proportionality review and its failure to ensure that the penalty was reserved for the "worst of the worst." *Id.* at 2.

163. *Id.* at 1.

164. *Archuleta v. Galetka*, 197 P.3d 650, 654 (Utah 2008).

165. *Id.*

Yet this is at least arguably a “fixable” problem if enough resources are dedicated to the task.¹⁶⁶ Regardless of resource allocation however, a second impediment to a successful prosecutorial discretion scheme is found in the youthfulness of the average homicide defendant.

B. Youthful Defendants

A significant portion of all homicides in the United States is committed by young adults, those between the ages of eighteen and twenty-four.¹⁶⁷ The average age of all homicide offenders fell “about 30.3 years in 1976 to 26.4 years in 1994.”¹⁶⁸ Yet the confounding fact is that this most heinous of crimes is committed by those less-capable of full reasoning regarding deed and consequence. As the Court explained,

[A]s any parent knows and as the scientific and sociological studies respondent and his amici cite tend to confirm, “[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.”¹⁶⁹

While the Court in *Roper* did not cite extensively to the “scientific and sociological studies,” it had before it an impressive array of documentation. In the Brief for the American Psychological Association filed on behalf of *Roper*, the psychological studies were presented in depth:

166. Remarkable proof of this is found in the performance of the homicide unit of the Defender Association of Philadelphia. Providing a ‘team’ approach to capital case representation, in more than 1500 homicide cases since its inception in 1993, it has to date successfully ensured that no client has received a sentence of death. E-mail from Paul Conway, Chief, Homicide Unit, Defender Association of Philadelphia (Oct. 13, 2009) (on file with author). Nonetheless, the question remains whether such stellar representation can be guaranteed nationally. Sundby, *Moral Accuracy and “Wobble” in Capital Sentencing*, *supra* note 27, at 58 (“[I]t is just that there is often almost an intangible quality that distinguishes the best from those who are merely competent . . . [and] it’s important to recognize that wobble will be in the system no matter how we try to define lawyer competency.”).

167. See JAMES ALAN FOX & MARIANNE W. ZAWITZ, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, HOMICIDE TRENDS IN THE U.S. 23, <http://bjs.ojp.usdoj.gov/content/pub/pdf/htius.pdf> (noting that almost half of homicide offenders for the years 1976-2005 were under the age of 25 and that the rate per 100,000 peals between the years 18-24). “Young adults (18-24 years old) have historically had the highest offending rates and their rates nearly doubled from 1985 to 1993. Since 1993 offending rates for 18-24 year-olds have declined but remain slightly higher than levels prior to the mid 1980’s.” *Id.* at 24.

168. *Id.* at 25.

169. *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (citation omitted).

In comparison with adults, studies show that adolescents are less likely to consider alternative courses of action, understand the perspective of others, or restrain impulses [A]dolescents, on average, were “less responsible, more myopic, and less temperate than the average adult.” In this study, the most dramatic change in behavior occurred sometime between 16 and 19 years of age, especially with respect to “perspective” (i.e., the consideration of different viewpoints and broader contexts of decisions), and “temperance” (i.e., the ability to limit impulsivity and evaluate situations before acting). And it was not until age 19 that this development of responsible decision-making plateaued.¹⁷⁰

The Brief of the ABA, also filed on behalf of Roper, emphasized that “recent scientific research supports the conclusion that the brains of juveniles are less developed than those of non-mentally retarded adults.”¹⁷¹

In particular, studies of the development of the brain show that this maturing process may not be complete until well past the age of eighteen.

The evidence now is strong that the brain does not cease to mature until the early 20s in those relevant parts that govern impulsivity, judgment, planning for the future, foresight of consequences, and other characteristics that make people morally culpable. . . . Indeed, age 21 or 22 would be closer to the ‘biological’ age of maturity.¹⁷²

While the science on this issue continues to be evaluated, “all available evidence seems to suggest that many important regions of the brain continue to develop through adolescence and into adulthood.”¹⁷³ This incomplete brain development impacts, as a general rule, the capacity to make life-significant decisions and assess future consequences.¹⁷⁴ That this extends beyond the calendar

170. Brief for the American Psychological Ass’n, and the Missouri Psychological Ass’n at 7, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633) (internal citations omitted).

171. Brief Amicus Curiae of the ABA In Support Of the Respondent at 9-10, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633).

172. ABA JUVENILE JUSTICE CENTER, CRUEL AND UNUSUAL PUNISHMENT: THE JUVENILE DEATH PENALTY: ADOLESCENCE, BRAIN DEVELOPMENT AND LEGAL CULPABILITY 2 (2004), <http://www.abanet.org/crimjust/juvjus/Adolescence.pdf>. Professor Gur, Chief of the University of Pennsylvania’s Brain Behavior Laboratory states that his preference, based on the brain studies, would be to disallow the death penalty for anyone below the age of 23 because “the frontal lobes are not yet on board during adolescence.” Joan Arehart-Treichel, *Brain Data Used to Argue Against Executing Minors*, PSYCHIATRIC NEWS, Apr. 2, 2004, at 44, available at <http://pn.psychiatryonline.org/cgi/content/full/39/7/44>.

