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Imposing a Cap on Capital Punishment

Adam M. Gershowitz*

Over thirty years ago, in *Furman v. Georgia*, the Supreme Court struck down all existing death-penalty laws because capital punishment in America was being applied in an arbitrary and capricious manner.¹ Although the Supreme Court reinstated capital punishment four years later² and has laid down dozens of procedural rules for the death penalty over the last thirty years,³ most scholars believe that capital punishment is applied just as arbitrarily today as the day *Furman* was decided.⁴ The reason for the continued arbitrariness is that — with a few exceptions⁵ — the Court’s death-penalty decisions have merely tinkered with the trial and appeal process rather than forcing substantive changes in the criminal justice system.⁶ In particular, this

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1. 408 U.S. 238 (1972).

2. See *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976). At the same time that the Court upheld the revised statutes adopted by Georgia, Florida, and Texas, it refused to accept North Carolina’s revised statute, which made the death penalty mandatory for all defendants convicted of first-degree murder. See *Woodson v. North Carolina*, 428 U.S. 280 (1976).

3. See generally RANDALL COYNE & LYN ENTZEROTH, *CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS* (1994).

4. See, e.g., DAVID R. DOW, *EXECUTED ON A TECHNICALITY: LETHAL INJUSTICE ON AMERICA’S DEATH ROW* (2005); BARRY NAKELL & KENNETH A. HARDY, *THE ARBITRARINESS OF THE DEATH PENALTY* (1987).

5. The Court has made a handful of “substantive” death penalty decisions that preclude the execution of certain categories of offenders. See *Roper v. Simmons*, 543 U.S. 551 (2005) (forbidding the execution of juveniles); *Atkins v. Virginia*, 536 U.S. 304 (2002) (striking down the death penalty for the mentally retarded); *Tison v. Arizona*, 481 U.S. 137 (1987) (affirming a death sentence but limiting the death penalty in felony murder cases to cases where the defendant either intended to kill or showed a reckless disregard for human life); *Coker v. Georgia*, 433 U.S. 584 (1977) (precluding the death penalty for defendants accused of raping an adult woman). While these decisions are significant, their impact in the wide landscape of capital punishment is minimal and they are dwarfed by the dozens of other death-penalty decisions that privilege procedure over substance.

6. See Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 436 (1995) (“The Supreme Court’s death penalty law [creates] an impression of enormous regulatory effort while achieving negligible regulatory ef-

tinkering has done very little to change the incentives and charging decisions of prosecutors. Prosecutors have incredibly wide discretion to choose which cases they will pursue,⁷ and their discretion is nearly as broad in determining whether to seek the death penalty.⁸ The procedural rules adopted by the Court in the years since *Furman* have imposed very few limits on prosecutors and therefore have failed to ensure that they pursue the death penalty only for the most heinous crimes and those cases with the most compelling evidence of guilt and moral culpability.⁹

For instance, in Harris County, Texas — which has executed more individuals than every state in the nation except Virginia and Texas¹⁰ — “[t]he district attorney’s office does not buy into the notion that the death penalty should belong only to the [most] heinous cases”¹¹ Although Harris County has a lower murder rate than numerous other jurisdictions in the

fects.”). On the distinction between substance and procedure generally see William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997). As one observer recently remarked, “[t]he distinction between substance and procedure pervades academic thinking all the way down to the foundations.” Donald A. Dripps, *Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies*, 109 PENN. ST. L. REV. 1155, 1155 (2005).

7. See, e.g., Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717 (1996); P.S. Kane, Comment, *Why Have You Singled Me Out? The Use of Prosecutorial Discretion for Selective Prosecution*, 67 TUL. L. REV. 2293 (1993); *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (“The Attorney General and United States Attorneys retain ‘broad discretion’ to enforce the Nation’s criminal laws.”). For a pessimistic assessment on the prospect of reducing prosecutorial discretion, see George C. Thomas, III, *Discretion and Criminal Law: The Good, the Bad, and the Mundane*, 109 PENN. ST. L. REV. 1043, 1043 (2005) (“Discretion in enforcement and prosecution of crime is inevitable; it can be restrained at the margin but it cannot be eliminated.”).

8. See, e.g., Charles S. Lanier & James R. Acker, *Capital Punishment, the Moratorium Movement, and Empirical Questions: Looking Beyond Innocence, Race, and Bad Lawyering in Death Penalty Cases*, 10 PSYCHOL. PUB. POL’Y & L. 577, 598 (2004) (“Prosecutors have unfettered discretion in virtually all jurisdictions to seek or refrain from seeking the death penalty in potentially capital cases.”); Anthony Neddo, Comment, *Prosecutorial Discretion in Charging the Death Penalty: Opening the Doors to Arbitrary Decisionmaking in New York Capital Cases*, 60 ALB. L. REV. 1949 (1997).

9. See *DeGarmo v. Texas*, 474 U.S. 973, 975 (1985) (Brennan, J., dissenting) (“[T]he decisions whether to prosecute, what offense to prosecute, whether to plea bargain or not to negotiate at all are made at the unbridled discretion of individual prosecutors. The prosecutor’s choices are subject to no standards, no supervision, no controls whatever.”).

10. See Eric Berger, *Olympics Bid Confronts Death Penalty; Boosters of 2012 Games in Houston Dismiss Capital Punishment As Issue*, HOUS. CHRON., May 28, 2000, at A37.

11. Mike Tolson & Steve Brewer, *A Deadly Distinction: Harris County Is a Pipeline to Death Row*, HOUS. CHRON., Feb. 4, 2001, at A1.

United States, prosecutors seek the death penalty far more often than any other jurisdiction.¹² In an average year, Harris County prosecutors seek the death penalty in fifteen or more cases,¹³ compared with only a handful of cases in comparably-sized Texas counties.¹⁴ Not surprisingly, the decision by Harris County prosecutors to frequently seek the death penalty leads to arbitrary results both within the county and in comparison to neighboring juris-

12. *See id.*; *see also* Scott Baldauf, *In the Capital of Capital Punishment*, CHRISTIAN SCI. MONITOR, July 29, 1999 (stating that Harris County's murder rate is below the national average for large cities but nevertheless has the largest number of death penalty prosecutions); Jen Joynt & Carrie Shuchart, *Mortal Justice: The Demography of the Death Penalty*, ATLANTIC MONTHLY, Mar. 2003, at 40 (explaining that "Harris County executed at nearly twice the rate of Dallas County, although Dallas's murder rate is higher than Harris's"). Some observers maintain that Harris County takes a backseat to Philadelphia County, where long-time District Attorney Lynne Abraham makes it a practice to seek the death penalty whenever it is available. *See* Tina Rosenberg, *The Deadliest D.A.*, N.Y. TIMES MAG., July 16, 1995, at 22 (stating that Philadelphia prosecutors seek the death penalty more often than any other jurisdiction). For a national comparison of high and low death-sentencing counties within the same state, *see* JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM, PART II: WHY THERE IS SO MUCH ERROR IN CAPITAL CASES, AND WHAT CAN BE DONE ABOUT IT 348 (2002), available at <http://www.thejusticeproject.org/press/reports/a-broken-system-part-ii.html> (follow "Second Half" hyperlink). Of course, some might point to Harris County's lower murder rate and greater imposition of the death penalty to argue that regardless of whether certain defendants are being charged arbitrarily, capital punishment is having its desired deterrent effect. For competing views on the deterrence arguments, *see* the Stanford Law Review's recent symposium, *The Ethics and Empirics of Capital Punishment*, 58 STAN. L. REV. 701 (2005).

13. *See* Norman Lefstein, *Reform of Defense Representation in Capital Cases: The Indiana Experience and Its Implications for the Nation*, 29 IND. L. REV. 495, 530 (1996) ("During 1992-1994, 64 death-penalty jury cases were tried [in Harris County], whereas during the same three-year period only five such cases were tried in Dallas County From 1984 through 1993, there were 174 death-penalty jury trials in Harris County compared to 35 in Dallas County." (footnote omitted)); Database of Cases in Which Harris County Has Sought the Death Penalty Since 1999 [hereinafter Database of Harris County Cases] (provided by Scott Durfee, general counsel of the Harris County District Attorney's Office on Oct. 13, 2005, and on file with the author). The database demonstrates that Harris County sought the death penalty between fourteen and twenty-two cases in every year between 1999 and 2003. Because Harris County seeks the death penalty so often, its success rate appears to be slightly lower than some comparable counties. *See* Tolson & Brewer, *supra* note 11.

14. *See* Tolson & Brewer, *supra* note 11 (explaining that Harris County prosecutors conduct "five or 10 more death trials than are seen in any other Texas jurisdiction" and that from 1995 to 2000 "Harris County sent 55 killers to death row[] [while] Dallas County sent 23"); *see also* Tamar Lewin, *Punishable by Death: Lessons for New York*, N.Y. TIMES, Feb. 23, 1995, at A1 (quoting a Dallas County district attorney as saying "his office seeks the death penalty only in cases where 'we're 99 percent certain that's what we're going to get'" whereas Harris County "seeks death in all cases that meet the legal requirements").

dictions. Some murderers are sentenced to death while nearly identical offenders never face the death penalty in the first place.¹⁵

Arbitrary prosecutorial discretion occurs in other jurisdictions as well. For example, while 12% of all death-eligible homicides are committed in Baltimore County, that jurisdiction accounts for nearly half of the state's capital prosecutions and death sentences.¹⁶ District Attorneys in New York City rarely seek the death penalty, while prosecutors in upstate New York pursue it often.¹⁷ Many defendants are sentenced to death in Memphis, Tennessee, but very few death-row prisoners come from Nashville.¹⁸ And so the story goes throughout the United States.¹⁹

Therefore, while today's death-penalty *trials* are marked by considerably more rules and procedural hurdles than three decades ago, those rules have had little effect on prosecutors' broad discretion to seek the death penalty in the first place. Accordingly, the death penalty continues to be sought arbitrarily, and being sentenced to death is still very much like being struck by lightning.²⁰

This Article argues that because prosecutors have discretion to seek the death penalty in too many cases, they lack the incentive to police themselves and choose carefully. Put simply, because there are few legal constraints —

15. See Tolson & Brewer, *supra* note 11 (describing Harris County's decision to seek the death penalty in a "routine" convenience-store-clerk killing because a videotape made it easier to procure the death penalty, while declining to seek the death penalty for a nearly identical crime that was not captured on videotape). Notably, the comprehensive study of capital error rates by Professor James Liebman and his colleagues found that the more often counties imposed the death penalty the higher the error rate became. See LIEBMAN ET AL., *supra* note 12, at 349 (follow "Second Half" hyperlink).

