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Deadly Decisions: Prosecutorial Misconduct and Prosecutorial Discretion in the Death Penalty System

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INTRODUCTION

Why is it that prosecutors measure their success based on how many convictions they have received, versus the more telling measurement of how many times they have brought justice to a victim?[1] On the surface, these measurements may seem equivalent. It could be said that justice is synonymous with convictions. But that may only exist in a world where prosecutors seek convictions to achieve justice. However, in a world where a prosecutor seeks a conviction in a case, regardless of evidence that the defendant is innocent, justice cannot be equivalent with conviction rate.

The death penalty is supposed to be reserved for the "worst of the worst."[2] By that metric, the death penalty would be applied uniformly across states and counties in the United States that use the death penalty. In theory, few defendants would qualify as the "worst of the worst," and the death penalty would be used sparingly, yet uniformly. But the death penalty is not used uniformly. Just two percent of counties in the United States account for most inmates on death row and for most of the death sentences carried out since 1976.[3] For example, Maricopa County, Arizona had four times the number of pending death penalty cases than Los Angeles County and Houston on a per capita basis.[4]

If the death penalty were applied uniformly, then Maricopa County, Arizona would be four times more dangerous than Los Angeles and Houston. The implication here is that Maricopa County is one of the most dangerous counties in the United States, one that churns out criminals who qualify as the "worst of the worst." But Maricopa County has less crime than Los Angeles, and a similar amount of crime as Houston. Maricopa County had 3.69 violent crimes per 1,000 residents, Los Angeles County had 5.59 violent crimes per 1,000 residents, and Houston County had 3.23

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1 While it is the crime victim who has suffered harm, the American criminal legal system operates without including the crime victim in the process at all. Juan Cardenas, *The Crime Victim in the Prosecutorial* Process, 9 HARV. J. L. PUB. POL'Y. 357, 389 (1986). A criminal proceeding has just two parties: the state and the offender. The crime victim is not factored in at all. *Id.* Further, although the crime victim may bring a civil lawsuit against another party, depending on the crime, they do not have standing to request or achieve a specific outcome in a criminal case, nor do they have recourse if it does not follow their wishes.

2 Kansas v. Marsh, 548 U.S. 163, 206 (2006) (Stevens, J. dissenting).

3 *The 2% Death Penalty: How a Minority of Counties Produce Most Death Cases at Enormous Costs to All*, DEATH PENALTY INFO. CENTER (Oct. 1st, 2013), https://deathpenaltyinfo.org/facts-and-research/dpic-reports/in-depth/the-2-death-penalty-how-a-minority-of-counties-produce-most-death-cases-at-enormous-costs-to-all.

4 *Id.*

violent crimes per 1,000 residents.[5] So, shouldn't Maricopa County have a similar number of death penalty cases?

The reason for such a stunning difference in death row statistics by state lies in the decisions of the prosecutors. A prosecutor is an agent of the state, working under a District or State Attorney, who has the unilateral right to bring charges against a defendant, plea bargain, decide not to bring any charges, or decide to pursue the death penalty.[6] This power vested in prosecutors allows for, and indeed enables, arbitrary prosecution of the death penalty. If the decision to bring such a charge against an individual lies with just one person, it can be assumed that not every prosecutor will choose to pursue the death penalty for all first-degree murder cases.

Such discretion is vested in prosecutors broadly by the constitution. Article II § 3 of the constitution grants power in the President to "take care that laws shall be faithfully executed." This power is carried out federally by the Attorney General and regionally by District Attorneys.[7] Prosecutorial discretion is generally regarded as an "unrestrained power" in the American criminal legal system.[8] This power is supported by U.S. Supreme Court precedent, which holds that, generally, prosecution is in the exclusive domain of prosecutors.[9] The Supreme Court has also supported prosecutorial discretion in death penalty cases. While discussing the stages of prosecution in a death penalty case, the Supreme Court said that "at each of these stages an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty . . . nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution."[10] Thus, the discretion given to prosecutors in death penalty cases gives them nearly unchecked power over defendants' lives.

This article will discuss the intersection of prosecutorial discretion and prosecutorial misconduct in the death penalty system. This article will be divided into four parts. In Part I, this article will provide foundational information on federal and state prosecutorial discretion, as well as discuss

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5 *Maricopa County, AZ Violent Crime Rates and Maps*, CRIME GRADE, https://crimegrade.org/violent-crime-maricopa-county-az; *Los Angeles County, LA Violent Crime Rates and Maps*, Crime Grade https://crimegrade.org/violent-crime-los-angeles-county-ca/

6 John A. Horowitz, *Prosecutorial Discretion and the Death Penalty: Creating A Committee to Decide Whether to Seek the Death Penalty*, 65 FORDHAM L. REV. 2571, 2573 (1997).

7 *See supra* Part I.a and I.b.

8 *Id.*

9 United States v. Armstrong, 116 S. Ct. 1480, 1486 (1996). *See also*, Wayte v. United States, 470 U.S. 598, 607-08 (1985).

10 Gregg v. Georgia, 428 U.S. 158, 199 (1976).

the background jurisprudence on prosecutorial misconduct. Part II will discuss issues of selective prosecution, geography, and race in the death penalty context. Part III will highlight specific instances of the issues discussed in Part II. And Part IV will discuss possible solutions to the issues discussed.

I. BACKGROUND

a. Federal Prosecutorial Discretion

Prosecutorial discretion is a long-recognized practice in our country that is consistently—and alarmingly—enforced by our judiciary. The judicial branch rarely interferes with the power of prosecutors to decide to bring charges against a defendant, offer a plea, drop the charges, or any other of the many powers granted to prosecutors in our country.[11] Our criminal legal system allows for such power to be vested in prosecutors both legally because federal law prohibits judges from interfering in most cases, and in practice because defendants often accept a plea bargain and forego any interaction with the judiciary at all.[12] According to Pew Research Center, only 2% of federal criminal defendants go to trial: approximately 90% of defendants take a plea bargain, while the remaining 8% have their cases dropped.[13]

Courts hesitate to interfere with prosecutorial discretion because of the separation of powers doctrine. In a 1965 case, the Fifth Circuit stated that "it is as an officer of the executive branch that [the federal prosecutor] exercises a discretion as to whether or not there shall be a prosecution in a particular case."[14] The court's formulation there is widely cited and treated as conclusive on the idea of federal prosecutorial discretion.[15] The Supreme Court has even supported the idea of broad prosecutorial

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[11] Rebecca Kraus, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Development*, 6 SETON HALL CIRCUIT REV. 1, 4-8, (2009).

[12] *Id.*

[13] John Gramlich, *Only 2% of Federal Criminal Defendants Go To Trial, and Most Who Do are Found Guilty*, PEW RESEARCH CENTER (Jun. 11, 2019), https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/.

[14] United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965).

[15] Rebecca Kraus, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Development*, 6 SETON HALL CIRCUIT REV. 1, 4, (2009) (citing See, e.g., United States v. Friday, 525 F.3d 938, 960 (10th Cir. 2008); United States v. Navarro-Vargas, 408 F.3d 1184, 1206 (9th Cir. 2005); United States v. Davis, 285 F.3d 378, 383 (5th Cir. 2002); Nathan v. Smith, 737 F.2d 1069, 1078 (D.C. Cir. 1984); United States v. Berrigan, 482 F.2d 171, 180 (3rd Cir. 1973); Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375, 379 (2d Cir. 1973).

discretion, saying "the decision of a prosecutor in the Executive Branch not to indict . . . has long been regarded as the special province of the Executive Branch."[16]

Beyond the separation of powers doctrine, the Supreme Court further explained why it does not often interfere with a prosecutor's discretionary powers in *Wayte v. U.S.*[17] There, it discussed how the judiciaries' powers are not suited to solve the issues that a prosecutor faces. The Court said that "[s]uch factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake."[18] Further, the Court reasoned that judicial supervision of prosecutorial decisions would delay criminal proceedings and undermine prosecutorial effectiveness.[19] Although sound on its face, this reasoning circumvents the truth that prosecutorial effectiveness is measured by the number of convictions, thus the Court's reason to deny judicial supervision is the same reason that people have called for the relief the Court denies.