173. Jay D. Aronson, *Neuroscience and Juvenile Justice*, 42 AKRON L. REV. 917, 924 (2009).

174. See *id.* (“What remains to be determined, however, is the extent to which these developmental milestones are causally related to changes in decision-making capacity.”); see also Barry C. Feld, *A Slower Form of Death: Implications of Roper v. Simmons for Juveniles Sentenced to Life Without Parole*, 22 NOTRE DAME J.L. ETHICS & PUB. POL’Y 9, 40 (2008) (stating that neuroscience research “enhances our understanding of how and why juveniles think and behave differently from adults”); Staci A. Gruber & Deborah A. Yurgelun-Todd, *Neurobiology and the Law: A Role in Juvenile Justice?*, 3

age of eighteen is no surprise; indeed, in research relied upon and cited by the Court in *Roper*, the researcher contended that adolescence extends into the early twenties.¹⁷⁵

The focus in *Roper*, of course, was on the significance of this science in determining a categorical ineligibility for the death penalty. *Roper's* separate significance in the death-worthiness assessment, however, is substantial. Two concerns arise here. The first is that the impulsivity of the young adult, and his or her inability to appreciate future consequences, may inhibit cooperation with the mitigation investigator. From this author's experience alone in capital cases, it can be said that it is not uncommon for a young adult offender to make assertions such as "there is no difference between twenty years in jail and a life sentence" or "I'd rather die and let my family forget me and move on, instead of being in jail for life." These and similar sentiments make cooperation in the mitigation development enterprise either less likely or less enthusiastic and complete.

Perhaps more critical is the younger adult's limited capacity to express remorse.¹⁷⁶ To the extent that an expression of remorse¹⁷⁷ (considered at least by jurors to be among the most important factors in mitigation) should be a factor in the prosecution calculus of death-worthiness, what may be a developmental hurdle¹⁷⁸ should not turn into a determinant of death-worthiness.

Not all young defendants are so limited; and at least some capital case attorneys believe that effective mitigation and attorney-client contacts and trust-building can overcome this limitation.¹⁷⁹ Yet this view is not uniformly held, and

OHIO ST. J. CRIM. L. 321, 333 (2006) (noting that "recent neurobiologic investigations have begun to clarify some of the reasons why adolescents are not able to plan carefully, utilize good judgment, and practice behavioral inhibition when faced with difficult situations that often require a near immediate decision").

175. Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339, 340-41 (1992). Arnett's article was cited by the Court in *Roper* in support of the proposition that juvenile offenders under the age of eighteen cannot be categorized in the same way that adult offenders can be. *Roper*, 543 U.S. at 569.

176. Martha Grace Duncan, "*So Young and So Untender*": *Remorseless Children and the Expectations of the Law*, 102 COLUM. L. REV. 1469, 1471-73 (2002).

177. This term, as used here, applies to both a formal apology and the functional showing of remorse by pleading guilty and thus sparing the victim's survivors the trauma of trial and ensuring finality.

178. See Jules Epstein, *Silence: Insolubly Ambiguous and Deadly: The Constitutional, Evidentiary and Moral Reasons for Excluding "Lack Of Remorse" Testimony and Argument in Capital Sentencing Proceedings*, 14 TEMP. POL. & CIV. RTS. L. REV. 45, 84-86 (2004) (discussing the limited capacity of juveniles to express remorse, and its potentially deadly impact in penalty trials).

179. This author solicited input on whether the young adult defendant proved to be a particularly problematic client via a request on a capital defense counsel listserv. One highly experienced and respected respondent, attorney Larry Hammond of Arizona, wrote:

My suspicion has been that if there is a correlation between pleading and age-of-accused it may be best explained by the quality of the defense team. The family dynamics seem to me usually more complicated with a young defendant, and that means that the defense team has to spend more time understanding the family culture. Too many of us, even if we are given the resources to create a team, simply do not spend the time it might take to acquaint the accused's family with the options.