16. See Raymond Paternoster, et al., *Justice by Geography and Race: The Administration of the Death Penalty in Maryland, 1978-1999*, 4 MARGINS 1, 28 (2004) (discussing a study of death-penalty cases from 1978 to 1999).

17. See *infra* notes 112-115 and accompanying text.

18. See *infra* note 117 and accompanying text.

19. (See, e.g., Karen Hucks, *Death Penalty Cases Weigh Heavily on Pierce County: With More Death Penalty Cases Than Any County in the State, Pierce County Struggles to Staff Them*, NEWS TRIB., Sept. 9, 2005, at A1 (explaining that one county in Washington sought the death penalty in 23 of its 44 aggravated first-degree murder convictions, while other counties sought the death penalty far less often).

20. See *Furman v. Georgia*, 408 U.S. 238, 309 (1972) (Stewart, J., concurring) (The "death sentences are cruel and usual in the same way that being struck by lightning is cruel and unusual."); accord Jonathan DeMay, *A District Attorney's Decision Whether to Seek the Death Penalty: Toward an Improved Process*, 26 FORDHAM URB. L.J. 767, 767-70 (1999) (contrasting the Philadelphia County District Attorney's Office, which sought the death penalty "nearly every time the law allow[ed] it" with the Bronx County District Attorney's Office, which refused to ever seek the death penalty); Tolson & Brewer, *supra* note 11 (explaining that as of 2001 Philadelphia was "responsible for 134 of Pennsylvania's 241 people on death row").

and virtually no political constraints²¹ — on the sheer number of cases in which prosecutors can pursue the death penalty, the Government is not under sufficient pressure to limit its use of capital punishment to only the most heinous cases.²² As a result, two things happen. First, the death penalty is sought and meted out in some cases, which though terrible, are no worse than the thousands of other murder cases in which prosecutors pursue only life imprisonment.²³ Second, because prosecutors file too many capital cases, the criminal justice system lacks the resources to focus sufficient attention on each one. Because defense lawyers, almost all of whom are appointed,²⁴ are

21. Support for the death penalty continues to hover around seventy-five percent. See Jeffrey M. Jones, *America's Views of Death Penalty More Positive This Year*, GALLUP NEWS SERVICE, May 19, 2003. Because capital punishment is so popular in the abstract, prosecutors who aspire to higher office have an incentive to seek the death penalty frequently, in the hopes that the publicity will further their careers. See, e.g., Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 760, 781 (1995) (explaining that prosecutors have an incentive to seek the death penalty rather than life sentences because the added publicity may provide a ticket to a judgeship).

22. There is one pressure that limits death-penalty prosecutions: financial constraints. Because capital prosecutions are very expensive, small jurisdictions often cannot afford to seek the death penalty for heinous crimes that likely would have resulted in capital prosecutions if they were perpetrated in a larger county. For example, while Harris County was responsible for more than 200 death sentences between 1976 and 2000, nearly 140 smaller Texas counties never sentenced a single defendant to death, and another fifty-three Texas counties meted out only one death sentence. See Mike Tolson, *A Deadly Distinction: Between Life and Death: Borderline Capital Cases Raise Questions of Justice*, HOUS. CHRON., Feb 5, 2001, at A1. The distinction between large, financially capable jurisdictions and small, cash-strapped counties further demonstrates the arbitrariness of the death penalty. For an argument that funding discrepancies at the county level renders the death penalty unconstitutional, see Ashley Rupp, Note, *Death Penalty Prosecutorial Charging Decisions and County Budgetary Restrictions: Is the Death Penalty Arbitrarily Applied Based on County Funding?*, 71 FORDHAM L. REV. 2735 (2003).

23. See Stephen B. Bright, *Legalized Lynching: Race, the Death Penalty and the United States Courts*, in THE INTERNATIONAL SOURCEBOOK ON CAPITAL PUNISHMENT 3, 12 (William A. Schabas ed., 1997) [hereinafter Bright, *Legalized Lynching*] (“[M]any cases in which prosecutors decide to seek the death penalty are not distinguishable from hundreds of other murder cases in which the death penalty is not sought.”). There are approximately 16,000 murders committed in the United States each year. See Michael J. Sniffen, *FBI: Murder Rate Hits 40-Year Low*, ASSOC. PRESS, Oct. 17, 2005. Prosecutors seek the death penalty in only a small fraction of those cases.

24. See CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, DEFENSE COUNSEL IN CRIMINAL CASES (2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf> (stating that 80% of felony defendants are indigent); Pamela S. Karlan, *Fee Shifting in Criminal Cases*, 71 CHI.-KENT L. REV. 583, 583 (1995) (“Estimates of the percentage of criminal defendants repre-

spread too thin, they are often unable to follow all of the legal and factual leads that might convince a jury to reject the death penalty.

While it is impossible to completely eliminate arbitrariness from capital punishment, the Supreme Court is in a position to reduce the problem by increasing prosecutors' incentive to choose their death-penalty cases much more carefully *ex ante*, before anyone sets foot in the courtroom.²⁵ The best way to create such an incentive structure is to put a strict cap on the number of death-penalty cases that individual jurisdictions can pursue each year. With the option to seek the death penalty in a relatively small number of cases each year, prosecutors will be forced to choose carefully which cases are death-worthy, and they will have greater incentive to ensure that those cases are tried fairly, lest their carefully-chosen death-penalty convictions be overturned.²⁶

Selecting an appropriate cap for the number of capital prosecutions is a difficult challenge and, ironically, involves a degree of arbitrariness. Nevertheless, there is good reason to set an annual cap on the number of death-penalty prosecutions per jurisdiction by looking to the average number of death-penalty prosecutions nationwide. As explained below, the death penalty is sought in approximately 2% of murder cases²⁷ each year.²⁸ Accordingly,

mented by appointed counsel . . . generally hover around seventy-five to eighty percent.”).

25. *Accord* Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 359-60 (explaining that to eliminate arbitrariness there must be “focus on points in the system of death penalty decisionmaking other than the moment of decision by the sentencer”).

26. Under the present system, a large percentage of death sentences are overturned. *See* LIEBMAN ET AL., *supra* note 12, at i (follow “First Half” hyperlink) (finding that of the more than 4,500 death-sentence appeals decided between 1973 and 1995, federal or state courts reversed the convictions or death sentences 68% of the time).

27. Nearly all defendants sentenced to death are convicted of murder; however, certain jurisdictions authorize the death penalty for other offenses as well. *See, e.g.*, GA. CODE ANN. § 16-5-40(b) (2003) (authorizing the death penalty for kidnapping with bodily injury); LA. REV. STAT. ANN. § 14:42(D)(2)(a) (1997 & Supp. 2007) (rape of a child under 13 years of age); 18 U.S.C. § 794 (2000) (espionage); 18 U.S.C. § 2381 (2000) (treason).

28. Because there are hundreds of counties in the 38 states that authorize the death penalty, and adequate records are not centralized, it is impossible to accurately state how many death sentences are sought per year. *See* David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts*, 15 STETSON L. REV. 133, 135 (1986) [hereinafter Baldus et al., *Arbitrariness and Discrimination*] (explaining that “no authoritative statistics exist”). Nevertheless, the Bureau of Justice Statistics does record the number of individuals sentenced to death each year, and we also know that prosecutors who seek the death penalty are usually successful. Over the last five years, prosecutors nationwide have procured, on average, about 160 death sentences per year. *See* TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS BULLETIN: CAPITAL PUNISHMENT, 2005, at 14 (Dec. 2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp05.pdf>. Assuming that

the number of death-penalty prosecutions should be capped at that national average: two capital prosecutions for every 100 murders. For smaller jurisdictions that have far fewer murders each year, the limit should be one capital prosecution per year, thus ensuring that every jurisdiction is permitted to seek the death penalty if a heinous crime arises.²⁹ Under this proposal, counties are free to pursue the death penalty in fewer cases, but under no circumstances can they pursue it more often. As a result of the cap, there will be fewer death-penalty prosecutions, the cases will be selected much more carefully, there should be far fewer reversals on appeal,³⁰ and the likelihood of arbitrary results should be reduced.³¹

A judicial cap on death-penalty prosecutions is not without objection. At first blush, the idea of a judicial cap seems to smack of judicial activism. Prosecutors long have had broad charging discretion, and it is ordinarily the prosecutor, not the judiciary, that decides whether to seek the death penalty. However, the prosecutor's freedom to charge is not unlimited; the Supreme Court has already imposed some substantive limits on prosecutors' ability to seek the death penalty. The Court has long precluded prosecutors from seeking the death penalty for certain rapists³² and felony murders³³ and, more

prosecutors succeeded in procuring the death penalty in approximately 50% of cases, that would mean there are somewhere in the neighborhood of 320 capital prosecutions per year, which is roughly 2% of the roughly 16,000 murders in the United States per year. See Sniffen, *supra* note 23. Compare John Blume et al., *Explaining Death Row's Population and Racial Composition*, 1 J. EMPIRICAL LEGAL STUD. 165, 172 (2004) (conducting state-by-state analysis of the number of death-row inmates compared to the number of known murders and finding a median of 2%). Of course, not all of the approximately 16,000 murders committed annually are "death-eligible." One noted scholar has estimated that less than 4,000 murders each year are death eligible. See Baldus et al., *Arbitrariness and Discrimination*, *supra*, at 154. For ease of exposition though, I begin from the proposition that the death penalty is sought in approximately 2% of all murders in a given year.