In sum, prosecutors have nearly unfettered discretion in the criminal legal system. The judiciary does, however, exercise a constitutional check over prosecutorial discretion.[20] So long as prosecutorial decisions do not violate equal protection or due process protections, the judiciary is unlikely to interfere with such decisions.[21]

b. State Prosecutorial Discretion

Prosecutorial discretion in state systems presents itself in much the same manner as in the federal system. There are, however, notable differences. First, most local and state district attorneys are elected officials.[22] While federal prosecutors, Attorney Generals, are appointed by the President, and therefore answer to him or her, state prosecutors must consider the wishes of the people they were elected to represent. Second, the body of law which state prosecutors are enforcing varies from state-to-

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16 Rebecca Kraus, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Development*, 6 SETON HALL CIRCUIT REV. 1, 4-8, (2009) (citing Heckler v. Chaney, 470 U.S. 821, 832 (1985).

17 Wayte v. United States 470 U.S. 598, 607 (1985).

18 *Id.*

19 *Id.*

20 *Id.* at 608.

21 *Id.*

22 *See, e.g.*, Ronald F. Wright, *Prosecutors and Democracy: A Cross-National Study*, 67 AMJCL 936, 937 (2019); William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 OHIO ST. L.J. 1325, 1337 (1993); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH L. REV. 505, 533 (2001).

state and is different from the body of law that federal prosecutors work from.

Addressing this first departure, state prosecutors are motivated to direct their goals towards the wishes of their voters. It is important to note, that while the heads of most prosecutors' offices are elected, the prosecutors in the offices are typically not.[23] Local district and state attorneys, and the line prosecutors in their office, are motivated to prosecute criminals whom their voters wish to see prosecuted.[24] They are motivated to prosecute as frequently and harshly as the public deems fit given crime rates in their area.[25] Meanwhile, federal prosecutors are not politically accountable to voters, and are more likely to prosecute to serve their own political or personal motives.[26]

Next, the fact that the body of law varies from state-to-state means that prosecutors in each state are basing their charges on different factors. Further, each state, city, and county deals with unique and varied criminal issues, which complicates the factors that prosecutors consider when making decisions. Because district attorneys set policies for their offices, the prosecuting policies of the office of a rural county may vary greatly from the prosecuting policies of an urban county, where the voting population may have more diverse opinions.[27] Essentially, this means that the same criminal laws may be enforced differently within the same state.[28]

Given these departures, it is hard to pinpoint exactly how prosecutorial discretion presents itself in the states, and how the judicial system interacts with it. But like in the federal system, judges are hesitant to interfere with the role of a prosecutor. Of course, following the federal system, state judges will intervene with a prosecution that violates the equal protection or due process clause of the Constitution by providing a remedy for the improper application of prosecutorial discretion.[29]

A discussion of judicial review of prosecutorial discretion in the states requires an analysis of state laws regulating judicial overview. Issues with prosecutorial discretion can arise, *inter alia,* in both the decision to initiate charges—and what those charges will be—or the decision to dismiss charges. In most states, it is at the sole discretion of the prosecutor's office

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[23] William J. Stuntz, *The Pathological Politics of Criminal Law,* 100 MICH. L. REV. 505, 535 (2001).

[24] *Id.* at 544.

[25] *Id.*

[26] Id. at 542.

[27] William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform,* 54 OHIO ST. L.J. 1325, 1343 (1993).

[28] *Id.*

[29] Darryl Brown, *The Judicial Role in Criminal Charging and Plea Bargaining,* 46 HOFSTRA L. REV. 63, 68 (2017).

to initiate charges against a defendant.[30] Some states, however, have statutes that authorize judges to review a prosecutor's decision not to initiate charges, and in some cases to order prosecution if the judge finds the decision unmerited[31]—Colorado, Michigan, Nebraska, and Pennsylvania all have such statutes.[32]

The most prevalent issue with prosecutorial discretion, and the one discussed in this article, is with overzealous prosecutor's offices that file either too many charges or too severe of charges. While judges have limited power to initiate criminal charges, state judges retain some tools to ensure prosecutors do not bring unfounded charges. At the start of a case, judges must confirm that the prosecutor has enough evidence to support a finding of probable cause or make out a prima facie case.[33] While the Constitution does not require that criminal charges in state court be screened in front of a judge or at a grand jury hearing, eighteen states require a grand jury screening of felony charges.[34] The remaining majority of states do not require a grand jury hearing, although state constitutions generally provide for a post-arrest preliminary hearing.[35] Judges may also dismiss a case due to prosecutorial misconduct or for impermissible charging motives.[36] Finally, some states allow a judge to dismiss a case "in the interest of justice."[37]

While state courts may seem to have more power over prosecutorial discretion than federal courts, the courts have mostly deprived themselves of the power given to them under these statutes by interpreting the statutes narrowly.[38]

c. Prosecutorial Misconduct

A discussion on prosecutorial misconduct would be remiss without an explanation, first, on the traditional role of a prosecutor in the criminal legal system. The most authoritative and widely cited description of the

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30 *Id.* at 73-74.

31 *Id.* at 74.

32 *Id.* (citing, e.g., COLO. REV. STAT. §16-5-209 (2017) ("the judge of a court having jurisdiction of the alleged offense . . . may require the prosecuting attorney to appear before the judge and explain the refusal. If after that proceeding . . . the judge finds that the refusal of the prosecuting attorney to prosecute was *arbitrary or capricious* and without reasonable excuse, the judge may order the prosecuting attorney to file an information and prosecute the case or may appoint a special prosecutor to do so (emphasis added))).

33 Darryl Brown, *The Judicial Role in Criminal Charging and Plea Bargaining,* 46 HOFSTRA L. REV. 63, 67 (2017).

34 *Id.* at 68.

35 *Id.*

36 *Id.* See discussions *infra* Sections II.a., c.

37 *Id.* at 70.

38 *Id.* at 71.

role of a prosecutor comes from *Berger v. United States*.[39] There, the Supreme Court admonished a prosecutor for purposely misleading the jury.[40] The Court explained that a prosecutor represents "a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win its case, but that justice shall be done."[41]

The American Bar Association (ABA) and the National District Attorneys Association (NDAA) have both adopted formulations of the *Berger* description in their own descriptions on the role of a prosecutor.[42] The ABA instructs prosecutors to act as "minister[s] of justice" in its Model Rules of Professional Conduct;[43] while the NDAA describes a prosecutor as an "independent administrator of justice."[44]

If the role of a prosecutor is to administer justice, then misconduct by a prosecutor can only inhibit justice. It can present in a multitude of ways, such as courtroom misconduct, mishandling physical evidence, threatening witnesses, selective prosecution, and withholding exculpatory evidence.[45]

1. The *Brady* Rule

The most common, and most relevant, abuse of prosecutorial power, is withholding exculpatory evidence. The Supreme Court addressed this issue in *Brady v. Maryland*.[46] In *Brady*, the Court ultimately held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to either guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[47] In *Brady,* the prosecution had withheld a statement from petitioner's coconspirator, in which he admitted to committing the

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39 Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. 1203, 1207 (2020).

40 *Id.* (citing Berger v. United States, 295 U.S. 78, 85 (1935)).

41 *Id.* (citing Berger v. United States, 295 U.S. 78 (1935)).

42 Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. 1203, 1207 (2020).