E-mail from Larry Hammond, Attorney in Arizona, (July 25, 2009) (on file with author).

experience is often to the contrary.¹⁸⁰ But to the extent that even some capital case decisions are distorted by the limited maturity, developmentally and/or neuroscientifically, of the accused, the prosecutor's capacity to assess blame-worthiness is reduced.¹⁸¹

C. *The Role of Certain Victim-Survivor Constituencies*

The third barrier to an accurate blame-worthiness determination by a prosecutor is the power, or perceived power, of certain victim-survivor constituencies. During a penalty trial, a survivor is forbidden to express his/her opinion as to what the appropriate sentence should be.¹⁸² There is no such prohibition, however, in those views being expressed to the prosecutor at the time he/she weighs the decision of whether to seek death. Rather, such consultation may be mandatory under a state's victims' rights provisions.¹⁸³

The problem here is not one of respect for victim survivor concerns, but whether such concerns will have a distorting effect on the decision of whether to seek death.¹⁸⁴ This may be particularly true where the victim is survived not merely by family and friends, but by a powerful institution, as when the victim in a capital homicide is a police officer.

180. A second e-mail respondent, also experienced in capital case law, wrote of a nineteen year old client who went to trial in a two victim homicide rather than take an offer of two life-without-parole sentences. The client, however, would have accepted one life-without-parole sentence, the ultimate distinction without a difference. E-mail from Michael Spiegel, Attorney in New York (July 26, 2009) (on file with author).

181. These problems may be mirrored in the population of death-eligible defendants with mental illness. See generally PAULA M. DITTON, U.S. DEP'T OF JUSTICE, MENTAL HEALTH AND TREATMENT OF INMATES AND PROBATIONERS 1 (July 1999), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/mhtip.pdf> (documenting the prevalence of mental illness issues in the prisoner population). Furthermore, it is estimated that approximately ten percent of those on death row nationally suffer from severe mental illness. Kelly A. Gabos, *The Perils of Singleton v. Norris: Ethics and Beyond*, 32 AM. J.L. & MED. 117, 119 (2006).

182. *Payne v. Tenn.*, 501 U.S. 808, 830 n.2 (1991).

183. As of 2005, thirty-three states had victims' rights amendments, and all states and the federal government have victims' rights statutes with varying provisions. See Steven J. Twist, *On the Wings of their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 LEWIS & CLARK L. REV. 581, 588 n.30 (2005) (listing state victims' rights amendments); OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, VICTIM INPUT INTO PLEA AGREEMENTS, LEGAL SERIES BULLETIN #7 (2002), <http://www.ojp.usdoj.gov/ovc/publications/bulletins/legalseries/bulletin7/2.html#1> (summarizing state laws establishing a right to consultation with a prosecutor regarding a plea agreement).

184. See Bennett L. Gershman, *Prosecutorial Ethics and Victims' Rights: The Prosecutor's Duty of Neutrality*, 9 LEWIS & CLARK L. REV. 559, 561 (2005) (arguing that the prosecutor must not act as the victim's surrogate). Gershman outlined the limitations and obligations of such prosecutorial behavior:

[A] prosecutor cannot align herself exclusively with the victim. A prosecutor also owes an allegiance to constituencies that are independent of the victim - i.e., the general public and the accused. A prosecutor must attempt to reconcile this tripartite responsibility to protect the public from harm and protect the rights of the accused while at the same time protecting the rights of the victim.

Id.; see also Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 840 (2004) (concluding that "prosecutors should make decisions based on articulable principles or sub-principles that command broad societal acceptance").

There are no data on how often pressure for a death penalty trial arises in police officer murders, but it is beyond dispute that such pressure has been brought on prosecutors in some such instances.¹⁸⁵ Highlighting this is not to suggest that the fact of a killing of a law enforcement officer is not a legitimate eligibility factor; but in these contexts the constituencies are urging that this be the sole determinant in whether to proceed and seek death. As death-worthiness is determined not merely by the crime but by circumstances and the perpetrator's own background, such pressure, if acceded to, again distorts the exercise of discretion and risks making the field of death-sentenced defendants over-inclusive.¹⁸⁶

CONCLUSION

Criticizing the vagaries of prosecutorial discretion in capital charging is not in any way an ad hominem attack on individual prosecutors or their offices. To the contrary, and especially in light of DNA exonerations, prosecutors' offices are often committed to taking the 'extra step' to ensure justice. This has occurred with the formation of "conviction integrity" units, the best known example of which is in Dallas, Texas.¹⁸⁷ This desire for integrity also appears in some capital case protocols, where the committee that reviews cases to determine whether death should be sought is denied the name of the accused and other identifying information to reduce the likelihood of race as a 'thumb on the scale.'¹⁸⁸

185. See Amanda S. Hitchcock, *Using the Adversarial Process To Limit Arbitrariness in Capital Charging Decisions*, 85 N.C. L. REV. 931, 948 (2007) (reporting instances of remonstrance by police and government officials when a prosecutor refused to seek death in a police officer killing).

186. *Wainwright v. Witt*, 469 U.S. 412, 459 (1985) (Brennan, J., dissenting).

[P]assions, as we all know, can run to the extreme when the State tries one accused of a barbaric act against society, or one accused of a crime that—for whatever reason—inflames the community. Pressures on the government to "do something," can overwhelm even those of good conscience [W]hen prosecutors and judges are elected, or when they harbor political ambitions, such pressures are particularly dangerous.