29. See *supra* text accompanying note 22.

30. See LIEBMAN ET AL., *supra* note 12, at ii (follow "First Half" hyperlink) (explaining the "main finding" of a comprehensive study of thousands of death sentences that "[t]he higher the rate at which a state or county imposes death verdicts, the greater the probability that each death verdict will have to be reversed because of serious error").

31. Recall, for example, that Harris County seeks the death penalty at least 15 times per year. See *supra* note 13 and accompanying text. In an ordinary year, there are between 300 and 400 murders in Harris County. See *infra* note 206 and accompanying text. Accordingly, under a cap permitting 2 capital prosecutions per 100 murders, Harris County would be limited to between 6 and 8 capital prosecutions per year. Thus, Harris County would be required to reduce its capital prosecutions by more than half to bring it in line with the nationwide average. Prosecutors would then be under pressure to more carefully select the worst offenders before filing any capital charges.

32. See *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (forbidding the death penalty for the rape of an adult woman).

recently, for the mentally retarded³⁴ and those who were juveniles at the time they committed their crimes.³⁵ These substantive limits on prosecutors can be seen as either judicial activism, or as vigorous interpretation of the Eighth Amendment's prohibition against cruel and unusual punishment.³⁶ Regardless of which interpretation one favors, it is fair to ask why the Supreme Court can interpret the Eighth Amendment to prohibit prosecutors from seeking the death penalty for certain classes of offenders, but not to limit the number of death-penalty cases prosecutors can file each year. As I argue in greater detail below, a cap on death-penalty prosecutions is a prophylactic rule that is no more activist than the Court's current jurisprudence of excluding certain categories of offenders from ever facing the death penalty. And unlike the Court's current categorical jurisprudence — which affects only a fraction of capital defendants — imposing a cap on death-penalty prosecutions is likely to have a substantial effect on reducing the arbitrariness of capital punishment.

This article begins by reviewing the Supreme Court's longstanding concern that the death penalty not be applied arbitrarily and by considering the procedural rules and categorical exclusions of certain types of offenders the Court has adopted. Part II then argues that the Court's efforts have failed and that the death penalty is applied in nearly as arbitrary a fashion today as it was in 1972 when the Supreme Court struck down all existing death-penalty statutes. In particular, Part II demonstrates that prosecutors in certain jurisdictions initiate a far greater number of death-penalty prosecutions than comparably sized counties. Part III then explains that the Court's mostly procedural and sporadically substantive capital-punishment jurisprudence has failed to eliminate arbitrariness because it has mostly tinkered with the trial process, rather than focusing on which cases are input into the system. Part IV argues that imposing a cap on the number of death-penalty prosecutions will create an incentive for prosecutors to choose their death-penalty cases far more carefully and will reduce the arbitrariness of the death penalty. Finally, Part V responds to the concern that a cap on death-penalty prosecutions amounts to impermissible judicial activism. It argues that a cap, like many other facets of criminal procedure, is a simple prophylactic rule that is designed to achieve a

33. See *Tison v. Arizona*, 481 U.S. 137 (1987); *Enmund v. Florida*, 458 U.S. 782 (1982).

34. See *Atkins v. Virginia*, 536 U.S. 304 (2002).

35. See *Roper v. Simmons*, 543 U.S. 551 (2005).

36. For a compelling argument that the Court's prohibition on executing juveniles is simply a "naked political judgment" see Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 90, 56 (2005) [hereinafter Posner, *A Political Court*] ("Judicial modesty is not the order of the day in the Supreme Court."). For an argument presaging and supporting the validity of the *Atkins* and *Roper* decisions, see Victor L. Streib, *Adolescence, Mental Retardation, and the Death Penalty: The Siren Call of Atkins v. Virginia*, 33 N.M. L. REV. 183, 205 (2003) ("The Court's method for assessing the evolving standards of decency for Eighth Amendment purposes is now part of the bedrock of modern death penalty law.").

valid constitutional goal of reduced arbitrariness. Moreover, Part V demonstrates that a cap on death-penalty prosecutions is actually less activist than the Court's existing death-penalty jurisprudence.

I. THE COURT'S CONCERN ABOUT ARBITRARINESS

A. *Procedural Efforts to Curb Arbitrariness*

In its 1972 decision in *Furman v. Georgia*,³⁷ the Court struck down all existing death-penalty statutes.³⁸ The Court's decision filled more than 230 pages of the official reporter and the justices penned ten separate opinions — one for each justice plus a per curiam opinion.³⁹ For the five justices in the majority, there was one overriding theme: arbitrariness. As Professor David Dow has succinctly stated, the Court concluded that “[t]he death penalty was arbitrary — and hence unconstitutional — because it was not being reserved for the most heinous crimes or the most despicable criminals.”⁴⁰

Following *Furman*, the states re-wrote their death-penalty laws to provide more guidance for juries in deciding whether to sentence defendants to life or death.⁴¹ Under some of the revised statutes, death-penalty trials were bifurcated into a guilt phase and a sentencing phase. After finding the defendant guilty of a death-eligible offense, juries were required to find at least one aggravating circumstance — something that made the crime particularly heinous — and to determine whether the aggravating circumstances were outweighed by any mitigating circumstances.⁴² By contrast, a handful of states revised their death-penalty statutes to provide for capital punishment to be mandatory for all first-degree murder convictions.⁴³ These states reasoned

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

38. The *Furman* decision relied on the Eighth Amendment's cruel and unusual punishment clause. *Id.* at 239-40. A year prior to *Furman*, the Court held that the death penalty was not so arbitrary as to violate due process. *McGautha v. California*, 402 U.S. 183 (1971).

39. See Weisberg, *supra* note 25, at 315 (describing *Furman* as “not so much a case as a badly orchestrated opera, with nine characters taking turns to offer their own arias”).

40. See DOW, *supra* note 4, at xvi. For an excellent discussion of the socio-political context of the *Furman* decision as well as the thin precedential basis supporting it, see Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. (forthcoming 2007) (on file with the author).

41. See NAKELL & HARDY, *supra* note 4, at 9.

42. See *id.*

43. See *Woodson v. North Carolina*, 428 U.S. 280 (1976) (striking down North Carolina's mandatory death penalty); *Roberts v. Louisiana*, 428 U.S. 325 (1976) (striking down Louisiana's mandatory death penalty); Paternoster et al., *supra* note 16, at 6 n.22 (discussing Maryland's mandatory death penalty); Michael Mello, *The Jurisdiction To Do Justice: Florida's Jury Override and the State Constitution*, 18

that arbitrariness could be eliminated by requiring the death penalty to be imposed for *all* first-degree murders, rather than a smaller number of crimes that appeared particularly heinous.⁴⁴ The goal of all of these statutes was to impose the death penalty in a less arbitrary fashion.

By 1976, thirty-five states had re-written their death-penalty laws, and the Court granted certiorari to five death-penalty cases to reconsider whether the arbitrariness problem had been remedied.⁴⁵ In the lead decision — *Gregg v. Georgia* — the Court reiterated that states cannot use “sentencing procedures that create[] a substantial risk that [the death penalty] would be inflicted in an arbitrary and capricious manner;”⁴⁶ however, the Court made clear that the death penalty is not forbidden by the Constitution in all circumstances.⁴⁷ The Court concluded that arbitrariness could be avoided if states used a “carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance,” particularly a system “that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.”⁴⁸ A majority of the justices therefore believed that arbitrariness could be limited by adopting trial and appellate procedures that ensured that the final decisionmakers would have adequate information.

Notably, the Court rejected the suggestion that placing too much discretion in the hands of prosecutors fueled the arbitrariness problem.⁴⁹ In response to the complaint 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,” the Court stressed that the system was aided when prosecutors have the ability to “remove a defendant from consideration as a candidate for the death penalty.”⁵⁰ Approving of prosecutorial discretion, the

FLA. ST. U. L. REV. 924, 939 n.84 (1991) (discussing California’s mandatory death penalty).

44. See, e.g., Vivian Berger, “Black Box Decisions” on Life or Death – If They’re Arbitrary, Don’t Blame the Jury: A Reply to Judge Patrick Higginbotham, 41 CASE W. RES. L. REV. 1067 (1991) (explaining that mandatory death-penalty statutes seemed like the “perfect response” to the Court’s concern about arbitrariness).

45. See *Gregg v. Georgia*, 428 U.S. 153, 179-80 (1976); *Proffitt v. Florida*, 428 U.S. 242, 247 (1976); *Jurek v. Texas*, 428 U.S. 262, 268 (1976); *Woodson*, 428 U.S. at 284-85; *Roberts*, 428 U.S. at 328.

46. 428 U.S. at 188.

47. Justices Brennan and Marshall continued to take the position that the death penalty was unconstitutional in all situations. See *Furman v. Georgia*, 408 U.S. 238, 358-59 (Marshall, J., concurring); *Gregg*, 428 U.S. at 230-31 (Brennan, J., dissenting); see also MICHAEL MELLO, AGAINST THE DEATH PENALTY: THE RELENTLESS DISSENTS OF JUSTICES BRENNAN AND MARSHALL (1996).

48. *Gregg*, 428 U.S. at 195.