43 MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. (AM. BAR ASS'N 2019) ("A prosecutor has the responsibility of a minister of justice . . . .").

44 NAT'L DIST. ATTY'S ASSN., NAT'L PROSECUTION STANDARDS pt. 1-1.1 (3d ed. 2009), https://ndaa.org/wp-conten1/uploads/NDAA-NPS-3rd-Ed.-w-Revised-Commentary.pdf [https://perma.cc/D9R2-F3FN ("The primary responsibility of a prosecutor is to seek justice . . . .").

45 Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 277 (2007).

46 373 U.S. 83 (1963).

47 *Id.* at 87.

homicide.[48] The statement did not come to defense counsel's attention until after the defendant had been sentenced to death.[49]

The Supreme Court has considered, and expanded, the holding of *Brady* many times since 1963. First in *United States v. Agurs*, where it ruled that the prosecutor must turn over exculpatory evidence even if the defense does not request it.[50] The Supreme Court next defined the definition of "material" within the holding of *Brady* in *United States v. Bagley,* where it explained that "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[51] The Court relied on its definition of "reasonable probability" from *Strickland v. Washington,* and said "a 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."[52]

One of the main problems with prosecutorial misconduct is its elusiveness. It often goes unnoticed, and therefore, unpunished.[53] One editorial described the problem as "like trying to count drivers who speed; the problem is larger than the number of tickets indicate."[54] Some national studies, however, have come up with shocking statistics. Staff writers for the Chicago Tribune, Ken Armstrong and Maurice Possley, conducted a national study of 11,000 cases involving prosecutorial misconduct.[55] They found that between 1963 and 1999 courts dismissed the homicide convictions of at least 381 defendants because of *Brady* violations or because prosecutors presented false evidence.[56] Of the 381 cases, 67 defendants had been sentenced to death.[57] Another study, conducted by

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48 *Id.* at 84.

49 *Id.*

50 Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors,* 36 HOFSTRA L. REV. 275, 277 (2007) (citing United States v. Agurs, 427 U.S. 97, 107 (1976)).

51 473 U.S. 667, 700 (1985).

52 *Id.* at 682 (citing Strickland v. Washington, 466 U.S. 668, 694 (1984)).

53 *See* Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors,* 36 HOFSTRA L. REV. 275, 277 (2007).

54 Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors,* 36 HOFSTRA L. REV. 275, 277 (2007) (citing Editorial, Policing Prosecutors, St. Petersburg Times, July 12, 2003, at 16A).

55 Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors,* 36 HOFSTRA L. REV. 275, 279 (2007) (citing Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB., Jan. 10, 1999, at 1).

56 *Id.*

57 *Id.*

Bill Moushey of the Pittsburgh Post-Gazette, found that prosecutors routinely withhold evidence that might prove a defendant innocent.[58]

2. Judicial Authority and Sanctions

Considering what seems to be such prevalent prosecutorial misconduct, it might be expected that judges intervene often in such cases. However, as with the judicial role in curtailing prosecutorial discretion, judges have little control over prosecutorial misconduct.[59]

Despite the ruling of *Brady*, detailing the courts' power to intervene in cases of prosecutorial misconduct, many courts have interpreted the ruling narrowly. For example, the Ninth Circuit Court of Appeals has said that it will only intervene in cases of prosecutorial misconduct when there is (1) flagrant misbehavior and (2) substantial prejudice.[60] In *United States v. Kearns*, the Ninth Circuit held that the court needs only dismiss an indictment for constitutional due process violations when less drastic alternatives are not available.[61] In sum, while judges have authority to dismiss charges for "egregious prosecutorial misconduct," this is generally a limited role which is exercised only in extreme cases.[62]

II. ISSUES

a. Selective Prosecution

A prosecutor's abuse of discretion is typically not recognized in the court system; courts give great deference to a prosecutor's choice of charges and sentencing.[63] However, the defense is permitted to argue the

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58 Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors,* 36 HOFSTRA L. REV. 275, 280 (2007) (citing Bill Moushey, *Win at All Costs*, PITTSBURGH POST-GAZETTE (Moushey examined 1500 cases around the nation).

59 *See* Darryl Brown, *The Judicial Role in Criminal Charging and Plea Bargaining,* 46 HOFSTRA L. REV. 63 (2017).

60 United States v. Kearns, 5. F.3d 1251, 1253 (9th Cir. 1993) (citing United States v. Jacobs, 855 F.2d 652, 655 (9th Cir. 1988).

61 United States v. Kearns, 5 F.3d 1251, 1254 (9th Cir. 1993).

62 *See, e.g.*, United States v. Kearns, 5 F. 3d 1251 (9th Cir. 1993); Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors,* 36 HOFSTRA L. REV. 275, 280 (2007) ("on the rare occasion when such misconduct is discovered, judicial review is extremely limited"); Darryl Brown, *The Judicial Role in Criminal Charging and Plea Bargaining,* 46 HOFSTRA L. REV. 63 (2017) ("the standard answer to the question of what role judges have in determining the appropriateness of criminal charges is 'virtually none'").

63 Peter K. Daniel, *State v. Wilson: The Improper Use of Prosecutorial Discretion in Capital Punishment Cases,* 63 N. C. L. REV. 1136, 1136-37 (1985).

prosecutor abused their discretion in violation of the Fourteenth Amendment's Equal Protection Clause.[64]

1. What is Selective Prosecution?

The Supreme Court set standards for this argument in *Oyler v. Boles*, where it held that a prosecution "deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classifications" violated the Equal Protection Clause of the Fourteenth Amendment.[65] The Sixth District Court of Appeal of California considered this issue in *Baluyut v. Superior Court*, when petitioners claimed a criminal solicitation statute was being selectively enforced against only homosexual people in violation of the Equal Protection Clause.[66] Citing *Oyler*, the court said Equal Protection Clause is only violated if prosecution is "deliberately" based on an unjustifiable standard.[67] The court recognized that the government, in that case the police, needed to maintain the power to choose which law violators to arrest.[68] But it distinguished that such decision making could not be enforced against only a particular class of persons.[69]

The Supreme Court again looked at the issue of selective prosecution in 1996, when a group of petitioners claimed they were being selected for prosecution because they were Black.[70] In that case, five Black defendants introduced evidence that in 1991 all of the twenty-four crack cocaine cases handled by the prosecutors handling their case, also a crack cocaine case, the defendants had also been Black.[71] The Court clarified the holding in *Oyler* and said that in order to prove a selective prosecution claim in violation of the Equal Protection Clause, respondents would have to show that a prosecutorial policy has a discriminatory effect and was motivated by a discriminatory purpose.[72] Essentially, the defendants would have had to show that similarly situated defendants of other races could have been prosecuted but were not.[73]

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64 *Id.*
65 *Id.* (citing Oyler v. Boles, 368 U.S. 448, 454-56 (1961)).
66 Baluyut v. Superior Court, 37 Cal.Rptr.2d 741, 742-43 (6th Dist. Ct. Appl. 1995).
67 *Id.* at 746-47.
68 *Id.*
69 *Id.*
70 United States v. Armstrong, 517 U.S. 456, 456 (1996).
71 Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of Armstrong*, 73 CHI. KENT L. REV. 605, 609 (1998) (citing United States v. Armstrong, 517 U.S. 456, 459 (1996)).
72 United States v. Armstrong, 517 U.S. at 456-57.
73 *Id.* at 457.