Id. Curiously, there is also a concern where the issue is that of victim survivors' opposition to the death penalty. That opposition may be excluded from juror consideration at a penalty trial. Charles F. Baird & Elizabeth E. McGinn, *Re-Victimizing the Victim: How Prosecutorial and Judicial Discretion Are Being Exercised to Silence Victims Who Oppose Capital Punishment*, 15 STAN. L. & POL'Y REV. 447, 448 (2004). And that opposition, if heeded by the prosecutor, may artificially reduce the field of those who are death-worthy albeit giving weight to such concerns does serve other purposes, particularly "closure" and an assuredness of finality when the case is resolved by a guilty plea. See *id.* at 464 (noting how a prosecutor whose primary goal is to obtain a death sentence "will likely exercise this discretion by calling the survivors who favor capital punishment over those who do not").

187. Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35, 62 (2009).

188. See FED. DEATH PENALTY SYS., *supra* note 78 (documenting how with federal death penalty review protocol, "[t]he United States Attorney's office does not provide information about the race or ethnicity of the defendant to review committee members, to attorneys from the Criminal Division's Capital Case unit who assist the review committee, or to the Attorney General"); PHILLIPS, *supra* note 131, at 7 (recommending such a race-neutralized approach). Professor Phillips outlines such approach as follows:

The DA's office should hire an assistant to strip the capital murder summary memorandum of all information that might insinuate the race of the defendant and victim, including, but not limited to: the names and addresses of the parties and the location of the crime.

If, as this Article proposes, the proper constitutional metric for who should face the death penalty is death-worthiness, the dilemma faced by even the most well-intentioned prosecutor is simple—extrinsic factors will conspire to impede meeting this threshold. In theory, the issues of funding and effective counsel can be remediated, particularly by enacting proposals for state-wide, state-funded capital defense teams,¹⁸⁹ although the budgetary straits faced in many jurisdictions may prevent such reforms.¹⁹⁰ More problematic are the demands of victim survivor constituencies, particularly because of the elected status of prosecutors. Most bedeviling is the issue of youth, one completely out of the control of budgetary processes and prosecutorial good faith.¹⁹¹ This problem is likely the intractable one, resistant to even the best prosecutorial effort at ensuring fairness.

In *McCleskey*, the Court accepted a risk of racially-based capital sentencing, largely because efforts to eradicate it would cripple the criminal justice system. “McCleskey’s claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system.”¹⁹² Likely the same response would arise with a challenge to the inability of a system to limit death to those truly death-worthy, particularly where the impediment is the criminal defendant her or himself. Yet the command to limit death to those who are worthy of it exists—and even if only aspirational, that command must be the measure for assessing the exercise of prosecutorial discretion.

Id.

189. See Gershowitz, *supra* note 89, at 35-43 (proposing statewide and state-funded elite defense and prosecution units with appropriate resource allocations). An additional benefit is the reduction in intra-state disparities in application of the death penalty: “[W]hile money may influence the total number of cases for which the committee approves death, no one individual case will turn on local funding.” *Id.* at 31.

190. See, e.g., John Byrne, *Public Defender: No Money, No Death Penalty*, CHICAGO BREAKING NEWS CENTER, June 3, 2009, <http://www.chicagobreakingnews.com/2009/06/public-defender-no-money-no-death-penalty.html> (explaining how Chicago’s Cook County public defender had exhausted all funds allotted for capital case representation); Bill Rankin, *State Can’t Afford to Defend Gwinnett Capital Murder Case*, ATLANTA JOURNAL-CONSTITUTION, Aug. 23, 2009, available at <http://www.ajc.com/news/gwinnett/state-can-t-afford-121607.html> (stating how the Gwinnett County prosecutors’ recent death penalty case stalled because the state cannot fund the accused’s defense); DEATH PENALTY INFO. CTR., COSTS OF THE DEATH PENALTY, <http://www.deathpenaltyinfo.org/costs-death-penalty> (last visited Feb. 11, 2010) (documenting the high cost to states, for both prosecution and incarceration, involving death penalty cases).

191. Yet another complicating factor is the requirement in many jurisdictions that notice of intent to seek the death penalty be given particularly early in the post-arrest process. A.B.A., *A.B.A. Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 994-995 (2003), available at <http://www.abanet.org/deathpenalty/resources/docs/2003Guidelines.pdf>. Yet this can be overcome, either by eliciting a waiver of the notice requirement, or providing timely notice but establishing a mechanism where defense counsel can make a mitigation proffer or presentation well before trial that might lead to notice being withdrawn and the case proceeding non-capitally. *Id.* at 1040-41.

192. 481 U.S. at 314-15.