49. See *id.* at 199.

50. *Id.*

Court explained that “[n]othing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution.”⁵¹ In the end, a majority of the justices concluded that arbitrariness could be curtailed by instituting particular trial and appellate procedures,⁵² while at the same time leaving individualized decision-making intact.⁵³

Given its focus on individualized decisionmaking, the court took a dim view of the mandatory death-penalty statutes adopted by a small minority of states. Although the surest way to eliminate arbitrary imposition of capital punishment would be to give every first-degree murderer the death penalty, a plurality of the Court explained that mandatory death-penalty statutes simply “papered over the problem of unguided and unchecked jury discretion.”⁵⁴ While mandatory death-penalty statutes might send more defendants to death row, the Court did not desire that result. Rather, the goal was to replace “arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death.”⁵⁵

51. *Id.*

52. See Baldus et al., *Arbitrariness and Discrimination*, *supra* note 28, at 145 (explaining that “the Supreme Court sustained in *Gregg* the constitutionality of Georgia’s post-*Furman* capital sentencing procedure because it seemed capable of producing consistent, evenhanded sentencing despite the broad discretion exercised by prosecutors and juries”).

53. With respect to the Georgia statute at issue, the Court determined that the jury’s discretion was sufficiently guided because the guilt and sentencing phases were bifurcated, the aggravating and mitigating factors were explicitly listed, and there was automatic appellate review of all capital sentences. See *Gregg*, 428 U.S. at 195, 200-07.

54. *Woodson v. North Carolina*, 428 U.S. 280, 302 (1976). According to the plurality, the mandatory statutes provided “no standards to guide the jury in its inevitable exercise of [their] power” and expressed concern that such statutes might actually cause jurors to acquit guilty defendants because they did not want to mete out a mandatory death sentence. *Id.* at 302-03.

55. *Id.* The principles announced in *Gregg* and *Woodson* have long appeared to be mutually inconsistent. On the one hand, the Court sought to eliminate the arbitrariness of the death penalty by instituting procedures that operated to narrow the jury’s unbridled discretion. On the other hand, the Court not only refused to permit mandatory imposition of the death penalty, but it also openly called for “individualized decisionmaking” in capital cases. In other words, the Court demanded that the individual facts of each case be carefully considered, but at the same time demanded that the results of the cases not be arbitrary. See Steven G. Gey, *Justice Scalia’s Death Penalty*, 20 FLA. ST. U. L. REV. 67, 81, 86 (1992) (explaining that the Court has “vacillated between two inconsistent objectives” and that “if the Court was right in *Furman* about the evil of arbitrariness, then the plurality was wrong in *Woodson* about the need for subjectivity and discretion”); Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147 (1991) (discussing the tension between “individualized consideration” and “guided discretion”); see also Mary Sigler, *Contradiction, Coherence, and Guided Discretion in the Supreme Court’s Capital Sentencing Jurisprudence*, 40 AM.

The *Gregg* decision and its companion cases set the Court's path for the next three decades by focusing on trial procedures that were designed to eliminate arbitrariness while at the same time maintaining that each case should be considered in an individualized manner. For instance, in *Lockett v. Ohio*, the Court was confronted with an Ohio statute that listed only a handful of mitigating factors for the jury to consider in deciding between life or death.⁵⁶ Believing that arbitrariness should be eliminated through even-handed trial procedures, the Court ruled that juries must be permitted to consider all mitigating circumstances, whether listed or not.⁵⁷

Following the *Lockett* decision, the Court continued to focus on procedural regulation of capital punishment by determining what juries should and should not be told. For instance, the Court concluded that when the only possible penalties are death or life imprisonment without possibility of parole, the defendant must be permitted to tell the jury that he is ineligible for parole.⁵⁸ Also in an effort to prevent arbitrary results, the Court has forbidden prosecutors from leading jurors to believe that their decision will be reviewed by an appellate court and therefore is not a final determination of whether a defendant will receive the death penalty.⁵⁹

The Court also has attempted to eliminate arbitrariness by focusing on the aggravating circumstances that justify a death sentence. Recently, the Court has demanded that juries, not judges, determine whether aggravating circumstances exist.⁶⁰ On multiple occasions the Court has struck down death sentences in which those aggravating circumstances were not clearly defined.⁶¹ And in order to give the jury a balanced assessment of the aggravating circumstances, the Court has required that defendants be permitted to cross-examine all witnesses who present any testimony about aggravating factors.⁶²

CRIM. L. REV. 1151 (2003) (attempting to reconcile the inconsistency with punishment theory).

56. 438 U.S. 586, 593-94 (1978) *Lockett* wanted the jury to consider non-listed mitigating factors such as character, lack of prior record, and age.

57. *See id.* at 604-05 (holding that the Eighth Amendment requires "that the sentencer . . . not be precluded from considering, as a *mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death" (footnotes omitted)). The *Lockett* principle was repeatedly confirmed in subsequent cases. *See, e.g.,* *Mills v. Maryland*, 486 U.S. 367 (1988); *Hitchcock v. Dugger*, 481 U.S. 393 (1987); *Skipper v. South Carolina*, 476 U.S. 1 (1986); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Green v. Georgia*, 442 U.S. 95 (1979); *Bell v. Ohio*, 438 U.S. 637 (1978).

58. *See Shafer v. South Carolina*, 532 U.S. 36 (2001); *Simmons v. South Carolina*, 512 U.S. 154 (1994).

59. *See Caldwell v. Mississippi*, 472 U.S. 320 (1985).

60. *See Ring v. Arizona*, 536 U.S. 584 (2002).

61. *See Maynard v. Cartwright*, 486 U.S. 356 (1988); *Godfrey v. Georgia*, 446 U.S. 420 (1980).

62. *See Gardner v. Florida*, 430 U.S. 349 (1977).

In sum, the goal of the Court's death-penalty jurisprudence over the last three decades has been to minimize arbitrariness by instituting procedural guarantees at the trial stage of criminal prosecutions.⁶³ In the decisions discussed above and dozens of others, the Court has erected a complicated maze of procedural safeguards.⁶⁴

B. The Substantive Efforts to Curb Arbitrariness

Although the overwhelming majority of the Court's capital punishment jurisprudence has been "procedural,"⁶⁵ on occasion the Court has placed substantive limits on the use of the death penalty.⁶⁶ As described below, these

63. Although complicated and seemingly protective, the Court's procedural jurisprudence has not always been favorable to defendants. In a series of decisions aimed at empanelling an impartial jury, the Court made it easier for prosecutors to remove jurors with some opposition to the death penalty, see *Wainwright v. Witt*, 469 U.S. 412 (1985), and it has rejected social science evidence indicating that death-qualified juries are more prone toward conviction. See *Lockhart v. McCree*, 476 U.S. 162 (1986). And while the Court has guaranteed the right to effective assistance of counsel, see *Strickland v. Washington*, 466 U.S. 668 (1984), it has upheld numerous death sentences in which defense lawyers did very little investigation or trial preparation under the theory that lawyers' strategic decisions should not be disturbed. See, e.g., *Lockhart v. Fretwell*, 506 U.S. 364 (1993); *Burger v. Kemp*, 483 U.S. 776 (1987); *Darden v. Wainwright*, 477 U.S. 168 (1986). In recent years, however the Court has signaled that it may more rigorously enforce the guarantee of effective counsel. See *Rompilla v. Beard*, 545 U.S. 374 (2005) (finding ineffective assistance of counsel for failing to review obviously relevant information regarding aggravating circumstances); *Wiggins v. Smith*, 539 U.S. 510 (2003) (finding ineffective assistance of counsel where counsel conducted an inadequate investigation and failed to introduce powerful mitigating evidence); *Williams v. Taylor*, 529 U.S. 362 (2000) (same).

64. The preceding analysis focused on only a few of the dozens, if not hundreds, of procedural decisions laid down by the Court in the thirty years since *Gregg v. Georgia*. For a more thorough discussion of these decisions, see Kenneth C. Haas, *The Rise and Fall of the American Death Penalty in the Twenty-First Century*, in *VISIONS FOR THE FUTURE: CRIME AND JUSTICE IN THE TWENTY-FIRST CENTURY* (Roslyn Muraskin & Albert Roberts eds., 2004); see also Steiker & Steiker, *supra* note 6, at 361-403 (discussing the law through 1995).

65. See Steiker & Steiker, *supra* note 6, at 426 (describing the Court's jurisprudence as "an enormous regulatory effort").

66. One could argue that the Court's procedural and substantive jurisprudence can be unified under the theme that the death penalty would be less arbitrary if it were used less often. After all, the Court has rejected mandatory death-penalty statutes, it has specifically remarked in *Gregg v. Georgia* that the criminal justice system is aided when prosecutors have the ability to "remove a defendant from consideration as a candidate for the death penalty." *Gregg v. Georgia*, 428 U.S. 153, 199 (1976). It has also adopted categorical exclusions of certain offenders that necessarily reduce the number of defendants eligible for the death penalty. Yet, the Court has never explicitly made the point that less use of the death penalty is preferable.

limits have fallen under the heading of “proportionality,” with the Court holding that the death penalty is a disproportionate punishment for certain crimes or certain classes of offenders.⁶⁷

The first substantive restriction on the death penalty came in *Coker v. Georgia*, just one year after the reinstatement of capital punishment.⁶⁸ Unlike most states, Georgia law permitted jurors to sentence rapists to death.⁶⁹ Reviewing the Twentieth Century history, the Court explained that although 18 states at one time permitted the death penalty for rape, the trend was toward abolishing capital punishment for rape.⁷⁰ By the time *Coker*’s case came before the Court, only three states permitted such executions.⁷¹ The Court also noted that in 9 out of 10 rape cases in Georgia courts, the jury refused to return a death sentence.⁷² The Supreme Court therefore overturned *Coker*’s death sentence, holding that the death penalty is “a disproportionate penalty for the crime of raping an adult woman.”⁷³

Shortly after *Coker*, the Court considered whether capital punishment was permissible for felony murderers who did not pull the trigger themselves. In *Enmund v. Florida*, the defendant was sentenced to death even though he was only acting as the getaway driver for a robbery and never drew a weapon.⁷⁴ The Supreme Court reversed *Enmund*’s death sentence on the theory that it would be disproportionate to execute someone who neither killed, attempted to kill, nor intended to kill.⁷⁵ A few years later, however, the Court backtracked from the *Enmund* decision and permitted the death penalty for a narrow class of felony murderers. In *Tison v. Arizona*, the defendants did not pull the trigger, but they were significantly involved in the misconduct that led to the murders and did nothing to interfere with the killings nor to disas-

67. See, e.g., Daniel Suleiman, Note, *The Capital Punishment Exception: A Case for Constitutionalizing the Substantive Criminal Law*, 104 COLUM. L. REV. 426, 439-445 (2004). In rendering these substantive proportionality decisions, the Court has never explicitly stated that its goal was to curb arbitrary imposition of the death penalty, but a concern about arbitrariness subtly underlies these cases.