The Court's reasoning in *Armstrong* draws on the separation of powers theory that it has relied on in protecting prosecutorial discretion in the past. Justice Rehnquist says that such a selective prosecution claim asks the Court to exercise its power over the Executive Branch.[74] However, he says that the prosecutor's discretion in choosing to press charges is given to them because they are "designated by statute as the President's delegates to help him discharge his constitutional responsibility to 'take care that the Laws be faithfully executed.'"[75]

2. Selective Prosecution and the Death Penalty

Given that "death is different,"[76] and that selective prosecution claims bear the heavy accusation that a prosecutor has chosen a defendant for prosecution based on an unjustifiable standard, it might be assumed that the judiciary has developed a special standard for evaluating selective prosecution of death penalty claims. This, however, would be wishful thinking.

In death penalty cases where the defense alleges selective prosecution, courts use the same framework of analysis set forth in *Armstrong*. For example, in *United States v. Christensen,* the defense claimed the prosecution sought the death penalty solely because the victim was a Chinese national.[77] Despite the implications of a conviction in this case being drastically different than in any other type of case, the court used the same standard of evaluation to determine whether there was a selective prosecution issue.[78] And finding that the defense failed to show discriminatory intent and discriminatory effect, the court denied defense's motion.[79]

The Supreme Court of Ohio also followed the *Armstrong* framework when evaluating a selective prosecution claim in the death penalty context. There, the defendant alleged that the Montgomery County Prosecuting Attorney disproportionately used his discretion to charge Black defendants with capital crimes.[80] The defense argued that they were entitled to

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74 *Id.* at 464.

75 *Id.* (citing U.S. Const., art. II, § 3).

76 The idea that "death is different" is often used by capital defense attorneys and scholars but can be attributed to Justice Stewart's concurrence in *Furman v. Georgia.* There, Justice Stewart said that "the penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability." 408 U.S. 238, 307 (1972) (Stewart, J. concurring).

77 United States v. Christensen, No. 17-cr-20037-JES-JEH, 2019 WL 570730, at *2 (C.D. Ill. Feb. 12th, 2019).

78 *Id.* at *2.

79 *Id.* at * 4.

80 State v. Keene, 81 Ohio St.3d 646, 650 (Ohio 1998).

discovery under both state and federal law. Under federal law, the defense argued that because the prosecutor brought sixty-four percent of capital cases in Montgomery County against Black defendants, when only seventeen percent of the population is Black, the trial judge had a constitutional obligation to allow discovery on the issue.[81] The defense argued that to not allow discovery would be to accept the impermissible assumption that a disproportionate amount of the Black population of Montgomery County commits capital crimes.[82] The court rejected this argument, citing the *Armstrong* Court's framework, and pointing out that the Court in *Armstrong* itself rejected a presumption that "people of *all* races commit *all* types of crimes."[83]

Under Ohio Rule of Criminal Procedure 16(B)(1)(f), prosecutors are required to disclose all evidence favorable to the defense and "material either to guilt or to innocence."[84] The court interpreted this using the Supreme Court's interpretation of "material" from *Brady*.[85] The court concluded that, under *Brady*, evidence only needs to be disclosed if it is material to mitigation, exculpation, or impeachment.[86] The court reasoned that a selective prosecution defense does not fall into these categories because it is not a defense on the merits, but a claim that the prosecutor has brought an unconstitutional charge.[87]

b. The Geography of the Death Penalty

As of January 2022, twenty-seven states and the federal government have the death penalty as a viable punishment and twenty-three states do not.[88] There are 2,474 death row prisoners, 699 of whom are on death row in California, 338 in Florida, 198 in Texas, 171 in Alabama, and 139 in North Carolina.[89] These five states account for more than half of the death row inmates in our country. Since 1976, Texas has carried out 573 executions, Oklahoma has carried out 114 executions, and Virginia has carried out 113 executions.[90] These three states have accounted for more than half of the executions since 1976.

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81 *Id.* at 651.

82 *Id.*

83 *Id.* ([Emphasis *sic*.] citing United States. V. Armstrong, 517 U.S. 456, 469 (1996), quoting United States v. Armstrong, 48 F.3d 1508, 1516-17 (Ca. 9th Information. 1995)).

84 *Id.* at 650.

85 *Id.*

86 *Id.*

87 *Id.* at 650-51.

88 *Facts About the Death Penalty*, DEATH PENALTY INFO. CENTER (Jan. 3, 2022), https://documents.deathpenaltyinfo.org/pdf/FactSheet.pdf.

89 *Id.*

90 *Id.*

However, only looking at state distribution of the use of the death penalty is like going to Antarctica and thinking that you have seen all there is to see of an iceberg from your boat. Among the myriad of possibilities that could account for the inconsistencies in use of the death penalty by county within a state, lies the fact that it is the decision of a prosecutor to charge a defendant capitally. And given that district attorney's offices operate in a county-separated system, it is important to look at the distribution of the use of the death penalty by counties, not just states.

For example, 64% of California counties did not sentence anyone to death between 2004 to 2009, and 90% of the counties did not sentence more than one person to death in that time frame.[91] Only six counties sentenced more than one person to death between 2004 to 2009.[92] And just three counties, Los Angeles, Riverside, and Orange, accounted for more than half of all death sentences in California between 2004 to 2009.[93]

And California is not the only state with such statistics. Texas has 254 counties and 222 of those counties sentenced someone to death between 2004 to 2009.[94] Nearly three of every four Florida counties did not sentence more than two people to death, and only three counties in Florida sentenced more than one person to death per year: Broward, Duval, and Polk.[95] Further, counties with the most executions are not the most populous counties in the country. For example, Oklahoma County accounted for just 0.23% of the national population between 2001-2005, yet it was responsible for 7.86% of the country's executions in that time.[96] This means that Oklahoma County overrepresented itself in national executions by 3,300%.[97]

This disparity in county sentencing is not just cited by legal scholars and defense lawyers, but it was used by Justice Breyer in his dissent in *Glossip v. Gross* to argue that use of the death penalty is arbitrary.[98] There, Justice Breyer discussed the statistics regarding the disproportionate use of the death penalty by county, and then discussed possible explanations for such a phenomenon. He pointed to the discretionary power of the local

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91 Robert J. Smith, *The Geography of the Death Penalty and Its Ramifications, 92* B. U. L. REV. 227, 231 (2012).

92 *Id.*

93 *Id.*

94 *Id.*

95 *Id.*

96 Lee Kovarsky, *Muscle Memory and The Local Concentration of Capital Punishment*, 66 DUKE LJ 259, 284 (2017).

97 *Id.*

98 Glossip v. Gross, 576 U.S. 873, 918-19 (2015) (Breyer, J. dissenting).

prosecutor,[99] resources of defense counsel,[100] racial disproportionality,[101] and political pressures on judges standing election[102] as possible explanations for the disparities.

c. Racial Issues with the Death Penalty

Prosecutorial discretion becomes even more troubling when the race of defendants and victims is considered. The history of the death penalty in the United States shows a heavy prejudice against Black defendants, specifically when the victim is white.[103] People of color have accounted for 43% of executions since 1976, and currently account for 55% of inmates on death row.[104] Currently, 41% of death row inmates are Black – while only 13.4% of the U.S. population is Black – which further emphasizes the racial disparity in sentencing. In addition, although white victims account for approximately one-half of murder victims, they account for nearly 80% of the victims in capital cases.[105] Because prosecution of the death penalty is left to the sole discretion of prosecutors, these statistics suggest that prosecutors seek the death penalty more often for Black defendants, especially when the victim is white, than defendants of any other race.

1. The Case of Warren McCleskey

The Supreme Court has dealt with the issue of racial disparity in the prosecution of Black and white defendants, and ultimately held, despite overwhelming evidence of inequality, that there was no constitutional

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[99] *Id.* (citing, e.g., Greg Goelzhauser, Prosecutorial Discretion Under Resource Constraints: Budget Allocations and Local Death–Charging Decisions, 96 Judicature 161, 162–163 (2013); Katharine Barnes, David Sloss, & Stephen Thaman, Place Matters (Most): An Empirical Study of Prosecutorial Decision–Making in Death–Eligible Cases, 51 ARIZ. L. REV. 305 (2009) (analyzing Missouri)).