68. 433 U.S. 584 (1977).

69. See *id.* at 586 (citing GA. CODE ANN. § 26-2001 (1972)).

70. *Id.* at 593.

71. *Id.* at 594.

72. *Id.* at 597.

73. *Id.* The Court stressed the fact that *Coker* was convicted of raping an *adult woman*, and it left open the question of whether the death penalty would be a permissible punishment for the rape of a child. The State of Louisiana has made the crime of raping a child punishable by death, and the Louisiana Supreme Court has upheld that statute against an excessiveness challenge. See *State v. Wilson* 685 So. 2d 1063 (La. 1996). For a thoughtful analysis of the questions raised by the Louisiana statute, see Elizabeth Gray, Comment, *Death Penalty and Child Rape: An Eighth Amendment Analysis*, 42 ST. LOUIS U. L.J. 1443 (1998).

74. 458 U.S. 782 (1982).

75. *Id.* at 801.

sociate themselves from the killers afterward.⁷⁶ The Court concluded that it was not disproportionate to execute felony murderers who neither killed, attempted to kill, or intended to kill if they knowingly engaged in unlawful activity and showed a “reckless indifference to the value of human life.”⁷⁷

The principle underlying *Coker* and *Enmund* (and implicit in *Tison*) is one of comparative desert. Certain crimes are simply not deserving of the ultimate punishment.⁷⁸ Implicit in this conclusion is the idea that it would be arbitrary to execute those who are less culpable.

More recently, the Court has turned its attention to whether the mentally retarded are deserving of death. In *Atkins v. Virginia*, the Court reversed a thirteen-year-old precedent and held that there was a sufficient national consensus that the Eighth Amendment should forbid the execution of mentally retarded defendants.⁷⁹ Relying on public opinion polls, the views of a diverse group of religious organizations, a trend among state legislatures to outlaw the execution for the mentally retarded, and, most controversially, international opposition to executing the mentally retarded, the Court concluded that neither retribution nor deterrence would be accomplished by executing the mentally retarded.⁸⁰

In 2005, the Court extended the *Atkins* reasoning to juvenile executions. In *Roper v. Simmons*, the Court once again reversed a fairly recent precedent and concluded that a national consensus forbids states from executing individuals that were younger than 18 years-of-age when they perpetrated their crimes.⁸¹ As in *Atkins*, the Court relied on the legislative trend away from authorizing and utilizing the death penalty, the lack of culpability of juveniles as a class, and international opinion.⁸²

Although commonly seen as just proportionality decisions, the Court’s substantive death-penalty jurisprudence with respect to rape, felony murder, mental retardation, and juvenile executions can also be viewed as an effort to reduce arbitrariness. By foreclosing the execution of certain categories of

76. See *Tison v. Arizona*, 481 U.S. 137, 139-44 (1987).

77. *Id.* at 157. For a discussion of the *Tison* case, see William K. Bass, Note, *Tison v. Arizona: A General Intent for Imposing Capital Punishment Upon an Accomplice Felony Murder*, 20 U. TOL. L. REV. 255 (1988).

78. See Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 722-23 (2005) (explaining that the decisions are driven by the argument that “X is bad, but not as bad as Y”).

79. 536 U.S. 304 (2002) (reversing *Penry v. Lynaugh*, 492 U.S. 302 (1989)).

80. *Id.* at 315-17. For one of the many criticisms of the *Atkins* decision, see Richard Posner, *No Thanks, We Already Have Our Own Laws*, LEGAL AFFAIRS, July-Aug. 2004, at 40-42 [hereinafter Posner, *No Thanks*].

81. 543 U.S. 551 (2005) (reversing *Stanford v. Kentucky*, 492 U.S. 361 (1989)).

82. *Id.* at 564-78. The *Roper* decision has suffered the same blistering criticism as *Atkins*. See, e.g., Posner, *A Political Court*, *supra* note 36.

offenders believed to be less culpable,⁸³ the most logical, though certainly not the only, result is a less arbitrary death penalty.⁸⁴

II. CAPITAL PUNISHMENT IS STILL SOUGHT AND IMPOSED ARBITRARILY

Despite the Court's considerable efforts, there is little dispute that the states impose the death penalty in just as arbitrary a fashion today as the day *Furman v. Georgia* was decided. Numerous scholars, notably David Baldus and his colleagues, have documented the widespread racial discrimination in capital sentencing.⁸⁵ Other observers have pointed to the differences between the treatment of male and female offenders⁸⁶ and the class differences be-

83. See *Roper*, 543 U.S. at 570 ("Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment."); *Atkins*, 536 U.S. at 306 ("Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, [the mentally retarded] do not act with the level of moral culpability that characterizes the most serious adult criminal conduct.").

84. In *Atkins v. Virginia*, the Court suggested that categorically excluding the mentally retarded from the death penalty might lead to less arbitrary results by preventing innocent or at least less culpable defendants from being sentenced to death. The Court explained that

[t]he reduced capacity of mentally retarded offenders provides a second justification for a categorical rule making such offenders ineligible for the death penalty. The risk 'that the death penalty will be imposed in spite of factors which may call for a less severe penalty'. . . . Mentally retarded defendants in the aggregate face a special risk of wrongful execution.

Atkins, 536 U.S. at 320-21 (citations omitted).

85. See DAVID BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY (1990) (describing the results of a long-term study showing that a defendant's odds of being sentenced to death were 4.3 times higher if the victim was white); David Baldus, et al., *In the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings From Philadelphia*, 83 CORNELL L. REV. 1638 (1998) (explaining that in 90% of the states where there have been reviews of race and the death penalty, there was a pattern of either race-of-victim or race-of-defendant discrimination or both); Jon Sorenson & Donald J. Wallace, *Prosecutorial Discretion in Seeking Death: An Analysis of Racial Disparity in the Pretrial State of Case Processing in a Midwestern County*, 16 JUST. Q. 559, 574 (1999) (reporting research result that prosecutors were two-and-a-half times more likely to seek the death penalty if a black defendant killed a white victim); *McKleskey v. Kemp*, 481 U.S. 279 (1987) (rejecting an equal protection claim based on the data in the Baldus study).

86. See, e.g., Victor Streib, *Engendering the Death Penalty: Countering Sex Bias in a Masculine Sanctuary*, 63 OHIO ST. L.J. 433, 434 (2002) ("Female offenders are unlikely to be arrested for murder, only very rarely sentenced to death, and almost never executed." (footnote omitted)); Elizabeth Rappaport, *Equality of the Damned: The Execution of Women on the Cusp of the 21st Century*, 26 OHIO N.U. L. REV. 581,

tween the rich and poor.⁸⁷ Additionally, the death penalty is imposed arbitrarily based on the status of the victim,⁸⁸ and imposition is sometimes based on whether the victim's family wants the prosecutor to seek the death penalty in the first place.⁸⁹ While all of these issues are worthy of attention, this Part focuses on the equally significant problem of geographic arbitrariness.

It is well recognized that different regions of the United States utilize capital punishment to vastly different degrees. The South seeks, imposes, and carries out the death penalty far more often than the other regions of the country combined.⁹⁰ What receives less recognition, however, is that capital punishment is used in widely different amounts not just between regions, but also *within* regions. Despite the South's proclivity to use the death penalty, certain southern states seek it far less often than others. And while the Northeast as a whole does not often use capital punishment, the State of Pennsylvania has hundreds of prisoners on death row. Taking it one level further, there are large disparities within the states themselves. For instance, one county in Pennsylvania seeks the death penalty frequently while many Pennsylvania counties rarely, if ever, pursue capital punishment.

This section begins in part II.A with a brief overview of the broad regional variations in the use of capital punishment in the United States. Part II.B then offers a short description of significant differences between states in the same region. Part II.C then reviews variations among counties within a single state.

582-83 (2000) (explaining that "[a]lthough women commit one in eight homicides," they seldom commit death-eligible homicides and therefore are rarely sentenced to death).

87. See Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994) [hereinafter Bright, *Counsel for the Poor*] (explaining that poor defendants receive underfunded and often unqualified appointed counsel and are therefore more likely to be sentenced to death).

88. See Charles F. Baird & Elizabeth E. McGinn, *Re-Victimizing the Victims: How Prosecutorial and Judicial Discretion Are Being Exercised to Silence Victims Who Oppose Capital Punishment*, 15 STAN L. & POL'Y L. REV. 477 (2004) (discussing victim impact statements); Wayne A. Logan, *Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials*, 41 ARIZ. L. REV. 143 (1999); Christine Clarridge, *Judge Denies Another Delay in Trial Over Officer's Death*, SEATTLE TIMES, Feb. 21, 2004, at B4 (describing lawyer's argument that it was arbitrary for King County, Washington to seek the death penalty for man accused of killing a police officer while not seeking the death penalty against a man who pleaded guilty to killing 48 women).

89. See, e.g., Rex Bowman, *Jury in Killing Case Recommends Life*, RICH. TIMES DISPATCH, July 30, 2005, at B3 (explaining that in a case where a husband hired a teenager to murder his wife, the prosecutor did not seek the death penalty because the wife's family thought "life in prison would be sufficient punishment").

90. See THOMAS P. BONCZAR & TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS BULLETIN: CAPITAL PUNISHMENT, 2004, at 5 (Nov. 2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp04.pdf>.

A. Wide Regional Variations

Although thirty-eight states authorize the death penalty, a far smaller number regularly sentence defendants to death, and an even smaller number carry out executions with any regularity.⁹¹

From 1973 through 2004, 436 defendants were sentenced to death in the Northeast region of the United States, and those states carried out three executions.⁹² By contrast, the Southern region of the United States — referred to as the Death Belt by some scholars⁹³ — accounted for 4,385 death sentences and 774 executions.⁹⁴ The Midwest and Western regions of the United States fell in the middle, with the former accounting for 990 death sentences and 102 executions,⁹⁵ while the latter had 1,457 death sentences and sixty-one executions.⁹⁶ As Tables 1 and 2 below indicate, the Southern region was responsible for approximately 60% of the nation's death sentences and more than 80% of its executions. No other region even comes close.

91. The execution and death sentence data discussed in this section is drawn from BONCZAR & SNELL, *supra* note 90, and focuses on states' use of the death penalty, as opposed to the federal death penalty. Between 1976 and 2004, federal juries sentenced 43 individuals to death and the federal government executed three people. *See id.* at 16.

92. *See id.* The Northeast includes Connecticut, New Jersey, New York, and Pennsylvania.

93. *See, e.g.,* Hugo Adam Bedau, *Background and Developments, in* THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES 21-23 (Hugo Adam Bedau ed., 1997) (explaining the "Death Belt").

94. *See* BONCZAR & SNELL, *supra* note 90, at 16. The South includes Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Texas, and Virginia.

95. *See id.* The Midwest includes Illinois, Indiana, Kansas, Missouri, Nebraska, Ohio, and South Dakota.

96. *See id.* The West includes Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming.

Table 1:

Death Sentences By Region: 1973-2004

<u>Region</u>	<u>Death Sentences</u>	<u>Percentage of Total Death Sentences</u>
Northeast	436	6.0
Midwest	990	13.6
West	1,457	20.1
South	4,385	60.3

Table 2:

Executions By Region: 1973-2004

<u>Region</u>	<u>Executions</u>	<u>Percentage of Total Executions</u>
Northeast	3	0.3
Midwest	102	10.8
West	61	6.5
South	774	82.4

B. Variations Within Regions

While it is unmistakably clear that the Southern region of the United States seeks the death penalty much more often than the Northern states, variations between regions reflects only a part of the picture. Equally important are the wide variations within the regions themselves.

As Table 3 demonstrates, most of the Northeastern death-penalty states rarely seek or impose capital punishment. Yet, Pennsylvania is a stark outlier. Although Pennsylvania's population is only 50% greater than the neighboring state of New Jersey, the former handed down seven times as many death sentences.

Table 3:

Death Sentences, Executions, and Population in the Northeast: 1973-2004

<u>State</u>	<u>Death Sentences</u>	<u>Executions</u>	<u>Population</u> ⁹⁷
Connecticut	9	0	3,405,565
New Hampshire	0	0	1,235,786
New Jersey	52	0	8,414,350
New York ⁹⁸	10	0	18,976,457
Pennsylvania	365	3	12,281,054

The South is not homogenous either. For example, although Alabama and Kentucky have nearly identical populations, Alabama sentenced 356 individuals to death over the last three decades while Kentucky sentenced only 76.

Table 4:

Death Sentences, Executions, and Population in Alabama and Kentucky: 1973-2004

<u>State</u>	<u>Death Sentences</u>	<u>Executions</u>	<u>Population</u>
Alabama	356	30	4,447,100
Kentucky	76	2	4,041,769

The disparity between the neighboring states of Maryland and Delaware is also instructive. Delaware's population is nearly seven times smaller than

97. All state populations are taken from the 2000 Census. See U.S. CENSUS BUREAU STATE AND COUNTY QUICK FACTS, available at <http://quickfacts.census.gov/qfd>.

98. After an eighteen-year hiatus, New York re-authorized the death penalty in 1995. See James Dao, *Death Penalty in New York Reinstated After 18 Years; Pataki Sees Justice Served*, N.Y. TIMES, Mar. 8, 1995, at A1. The first death sentence under New York's new law was handed down in 1998. See Joseph P. Fried, *Death Penalty for Ex-Guard in Murder of 3*, N.Y. TIMES, June 7, 1998, at A11.

Maryland's yet Delaware sentenced an almost identical number of individuals to death and carried out far more executions.

Table 5:

Death Sentences, Executions, and Population in Delaware and Maryland:
1973-2004

<u>State</u>	<u>Death Sentences</u>	<u>Executions</u>	<u>Population</u>
Delaware	52	13	783,600
Maryland	53	4	5,296,486

Similarly, consider the neighboring states of Oklahoma and Arkansas. Oklahoma meted out 326 death sentences while Arkansas, with only a slightly smaller population, imposed one-third as many death sentences.

Table 6:

Death Sentences, Executions, and Population in Arkansas and Oklahoma:
1973-2004

<u>State</u>	<u>Death Sentences</u>	<u>Executions</u>	<u>Population</u>
Arkansas	103	26	2,673,400
Oklahoma	326	75	3,450,654

C. Variations Within States

Even more telling than the variations between regions, and the differences between states in the same region, are the discrepancies within particular states.

Texas is the national leader in capital punishment. Yet, between 1976 and 2000, 140 of Texas's 254 counties never sentenced a single defendant to death, and another fifty-three counties each meted out only a single death sentence.⁹⁹ By contrast, Harris County, Texas sentenced more than 200 defendants to death during the same time frame.¹⁰⁰ Year after year, Harris County prosecutors seek the death penalty in fifteen or more cases while prosecutors in nearby Dallas County seek the death penalty in only a handful

99. See Tolson, *supra* note 22.

100. See *id.*

of cases.¹⁰¹ Indeed, in 2004 and 2005, Dallas County prosecutors brought no capital cases.¹⁰² Accordingly, it is not surprising that Harris County has executed more individuals than every other state in the nation with the exception of Texas and Virginia.¹⁰³

A similar disparity is on display in the Baltimore, Maryland area. The City of Baltimore has a fairly high crime rate and experiences about 270 murders per year.¹⁰⁴ Yet, a 2002 survey found that only one person on Maryland's death row came from that jurisdiction.¹⁰⁵ By contrast, the separate jurisdiction of Baltimore County (which includes the suburbs surrounding the City) had one-tenth as many murders as Baltimore City but nine inmates sitting on death row.¹⁰⁶ More recently, a study led by a distinguished criminologist at the University of Maryland found that "[d]efendants who killed their victims in Baltimore County were about 23 times more likely to be sentenced to death than those whose victims lived in Baltimore City."¹⁰⁷ The study also found that Baltimore County murderers were "nearly 14 times more likely [to be sentenced to death] than if they lived in Montgomery County and eight times more likely than if they lived in Prince George's County."¹⁰⁸

101. See Tolson & Brewer, *supra* note 11. There is a sizable population difference between the two counties. In 2000, the population of Harris County was about 3.4 million people, whereas Dallas County had a population of about 2.2 million people. See U.S. CENSUS BUREAU STATE AND COUNTY QUICK FACTS, *supra* note 97. Nevertheless, Harris County's larger population still does not explain its vastly greater number of capital prosecutions.

102. See Robert Tharp, *Is the Death Penalty Losing Capital? Sentences Drop in Dallas, Across U.S. as Courts Face New Limits, Alternatives*, DALLAS MORNING NEWS, Dec. 30, 2005, at 1A.

103. See *supra* text accompanying note 10.

104. See Gus G. Sentementens, *Warrant Denied, Killings Follow; 79-year-old, Teen Die; City Prosecutors and Police Trade Blame*, BALT. SUN, Dec. 29, 2005, at A1 (explaining that there had been 267 murders to that point in 2005, compared with 272 murders in 2004).

105. See Lori Montgomery, *Md. Questioning Local Extremes on Death Penalty*, WASH. POST, May 12, 2002, at C1.

106. See *id.* With respect to certain states, there is evidence "that the prosecutor's decision to request a death sentence is significantly more likely in rural rather than urban areas." Raymond Paternoster, *Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 J. CRIM. L. & CRIMINOLOGY 754, 780 (1983).

107. See Ray Paternoster, *Misunderstandings Cloud Death Penalty Findings*, BALT. SUN, Dec. 20, 2005, at A19. One possible explanation for prosecutors seeking the death penalty less often in Baltimore City is that jurors in that jurisdiction are predominantly black and opposed to the death penalty. See Douglas Birch, *Recent Cases Stir Debate on Execution*, BALT. SUN, Dec. 5, 2005, at A18.