[100] *Id.* (citing, e.g., James S. Liebman & Peter Clarke, *Minority Practice, Majority's Burden: The Death Penalty Today*, 9 OHIO S. J. CRIM. L. 255, 274 (2011)).

[101] *Id.* (citing, e.g., Justin D. Levinson, Robert J. Smith, & Danielle M. Young, *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury–Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. REV. 513, 533–536 (2014)).

[102] *Id.* (citing See Woodward v. Alabama, 571 U.S. 1045, 1045 (2013) (Sotomayor J., dissenting from denial of certiorari) (noting that empirical evidence suggests that, when Alabama judges reverse jury recommendations, these "judges, who are elected in partisan proceedings, appear to have succumbed to electoral pressures")).

[103] This article follows the New York Times style guide when capitalizing "Black" but not capitalizing "brown" or "white;" *see* Nancy Coleman, *Why We're Capitalizing Black*, N.Y. Times (Jul. 5, 2020), https://www.nytimes.com/2020/07/05/insider/capitalized-black.html.

[104] *Race and the Death Penalty*, ACLU, https://www.aclu.org/other/race-and-death-penalty.

[105] *Id.*

violation.[106] In 1978, Warren McCleskey, a Black man, was convicted of the murder of a white police officer.[107] The prosecutor of his case sought the death penalty, and the jury recommended a death sentence, which the court followed.[108] After a number of motions for new trials, petitions for writs, and evidentiary hearings, McCleskey eventually raised the issue of racial discrimination in Georgia's capital sentencing process in a petition for a writ of habeas corpus in the Federal District Court for the Northern District of Georgia.[109] McCleskey cited a study performed by Professor David C. Baldus, Charles Pulaski, and George Woodworth ("The Baldus Study"), which examined over 2,000 murder cases in Georgia in the 1970s.[110] One model of The Baldus Study concluded that defendants charged with killing white victims were 4.3 times more likely to receive a death sentence than defendants charged with killing Black victims.[111] The District Court determined that the statistics cited by McCleskey did not make out a prima facie case that the imposition of the death penalty was because of his race, the race of the defendant, or any other impermissible standard.[112]

The Eleventh Circuit reviewed McCleskey's claims and determined that the statistics were "insufficient to demonstrate discriminatory intent or unconstitutional discrimination in the Fourteenth Amendment context, [and] insufficient to show irrationality, arbitrariness, and capriciousness under any kind of Eighth Amendment analysis."[113]

The Supreme Court's analysis in *McCleskey* harks back to this article's earlier discussion of selective prosecution. Though *McCleskey* was decided before *Armstrong*, the foundation of the court's holding in *Armstrong* is the same as the foundation of the court's holding in *McCleskey*. That is, *Wayte v. United States*.[114] There, the Court says that a defendant who alleges an equal protection violation must show that the purposeful discrimination had a "discriminatory effect" on him.[115] The Court held that McCleskey had not proven that Georgia's capital

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106 *See* McCleskey v. Kemp, 481 U.S. 279 (1987).

107 *Id.* at 284.

108 *Id.* at 285. Prosecutors in Georgia did not have to follow any guidelines in deciding to seek the death penalty. *McCleskey*, 481 U.S. at 333 (Brennan, J. dissenting). Further, the jury was provided with no aggravating or mitigating factors or guidelines on how to balance them, so juries are left with no guidance in choosing between life and death. *Id.*

109 *Id.* at 286.

110 *Id.*

111 *Id.* at 287.

112 *Id.* at 288. (citing McCleskey v. Zant, 580 F. Supp 338, 379 (ND Ga. 1984)).

113 *Id.* (citing McCleskey v. Kemp, 735 F.2d 877, 891 (11th Cir. 1985)).

114 470 U.S. 598 (1985).

115 McCleskey v. Kemp, 481 U.S. 279, 292 (1987) (citing Wayte v. United States, 470 U.S. 598, 608 (1985)).

punishment statutes were discriminatory because he had not shown that decisionmakers in his case had acted with a discriminatory purpose.[116] Further the Court said that "discretion is essential to the criminal justice process," and the study cited by McCleskey could not support an inference that any of the decisionmakers acted with a discriminatory intent.[117]

2. Continued Racial Bias in Death Sentencing

Even though *McCleskey v. Kemp* was decided almost thirty-five years ago, racial disparity in the sentencing of defendants to death row continues to prevail in our criminal legal system. And as Shelly Song argues, the discriminatory intent doctrine outlined in *McCleskey v. Kemp* places the burden on the wrong party because, although racism is not as overtly prevalent in our society, it still presents itself in our criminal legal system and, critically, in the sentencing of defendants to death.[118]

The Baldus Study is far from the only study on racial disparities in capital sentencing. Glenn Pierce and Michael Radelet have conducted multiple single state studies on the connection between race and capital sentencing. Their first study took place in Florida, where they concluded that defendants suspected of killing white people were 3.42 times more likely to receive the death penalty than those suspected of killing Black people.[119] A study on all homicides in California in the 1990s found that of the 302 death sentences that were imposed, the defendant was three times more likely to be sentenced to death if the victim was white than if the victim was Black.[120] Another study in East Baton Rouge Parish, Louisiana, found that defendants were 97% more likely to be sentenced to death if the victim was white than if the victim was Black.[121] Pierce and Radelet have also conducted smaller studies in Missouri, Arizona, Ohio, North Carolina, and Illinois, all of which have uncovered racial disparities.[122]

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116 *Id.* at 292.
117 *Id.* at 297.
118 Shelly Song, *Race Consciousness in Imposing the Death Penalty*, 17 RICH. J.L. & PUB. INT. 739, 759 (2014).
119 Steven F. Shatz & Terry Dalton, *Challenging the Death Penalty with Statistics: Furman, McCleskey, and a Single County Case Study*, 34 CARDOZO L. REV. 1227, 1246-47 (2013) (citing Michael L. Radelet & Glenn L. Pierce, *Choosing Those Who Will Die: Race and the Death Penalty in Florida*, 43 FLA. L. REV. 1 (1991)).
120 *Id.* (citing Glenn L. Pierce & Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-1999*, 46 SANTA CLARA L. REV. 1, 11 (2005)).
121 *Id.* (citing Glenn L. Pierce & Micahel L. Radelet, *Death Sentencing in East Baton Rouge Parish, 1990-2008, 71* LOUISIANA L. REV. 647, 670-71 (2011)).
122 *Id.* at 1248.

III. SPECIFIC INSTANCES

The following section discusses specific instances of prosecutorial misconduct and abuse of prosecutorial discretion. These demonstrate the insidious nature of prosecutorial discretion and exemplify the disastrous effects such discretion can have on individual lives.

a. Dale Cox

Rodricus Crawford lived with his mother, grandmother, uncle, sister, younger brother, and occasionally his son in a three-bedroom house in Mooretown, a small neighborhood in Shreveport, Louisiana.[123] On the night of February 15th, 2012, Rodricus's son, Roderius "Bobo" Lott, was sharing a spot on the pull-out couch that Rodricus slept on.[124] Roderius was turning one-year-old in just a week, and he was spending the night with Rodricus at the request of his mother.[125] At 7:00am on February 16th, 2012, Rodricus's mother was awakened to the sound of her son screaming for help.[126] Roderius was not breathing.[127] The ambulance did not arrive at their house for over twenty minutes, and when it did Roderius had a stiff jaw and milky eyes, which were signs that he had been dead for over an hour.[128] Detectives searched the home, and Rodricus was taken to the police station to be questioned after two marijuana blunts were found on an ashtray.[129] These events culminated in Rodricus being arrested and charged with the first degree murder of his son Roderius.[130]

Shreveport, Louisiana is in Caddo Parish; and in 2012 Dale Cox was the First District Attorney of Caddo Parish.[131] Upon receiving Rodricus's case, Cox decided he was going to seek the death penalty.[132] Just one look at Dale Cox's prosecutorial history would reveal that this decision was inevitable: Cox personally prosecuted one-third of all Louisiana death penalty cases which returned a sentence of death between 2010-2014.[133] After jury selection for Rodricus's trial, the defense moved to quash the

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123 State v. Crawford, 218 So.3d 13, 16 (La. 2016).
124 *Id.*
125 *Id.*
126 *Id.*
127 *Id.*
128 Rachel Aviv, *Revenge Killing: Race and the Death Penalty in a Louisiana Parish,* THE NEW YORKER, (Jun. 29, 2015), https://www.newyorker.com/magazine/2015/07/06/revenge-killing.
129 *Id.*
130 *See Crawford,* 218 So.3d at 18.
131 Aviv, *supra* note 128.
132 *Id.*
133 *Rodricus Crawford Becomes 158th Death Row Exoneree,* DEATH PENALTY INFO. CENTER (Apr. 18th, 2017), https://deathpenaltyinfo.org/news/rodricus-crawford-becomes-158th-death-row-exoneree.

petit jury venire on the basis of "systematic and intentional underrepresentation of African Americans on the venire panel, specifically African American males."[134] The defense argued that there had been a *Batson* violation,[135] and asked the trial court to require the State to provide race neutral reasons for its peremptory challenges.[136] The trial court did not require the state to articulate race neutral reasons for its peremptory challenges, yet found there to be no *Batson* violation.[137]

Rodricus was found guilty during the guilt phase of the trial, and his defense team had not prepared anything for the penalty phase of the trial because they were "too attached to 'not guilty,'" according to J. Antonio Florence, a lawyer on Rodricus's defense team.[138] During closing statements of that penalty phase, Cox told the jury "[n]ow this is Jesus Christ of the New Testament . . . It would be better if you were never born.[139] You shall have a millstone cast around your neck, and you will be thrown into the sea."[140] Rodricus was sentenced to death that night.[141] One month later, Dale Cox wrote to the state's probation department, expressing his dismay that it had discontinued use of the electric chair because, in his view, "Mr. Crawford deserves as much physical suffering as it is humanly possible to endure before he dies."[142]

In addition to J. Antonio Florence, Rodricus was represented by Daryl Gold, who had argued against Dale Cox in the late seventies. He remembered Cox as one of the "nicest people [he] had ever known," and, by the time he encountered Cox again in Rodricus's trial he wondered if Cox had a "brain tumor or something."[143] Another Shreveport lawyer wrote an email to the bar's Listserv expressing concern for Cox's mental

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134 *Crawford*, 218 So.3d at 18.

135 *See id.* A *Batson* violation occurs when a prosecutor strikes a potential juror solely on account of their race. The defendant must show (1) that he is a member of a cognizable racial group, (2) that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race, and (3) that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the jury on account of their race. Batson v. Kentucky, 476 U.S. 79, 96 (1986).

136 *Crawford*, 218 So.3d at 18.

137 *Id.*

138 Aviv, *supra* note 128.

139 *See id.* Religious references during closing trials are generally accepted if they are not argumentative. Further, even if they were not accepted, reversal on the grounds of a religious reference is rare. *See generally*, John H. Blume and Sheri Lynn Johnson, *Don't Take His Eye, Don't Take His Tooth, and Don't Cast the First Stone: Limiting Religious Arguments in Capital Cases*, 9 WM. & MARY BILL RTS. J. 61 (2000).

140 *Id.*

141 Aviv, *supra* note 128.

142 *Id.*

143 *Id.*

health after he heard of an outburst Cox had in court.[144] He said that he remembered Cox as a person of "unquestioned integrity."[145]

In 2016, the Supreme Court of Louisiana granted a motion on direct appeal to consider Rodricus's case under Article V of Louisiana's Constitution.[146] In the motion the defense raised twenty-three issues, and the court addressed two: whether the evidence was sufficient to support a conviction, and whether the district court abused its discretion in finding the defense had not made a *prima facie* case for a *Batson* challenge.[147] The court vacated Rodricus's sentence and conviction, and remanded for a new trial, finding that the district court's failure to have the state provide race neutral reasons for its peremptory strikes violated the defendant's right to a fair trial and the jurors' equal protection rights.[148] Of course, the state actor at issue in the voir dire was Dale Cox. And this was not the only time Cox had issues with *Batson* during voir dire. Data from twenty-two felony trials by Cox show that he struck Black jurors 2.7 times more than other jurors.[149] Rodricus Crawford was eventually exonerated in 2017 when the Caddo Parish District Attorney's Office dropped charges against him.[150]

Rodricus's story is not an isolated one in Dale Cox's prosecutorial history.[151] Nor is it a unique one. During his time as District Attorney, Cox was not only one of the most influential prosecutors in the country he was also one of the death penalty's most outspoken proponents.[152] In March of 2015, Cox told the Shreveport Times that he thinks the state needs to "kill more people."[153] After another Caddo Parish man had been exonerated from death row after thirty years, following evidence of a Brady violation,

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144 *Id.* Henry Walker, president of the criminal-defense bar.

145 *Id.*

146 State v. Crawford, 218 So. 3d 13, 15 (La. 2016).

147 *Id.* at 19, 29.

148 *Id.* at 35.

149 Death Penalty Info. Center, *supra* note 133.

150 *Id.* Dale Cox did not run for reelection in 2015, and was instead replaced by James Stewart, a former appellate judge, and the first Black district attorney in Caddo Parrish. (Josie Duffy Rice, *In Louisiana Harsh Prosecutors are Moving from Parish to Parish*, THE APPEAL (Jun. 29, 2018) https://theappeal.org/in-louisiana-harsh-prosecutors-are-moving-from-parish-to-parish/).

151 *See e.g., 30 Years on Death Row* (CBS News Broadcast Oct. 11, 2015 7:40pm) (describing Cox's refusal as acting district attorney to compensate a man who had been wrongfully on death row for thirty years); Dahlia Lithwick, *Louisiana Prosecutor Wants to "Cold Cock" Defense Attorneys* (Oct. 28, 2015, 4:53pm), https://slate.com/news-and-politics/2015/10/louisiana-prosecutor-dale-cox-wants-to-cold-cock-defense-attorneys.html (describing Cox's outburst in court when defense attorneys corrected his statement that defendant had never had a job).

152 Rice, *supra* note 150.

153 Campbell Robertson, *The Prosecutor Who Says Louisiana Should 'Kill More People,'* THE NEW YORK TIMES (Jul. 7th, 2015), https://www.nytimes.com/2015/07/08/us/louisiana-prosecutor-becomes-blunt-spokesman-for-death-penalty.html.

Dale Cox, in his role as District Attorney, fought all efforts to compensate the exoneree for the state's misconduct.[154] In an interview discussing his views on the death penalty, Cox described his personal evolution from an opponent of the death penalty to Louisiana's strongest advocate. In his early days as a prosecutor, Cox would not prosecute death penalty cases, on account of his Catholic faith.[155] After a twenty-year career in insurance law, Cox returned to prosecution: capital cases included.[156] His explanation? Retribution. Specifically, he said "'what kind of society would say that it's O.K. to kill babies and eat them, and in fact we can have parties where we kill them and eat them, and you're not going to forfeit your life for that?'"[157] Cox later clarified that he had not prosecuted any cannibalism cases, but that he thought it was the next logical step in our society.[158]

In addition to Cox's extreme views on use of the death penalty, he later became increasingly violent in the court room towards defendants and defense attorneys alike. During litigation of the case of Eric Mickelson, a defendant on trial for capital murder, Cox threatened the defense and repeatedly used profanity when the judge was out of the courtroom. He called the female defense attorney a "bitch," and, when the other defense attorney came to her defense, Cox asked him if he "wanted to go outside." Cox's unprofessional behavior in the courtroom is not indicative of the overall issue with prosecutorial misconduct, but it is an example of the hostility present in courtrooms between defense and prosecution.