108. See Paternoster, *supra* note 107. An earlier study also found wide variations among Maryland counties in the use of capital punishment. The 1993 Report of the Governor's Commission on the Death Penalty found that "suburban counties with smaller populations were more likely to have capital sentencing proceedings com-

The same situation exists in Pennsylvania. The long-time district attorney for Philadelphia County, Lynne Abraham, makes it a practice to seek the death penalty whenever it is available.¹⁰⁹ By contrast, the former district attorney of comparably sized Allegheny County (which includes Pittsburgh) rarely sought the death penalty during his tenure.¹¹⁰ As of early 1997, Philadelphia County had sent 114 prisoners to death row, compared with 8 from Allegheny County.¹¹¹

When New York re-enacted its death penalty statute in 1995, the Bronx District Attorney said he would “refuse to seek the death penalty once the state’s new law takes effect” and prosecutors in Manhattan, Queens, and Brooklyn “all expressed reservations about the legislation.”¹¹² By contrast, prosecutors in upstate New York announced that they would use the death penalty “aggressively.”¹¹³ Data through mid-2003 indicates that while upstate jurisdictions accounted for only 20% of New York’s homicides, they made up 65% of the state’s capital prosecutions.¹¹⁴ Moreover, as of mid-2003, six of New York’s 62 counties accounted for more than half of the state’s capital prosecutions.¹¹⁵

The same story exists throughout the country. A 1999 analysis found that Hamilton County, Ohio (which includes Cincinnati) had nearly five times as many prisoners on death row as Franklin County, Ohio (which includes Columbus), even though the latter had a population that was fourteen-percent larger.¹¹⁶ According to Professor James Liebman — one of the nation’s leading experts on capital punishment — “[i]n southern Georgia, there are tons of death sentences; in northern Georgia, there aren’t. In Tennessee, there are

pared to more urbanized areas.” KEITH HARRIES & DERRAL CHEATWOOD, *THE GEOGRAPHY OF EXECUTION* 36 (1997).

109. See Terry Carter, *A Little-Used Statute Puts White Police Officers Involved in Violent Incidents with Blacks Under the Gun Over Use of Deadly Force*, 86 A.B.A. J. 58, 59 (2000) (“She is widely known for seeking the death penalty more often than any other prosecutor in the country.”); Rosenberg, *supra* note 12 (same).

110. See Rosenberg, *supra* note 12.

111. See William C. Smith, *A Tale of Two Cities*, LEGAL INTELLIGENCER, Jan. 15, 1997, at 1 (explaining that the difference is due in part to the higher murder rate in Philadelphia but in greater part to the fact that the “Philadelphia D.A.’s office is much more aggressive in seeking the death penalty”).

112. Adam Nossiter, *Balking Prosecutors: A Door Opens to Death Row Challenges*, N.Y. TIMES, Mar. 11, 1995, at 27.

113. *Id.*

114. See THE CAPITAL DEFENDER OFFICE, *CAPITAL PUNISHMENT IN NEW YORK STATE: STATISTICS FROM EIGHT YEARS OF REPRESENTATION* (Aug. 2003), available at <http://www.nycdo.org/8yr.html>.

115. See *id.*

116. See Richard Willing & Gary Fields, *Geography of the Death Penalty*, USA TODAY, Dec. 20, 1999, at A1 (recounting the Ohio disparity, as well as variations in other states).

tons of death sentences in Memphis and East Knoxville, but not in Nashville.”¹¹⁷

There are also “unexplained geographic differences” throughout the 94 federal districts in which the death penalty is authorized.¹¹⁸ Professor Rory Little has observed that between 1994 and 2000, the Eastern District of Virginia sought permission from the Department of Justice to seek the death penalty in 62 cases, whereas the Western District of Virginia sought such permission only five times.¹¹⁹ Indeed, during the period from 1994 to 2000, 42% of the cases in which federal prosecutors sought the Justice Department’s permission to seek the death penalty came from only five of the ninety-four federal districts.¹²⁰

Put simply, geographic disparities are rampant throughout the country.¹²¹

117. Lewin, *supra* note 14 (quoting Professor Liebman); *see also* HARRIES & CHEATWOOD, *supra* note 108, at 35 (discussing the same finding).

118. Rory K. Little, *The Future of the Federal Death Penalty*, 26 OHIO N.U. L. REV. 529, 560 (2000).

119. *See id.* at 561. The centralized review conducted by the Department of Justice could itself be a means of reducing the arbitrariness of the death penalty. As Professor Ron Krotoszynski has suggested, “[r]equiring a central commission or agency to approve capital charges after a review of the record would ensure greater consistency in charging behavior and greatly facilitate review of charging behavior for arbitrary or otherwise inappropriate reasons such as race.” Ronald J. Krotoszynski, Jr., *An Epitaphios for Neutral Principles in Constitutional Law: Bush v. Gore and the Emerging Jurisprudence of Oprah!*, 90 GEO. L.J. 2087, 2130 n.224 (2002).

120. *See* Death Penalty Information Center, *Arbitrariness and the Death Penalty*, <http://www.deathpenaltyinfo.org/article.php?did=1328> (last visited May 26, 2007).

121. Scholars have offered numerous explanations for the wide geographic variations in the use of the death penalty. In explaining the greater use of the death penalty in the South as a whole, observers have pointed to a culture of “personal honor” and firearms ownership, as well as the fact that it is a historically poorer region with a higher crime rate than the rest of the country. *See* HARRIES & CHEATWOOD, *supra* note 108, at 30, 69. Drilling down deeper, some observers have sought to explain why there are differences within regions. For instance, experts contend that New Mexico does not make frequent use of the death penalty because it has a large Catholic population and the Catholic Church has spoken out against the death penalty. *See* Lewin, *supra* note 14. Race is also a relevant factor. Prosecutors in Baltimore City may decline to seek the death penalty because their jurors are drawn from a predominately black population that largely opposes capital punishment, whereas prosecutors in predominately white Baltimore County have a constituency more likely to vote for the death penalty. *See* Rory K. Little, *What Federal Prosecutors Really Think: The Puzzle of Statistical Race Disparity Versus Specific Guilt and the Specter of Timothy McVeigh*, 53 DEPAUL L. REV. 1591, 1596 (2004) (“If we can trust public opinion polls at all, they consistently show that opposition to capital punishment runs around 45% to 55% for Black Americans, while for whites it is much lower, ranging from 17% in 1992 to 24% in 2000.”). Finally, there are anecdotal and non-scientific explanations. Some district attorneys have ambitions of higher office and regularly seek the death penalty to appear tough on crime. *See* Bright & Keenan, *supra* note 21, at 763.

III. THE FAILURE OF THE COURT'S PROCEDURAL AND SUBSTANTIVE JURISPRUDENCE

As Part II demonstrated, there is significant evidence that the death penalty continues to be imposed arbitrarily in the United States. A more vexing question is why so little progress has been made. In other words, after decades of procedural regulation and in light of categorical restrictions for capital cases that do not exist in ordinary criminal cases,¹²² why is the death penalty still administered in a capricious fashion? In particular, why has the Court failed to limit the geographic arbitrariness of the death penalty? In large part, the answer to these questions is threefold: first, the Court's procedural safeguards are an empty vessel; second, the substantive categorical restrictions are poor proxies for reducing arbitrariness; and third, neither the procedural nor substantive restrictions offer an incentive for prosecutors to bring only the worst of the worst cases into the death-penalty system.

A. Empty Procedural Safeguards That Focus Only on the Trial

The Supreme Court's procedural safeguards are a shell of what they appear to be. In the first few years after *Furman v. Georgia*, the Court imposed what looked to be fairly significant procedural hurdles, most notably a bifurcated sentencing phase,¹²³ proportionality review comparing death sentences to other cases,¹²⁴ the right to present mitigating evidence irrespective of the rules set forth in the state statute,¹²⁵ and the guarantee of not just counsel but the *effective* assistance of counsel.¹²⁶ These safeguards continue to exist in name,¹²⁷ but the Court has since removed whatever teeth they may have had.¹²⁸ For instance, while defendants are entitled to present mitigating evidence, the court need not give any specific jury instructions about the concept.¹²⁹ While there is a right to effective assistance of counsel, the Court has

122. Compare *Ewing v. California*, 538 U.S. 11 (2003) (rejecting Eighth Amendment proportionality challenge to a lengthy non-capital punishment), and *Harmelin v. Michigan*, 501 U.S. 957 (1991) (same), with *supra* Part I.B (detailing the substantive restrictions in capital cases involving felony murderers, rapists, juveniles, and mentally retarded defendants).

123. *Gregg v. Georgia*, 428 U.S. 153, 190 (1976).

124. *See id.* at 203.

125. *See Lockett v. Ohio*, 438 U.S. 586 (1978).

126. *See Strickland v. Washington*, 466 U.S. 668 (1984).

127. Proportionality review is the exception. In *Pulley v. Harris*, the Court made clear that such review was not constitutionally required. 465 U.S. 37, 50-51 (1984).

128. *See Haas, supra* note 64, at 439 ("Since 1983, the Court has weakened the procedural protections available to convicted defendants, [and] created formidable procedural obstacles to federal appellate review of capital appeals . . .").

129. *See Buchanan v. Angelone*, 522 U.S. 269 (1998).

been very reluctant to find cases where that right has been violated.¹³⁰ And perhaps most importantly, the Court has scaled back the writ of habeas corpus, the very procedural vehicle by which inmates can challenge their death sentences.¹³¹ Put simply, the vast procedural safeguards are more symbolic than effective.¹³²

Moreover, even if the procedural safeguards had sharper teeth, their impact would be limited because they focus almost exclusively on the capital trial and sentencing stages. Because the Court has done little to regulate pre-trial charging decisions, it has failed to provide prosecutors with incentives or constraints to bring only the worst cases into the death-penalty system.

The Supreme Court has long held that prosecutors retain “broad discretion” to enforce the criminal laws and that “so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before the grand jury, generally rests entirely in his discretion.”¹³³ A “‘presumption of regularity supports’ . . . prosecutorial decisions and . . . ‘courts presume that they have properly discharged their official duties.’”¹³⁴

And while the Court has adopted “death is different” jurisprudence with respect to certain aspects of the death penalty,¹³⁵ it has refused to impose more significant restrictions on prosecutorial discretion in the capital context

130. See, e.g., Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 284 (1997) (“Under Strickland, ineffective assistance is easily alleged but almost impossible to prove.”). In recent years, the Court seems to have taken a more robust view of the right to effective assistance of counsel, see *supra* note 63, but successful claims are still a rarity.