Ultimately, Dale Cox is one prosecutor, in one county, in one state of our country. But he's a prosecutor who was accountable for one-third of the death sentences in Louisiana between 2010-2014.[159] In a county that is among the two percent of U.S. counties responsible for most death row inmates in the U.S., which had a death sentencing rate per homicide that was eight times higher than the rest of Louisiana between 2006 and

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154 Josie Duffy Rice, *In Louisiana Harsh Prosecutors are Moving from Parish to Parish*, THE APPEAL (Jun. 29, 2018), https://theappeal.org/in-louisiana-harsh-prosecutors-are-moving-from-parish-to-parish/.
Glenn Ford was convicted, on circumstantial evidence, of murder by a prosecutor, Marty Shroud, who later wrote a letter publicly apologizing for his conduct during the trial. His attorneys discovered after the trial that the state had withheld evidence proving his innocence.

155 Robertson, *supra* note 153.

156 *See id.*

157 *Id.*

158 *Id.*

159 Death Penalty Info. Center, *supra* note 133.

2015.[160] A county in the most incarcerated state in our nation; in the most incarcerated nation in the world.[161]

b. Aramis Ayala

On the exact opposite end of the prosecutorial discretion spectrum of Dale Cox lies Aramis Ayala. Ayala gained notoriety for her announcement in March of 2017 that she would not seek the death penalty in any of the current capital cases in her county.[162] Ayala was Ninth Circuit State Attorney for Orange-Osceola County, Florida.[163] That same day, Governor Rick Scott signed an executive order removing Ayala as prosecutor on the two cases for Markeith Loyd. Just two days later he signed another executive order removing her as prosecutor on another twenty-one pending homicide cases, replacing her with another State Attorney, Brad King, an outspoken proponent of the death penalty.[164] Ayala filed a petition for writ of *quo warranto* with the Florida Supreme Court, seeking it to recognize her as the constitutional officer to prosecute cases in the Ninth Circuit.[165]

The Republican controlled House filed an amicus brief in the Florida Supreme Court, in which it said "[d]espite the petitioner's suggestions otherwise, a state attorney must pursue death as a punishment in each case where she believes, upon a good faith assessment of the evidence, that she can prove beyond a reasonable doubt at least one aggravating factor during the penalty phase of a capital murder trial."[166] Ayala's attorney responded that the House's amicus brief calls for an "unconstitutional mandate of the death penalty," to which the House responded that "the House – and no other – sets Florida's public policy regarding death as punishment for capital murder."[167] Governor Scott's executive order relied on a 1905 Florida statute, which permits the Governor to reassign a prosecutor to "if the ends of justice would best be served."[168] In August 2017 the Florida

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160 *Id.*

161 Emily Widra & Tiana Herring, *States of Incarceration: The Global Context 2021*, PRISON POLICY INITIATIVE (Sept. 2021), https://www.prisonpolicy.org/global/2021.html.

162 Jan Pudlow, *A Constitutional Question of a Prosecutor's Discretion*, THE FLORIDA BAR (May 1st, 2017) https://www.floridabar.org/the-florida-bar-news/a-constitutional-question-of-a-prosecutors-discretion/.

163 *Id.*

164 *Id.*

165 *Id.*

166 Nathan Hale, *Fla. House Says State Attys. Lack Death Penalty Discretion*, LAW360 (May 4th, 2017), https://www-law360-com.daytona.law.miami.edu/articles/920530/fla-house-says-state-attys-lack-death-penalty-discretion.

167 *Id.*

168 *Id.*

Supreme Court upheld Scott's reassignment of the case, saying he had acted "well within the bounds of the Governor's broad authority."[169]

Ayala said that she initially came to the decision not to prosecute any of the cases on her docket for death after carefully reviewing the evidence and finding that the death penalty had failed as a deterrent, drained public resources, and broken promises to surviving families.[170] In a dissent to the Florida Supreme Court's decision, Justice Pariente wrote that Ayala " . . . did not announce a refusal to prosecute the guilt of defendants charged with first degree murder."[171] Justice Pariente further wrote that Ayala's decision was not influenced by emotion or personal opposition to the death penalty, and was within the scheme of the Florida legislature.[172] In response to the Supreme Court's ruling, Ayala created a death penalty review panel to evaluate cases on an individual basis.[173]

IV. SOLUTIONS

The dangers of unfettered prosecutorial discretion in the death penalty system are obvious: personal opinions influence a prosecutor's decision to seek the death penalty, the location where a defendant commits a crime plays perhaps the most influential role in whether they will be charged capitally, and the judiciary has a limited, if not nonexistent role in oversight of prosecutorial discretion and misconduct.

Prosecutorial reform could take shape in many forms. Because each district attorney's office follows their own rules and regulations, each office could enact their own policies to follow and their own sanctions for prosecutors who fall off the wagon. On the other hand, the ABA or the NDAA could enact nation-wide policies and sanctions for prosecutors. Prosecutorial misconduct is both a widespread and pervasive issue. It is

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169 *Citing Conflict with Florida Death Penalty Ruling, Aramis Ayala Will Not Seek Reelection as State Attorney,* DEATH PENALTY INFO. CENTER (May 31st, 2019), https://deathpenaltyinfo.org/news/citing-conflict-with-florida-death-penalty-ruling-aramis-ayala-will-not-seek-re-election-as-state-attorney.

170 *Florida Prosecutor Announces She Will No Longer Seek Death Sentences, Governor Moves to Exclude Her From Police Killing Case,* DEATH PENALTY INFO. CENTER (Mar. 17th, 2017), https://deathpenaltyinfo.org/news/florida-prosecutor-announces-she-will-no-longer-seek-death-sentences-governor-moves-to-exclude-her-from-police-killing-case.

171 *Supreme Court Backs Scott in Death Penalty Battle with State Attorney,* WUSF PUBLIC MEDIA (Sept. 1st, 2017), https://wusfnews.wusf.usf.edu/2017-09-01/supreme-court-backs-scott-in-death-penalty-battle-with-state-attorney.

172 *Id.*

173 *Citing Conflict with Florida Death Penalty Ruling, Aramis Ayala Will Not Seek Reelection as State Attorney,* DEATH PENALTY INFO. CENTER (May 31st, 2019), https://deathpenaltyinfo.org/news/citing-conflict-with-florida-death-penalty-ruling-aramis-ayala-will-not-seek-re-election-as-state-attorney.

not likely to disappear easily or quickly. Thus, reform on multiple levels is most likely to be successful.

a. The Issue of One

Solving the issue of prosecutorial misconduct will likely lead to the conclusion that such life-changing decisions should not be left to one person. Or it should lead to such a conclusion. Rather than leaving a death penalty decision up to a single district attorney, it could be instrumental to turn the decision over to a team of multiple assistant district attorneys from that county. This solution is a direct copy of Aramis Ayala's response to the Florida Supreme Court's decision in her case.[174] It is also not a novel solution. The Department of Justice has a committee to review death penalty charging decisions, and some state prosecutors offices have also considered and tested the idea.[175]

The problem with a District Attorney making the final call on whether a defendant will be charged with the death penalty or not is that they are ultimately driven by personal motives.[176] The concern is that an individual district attorney may be more concerned with public reception of their decision, or with an impending reelection, than with the fact-based justification for charging a defendant with the death penalty.[177]

If every case that Dale Cox prosecuted as a death case also had to be screened by other prosecutors in his county, would he have prosecuted as many death penalty cases? Of course, there is no way of knowing, but because "death is different,"[178] it cannot hurt to have multiple prosecutors agree that a crime rises to the level of "worst of the worst," before it is brought as a capital case.

Another solution would be to have a prosecutorial oversight board, composed of district attorneys, former judges, and former defense attorneys. This board need not necessarily be part of the decision-making process unless the District Attorney's office wants it to be. Otherwise, it could serve as a liaison for the District Attorney's office in making such decisions.

Such a prosecutorial oversight board would also have veto power over any death penalty decision that the district attorney's office makes. Hopefully, this power would not have to be used often. But the threat of it may ensure that prosecutors only bring death penalty cases that are the

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174 *Id.*

175 Bruce A. Green & Rebecca Roiphe, *Rethinking Prosecutors' Conflicts of Interest*, 58 B.C. L. REV. 463, 529 (2017).

176 *Id.*

177 *Id.*

178 *See supra* note 72 and accompanying text.

"worst of the worst," and do not have any racial bias, or other personal vendetta motivating them.

b. Increased Accountability

When a prosecutor chooses to pursue a capital conviction in a case where most other prosecutors would not make the same decision, or when a prosecutor withholds exculpatory evidence in a capital case, they are not just neglecting the oath they swore as an attorney, they are playing a dangerous game where someone's life is in the balance. This is not a situation of negligent disregard for your job duties; it is a situation of reckless disregard for human life.

While the most ideal form of prosecutorial reform would be to remove the power-making decision from one person and place it in the hands of a team of lawyers, or lawyers and judges, qualified to make such a decision, that is unlikely to happen in every district attorney's office across the country. Thus, reform of the prosecutorial system could take the form of increased accountability to the public, or increased accountability to the law.[179] Increased accountability to the public would likely take the form of increased transparency in the prosecutorial system.[180] For example, while prosecutors hold significant power, they do not have to justify any of their decisions to the public. Compared to a judge or police officer, who also hold significant power in our criminal justice system, the lack of transparency in the prosecutors' office allows for biased sentencing and flagrant misconduct.[181] Increased accountability to the law would take the form of heightened scrutiny by national, state, and local bar associations. This could include increased sanctions for prosecutors who take part in intentional prosecutorial misconduct, and increased oversight by those outside the prosecutor's office, such as judges or disciplinary committees.[182] Ultimately, holding prosecutors accountable for their actions would hopefully serve to increase pressure on them to act faithfully according to the law, and to "do justice" rather than to abuse justice.

c. The Obvious

Finally, the obvious solution to the egregious misconduct mentioned in this article is abolishing the death penalty. This solution needs little to no discussion, as it is self-explanatory. Twenty-three states have already done it. As Justice Breyer states, "[t]he arbitrariness of the death penalty

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179 *See* Daniel Fryer, *Race, Reform, and Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 769, 775-76 (2020).

180 *Id.*

181 *Id.*

182 *Id.*

is the antithesis of the rule of law."[183] Justice Breyer's dissent in *Glossip* goes on to list the multitude of reasons why there are no solutions to our country's death penalty problem other than to abolish it: "[t]he Constitution does not prohibit the use of prosecutorial discretion;"[184] "[i]t has not proved possible to increase capital defense funding significantly;"[185] "[a]nd courts cannot easily inquire into judicial motivation."[186] Of course, abolishing capital punishment is easier said than done. Thanks to the work of organizations such as the ACLU, the Death Penalty Information Center, and the National Coalition to Abolish the Death Penalty, and individuals such as Helen Prejean and Bryan Stevenson, death penalty abolition is becoming a more attainable goal than ever.

Currently, twenty-seven states, the federal government, and the U.S. Military have the death penalty and twenty-three states, and the District of Columbia have abolished it. Four states have abolished it in the past five years: Washington, New Hampshire, Colorado, and Virginia. While state action to abolish the death penalty is a promising indication of a societal move toward abolition, it can only go so far in our federal system. Thus, federal action is necessary to completely get rid of use of the death penalty.

Of the three branches of our government, the judicial and legislative branch could both take action to end use of the death penalty in the United States[187], however, the judicial branch is the most likely route for a multitude of reasons. First, Congress is unlikely to pass a law prohibiting the death penalty when national support of the death penalty is still so high. Meanwhile, the President can only outlaw federal executions, and the Attorney General can halt federal executions but not stop them.[188] Thus, the judicial branch is both most poised and most likely to solve this issue. This is because the Supreme Court's actions are insulated from public opinion, and because the Supreme Court has a long history of landmark decisions which bring about social change.[189]

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183 Glossip v. Gross, 576 U.S. 863, 915 (2015) (Breyer, J. dissenting).

184 *Id.* at 921.

185 *Id.*

186 *Id.*

187 The executive branch can only end federal executions. Madeline Carlisle, *What Happens to the Federal Death Penalty in a Biden Administration?*, Time (Jan. 25, 2021), https://time.com/5932811/death-penalty-abolition-joe-biden/.

188 On July 1, 2021, Attorney General Merrick Garland issued a moratorium on federal executions. *Merrick Garland, Attorney General, Attorney General Merrick Garland Imposes a Moratorium on Federal Executions; Orders Reviews of Policies and Procedures*, DEP'T OF JUST. (Jul. 1, 2021), https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-imposes-moratorium-federal-executions-orders-review.

189 *See* Kevin M. Barry, *The Law of Abolition*, 107 J. CRIM. L. & CRIMINOLOGY 521, 532 (2017).

Although the decision to abolish the death penalty most likely will be left up to the Supreme Court, it is not one without support from other federal and state judges. State high court Justices have been arguing over the past half-century that the death penalty is per se unconstitutional.[190] In Kevin M. Barry's article called the "Law of Abolition," he argues that the amalgamation of these opinions by state and federal judges forms a coherent body of law that the Supreme Court should follow in declaring the death penalty unconstitutional.[191]

V. CONCLUSION

There is not one approach to discussion of the death penalty that could artfully sum up its infinite problems. While this article discussed prosecutorial discretion and prosecutorial misconduct, it failed to account for and analyze a myriad of other problems associated with the death penalty in our country. Namely, that while law students, law professors, and Supreme Court Justices will continue to write about the abhorrence of its use in our society, prosecutors, legislatures, and judges, will continue to uphold the institutions that keep it in place.[192] But, given the serious implications of its use, there is no amount of discussion of the death penalty that could exhaust it. Whether it is our state legislatures or our Supreme Court, the problems of prosecutorial discretion relating to racial bias in use of the death penalty, and the disproportionate use of the death penalty by county need to be addressed. Hopefully by abolishment.

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190 *See id.* at 535-556. For example, in 1994 Justice Robert Berdon of the Connecticut Supreme Court declared the death penalty unconstitutional as applied to the Connecticut Constitution; in 1984 Justice James Dolliver of the Washington Supreme Court declared the death penalty violated the Washington Constitution; in 1981, Chief Justice Ray Brock of the Tennessee Supreme Court argued in a dissent that the death penalty is unconstitutional under the Tennessee Constitution.

191 *Id.* at 558.

192 The most notable Supreme Court Justices who discuss the death penalty are, of course, Breyer, Brennan, and Goldberg; but it's also worth noting that other Supreme Court Justices agree with the use of the death penalty and fall into the category of Justices who will uphold the institutions which keep the death penalty in place. *Public Statements by Justices on the Death Penalty*, DEATH PENALTY INFO. CENTER, https://deathpenaltyinfo.org/facts-and-research/united-states-supreme-court/individual-justices (last visited Aug. 30, 2023).