131. See, e.g., John Blume *AEDPA: The “Hype” and the “Byte,”* 91 CORNELL L. REV. 259, 265-70 (2006). By enacting the Anti-Terrorism and Effective Death Penalty Act, Congress also played a large part in limiting habeas corpus relief. See *id.* at 270-72 (noting the major congressional changes and citing sources). For an overview on the problem of restricting habeas corpus access, see Stephen B. Bright, *Is Fairness Irrelevant?: The Evisceration of Federal Habeas Corpus Review and Limits on the Ability of State Courts to Protect Fundamental Rights*, 54 WASH & LEE L. REV. 1 (1997).

132. See Steiker & Steiker, *supra* note 6, at 429 (explaining that the Court’s death-penalty jurisprudence is a “façade” that serves more to make “the public at large more comfortable with the death penalty” than with providing actual protection to defendants).

133. *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (citing *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)).

134. *Id.* at 464. In light of prosecutors’ broad discretion, the Court has made it nearly impossible for defendants to successfully allege a claim of selective prosecution. See William J. Stuntz, *Bordenkircher v. Hayes: Plea Bargaining and the Decline of the Rule of Law*, in *CRIMINAL PROCEDURE STORIES* 369 (Carol S. Steiker ed., 2006) (“In practice, it’s more than difficult – it’s impossible . . .”).

135. See, e.g., *Gardner v. Florida*, 430 U.S. 349 (1977); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

than in ordinary criminal cases.¹³⁶ For instance, in *United States v. Bass*, the Court squarely rejected the contention that the test for establishing a selective prosecution claim should be less stringent in capital cases.¹³⁷ In *Bass*, the lower court found that although whites make up the majority of all prisoners, they comprised only 20% of those charged by federal prosecutors with death-eligible offenses and, even then, they received plea deals twice as often as did blacks.¹³⁸ Just as in non-capital cases, the Court held that capital defendants are not entitled to discovery on selective prosecution cases unless they can demonstrate that the prosecutor was motivated by discriminatory intent and can prove a discriminatory effect, a nearly insurmountable test.¹³⁹

Because the Supreme Court has not cabined prosecutors' wide discretion to seek the death penalty in large numbers of cases, the Court has not created a sufficient incentive for prosecutors to choose their death-penalty cases carefully.¹⁴⁰ As such, prosecutors can file capital charges in not just the heinous cases, but also in the borderline situations in which the crime, though terrible, is no worse than the thousands of other murder cases in which prosecutors throughout the country pursue only life imprisonment.¹⁴¹ Moreover, because prosecutors in some jurisdictions can file a large number of capital cases, the criminal justice system — which often lacks sufficient resources

136. The Court has placed some restrictions on prosecutorial discretion by forbidding the execution of certain felony murderers and rapists, as well as the mentally retarded and those who were juveniles when they committed their crimes. *See supra* Part I.B.

137. *See United States v. Bass*, 536 U.S. 862 (2002).

138. *See United States v. Bass*, 266 F.3d 532, 536-37 (6th Cir. 2001).

139. *See Bass*, 536 U.S. at 863. For criticism of the *Bass* decision, see Jessie Larson, *Supreme Court Review: Unequal Justice: The Supreme Court's Failure to Curtail Selective Prosecution for the Death Penalty*, 93 J. CRIM. L. & CRIMINOLOGY 1009, 1020-23 (2003) (explaining that the *Bass* decision makes selective prosecution claims "virtually impossible").

140. Other scholars have questioned the incentive structure for prosecutors, though advocating vastly different proposals than a cap on death-penalty prosecutions. *See, e.g.*, Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct With Financial Incentives*, 64 FORDHAM L. REV. 851 (1995) (proposing to financially reward prosecutors for obtaining convictions on the same charge pursued at the outset of the case). While Professor Meares' proposal might limit overcharging, it would have minimal effect on preventing prosecutors from treating two seemingly identical capital crimes differently. *See also* John A. Horowitz, Note, *Prosecutorial Discretion and the Death Penalty: Creating a Committee to Decide whether to Seek the Death Penalty*, 65 FORDHAM L. REV. 2571 (1997) (suggesting that charging decisions be made by a committee composed of representatives from the District Attorney and Governor's offices).

141. *See Bright*, *Legalized Lynching*, *supra* note 23, at 12 ("[M]any cases in which prosecutors decide to seek the death penalty are not distinguishable from hundreds of other murder cases in which the death penalty is not sought.").

for indigent defendants in the first place — is unable to provide an adequate defense for each of the numerous capital defendants selected by prosecutors.

To be sure, the procedural safeguards the Court has put in place for capital trials are daunting. However, once prosecutors — who are repeat players in the criminal justice system¹⁴² — have learned to circumvent the maze of restrictions, they have little disincentive to file capital charges and seek the death penalty. Further, once prosecutors have filed capital charges, the Court's maze of procedural restrictions does nothing to weed out cases in which the death penalty should never have been sought in the first place. Rather, juries — which do not have the same opportunity as prosecutors or judges to compare hundreds of murder cases — are asked to return death-penalty verdicts in the abstract, and they often do.

Thus, while the Court's procedural restrictions can be beneficial to a capital defendant who is represented by competent counsel and is being prosecuted by an inexperienced lawyer unfamiliar with the Court's confusing death-penalty jurisprudence, such defendants are a rarity. In reality, the Court's procedural safeguards are of little value to the vast majority of defendants who are represented by overworked appointed counsel and are being prosecuted by experienced lawyers who have navigated the system many times before. Moreover, the safeguards are of little value to the system as a whole. They do little to stop prosecutors from clogging the courts with capital cases that prosecutors would never have filed if they were forced to choose only the worst of the worst offenders.

B. Substantive Protections as Poor Proxies

Recent substantive limits on the death penalty are not likely to be more effective than the procedural safeguards. In two recent decisions, the Court has forbid the execution of the mentally retarded¹⁴³ and those who were juveniles when they committed their crimes.¹⁴⁴ While sparking considerable out-

142. See David C. Baldus, *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. LAW 3, 41 (2001) (explaining the fact that many Philadelphia prosecutors “have tried substantial numbers of capital cases” and know how to circumvent constitutional challenges to their use of peremptory challenges. By contrast, there are far fewer repeat players in the criminal defense bar. See David Cole, *Gideon v. Wainwright and Strickland v. Washington: Broken Promises*, in CRIMINAL PROCEDURE STORIES, *supra* note 134, at 124 (“Because death penalty cases are so draining, emotionally and financially, private attorneys rarely take on more than one capital defense case in their careers.”).

143. See *Atkins v. Virginia*, 536 U.S. 304 (2002).

144. See *Roper v. Simmons*, 544 U.S. 551 (2005); see also *supra* Part I.B (discussing the categorical exclusions, which include the mentally retarded, juveniles, rapists, and certain types of felony murderers).

cry among proponents of the death penalty,¹⁴⁵ the Court's substantive restrictions on capital punishment is unlikely to reduce the arbitrariness of the American death penalty.

The Court has forbidden the execution of juveniles and mentally retarded individuals because it believes that, as a group, those offenders are less culpable writ large. There is much to support this view. Generally speaking, the mentally retarded tend to be less likely to engage in logical reasoning, and less able to control their impulses.¹⁴⁶ Similarly, social scientists have demonstrated that juveniles, more so than adults, suffer from "a lack of maturity and an underdeveloped sense of responsibility" and that they tend to be more susceptible to negative influences.¹⁴⁷

The problem with this approach, however, is that while most juvenile and mentally retarded offenders are less culpable than average criminal defendants, some of them are as culpable or more so than adult defendants. Because some juvenile and mentally retarded offenders are *very* culpable, juries might rationally conclude that certain juvenile crimes are worse than those committed by adults and those with higher IQ's. For instance, an amicus brief spearheaded by the State of Alabama in the juvenile-execution case detailed six vicious murders by offenders who were sixteen or seventeen years old when they committed their crimes.¹⁴⁸ The first case involved a sixteen-year-old boy, Mark Anthony Duke, who plotted to kill his father, his father's girlfriend, and her two young children.¹⁴⁹ After enlisting friends to help him, Duke shot his father and his father's girlfriend at point-blank range, slit the throat of their six-year-old child, and held down the other child while his co-conspirator slit her throat.¹⁵⁰ Duke and his accomplices then engaged in an elaborate cover-up: disposing of the weapons, buying movie tickets as a di-

145. The *Roper* and *Atkins* decisions also provoked considerable outcry from constitutional scholars – regardless of their views on the death penalty – on the ground that the opinions more closely resembled "naked political judgment[s]" than constitutional law. See Posner, *A Political Court*, *supra* note 36, at 90.

146. See *Atkins*, 536 U.S. at 318.

Because of their impairments, however, by definition [the mentally retarded] have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reaction of others. . . . [T]here is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders.

Id.

147. *Roper*, 543 U.S. at 569.

148. See Brief of the States of Alabama, Delaware, Oklahoma, Texas, Utah, and Virginia as Amici Curiae in Support of the Petitioner, 2004 U.S. Ct. Briefs LEXIS 335.

149. *Id.* at *5.

150. See *id.* at *5-6.

version, and concocting a group alibi.¹⁵¹ These chilling facts do not suggest the lack of culpability the Supreme Court was talking about in sweeping terms when it forbid the execution of all juveniles.¹⁵² To the contrary, Duke was the ringleader, and it is difficult to imagine more vicious murders occurring in Alabama during any given year.

Presented with the choice of seeking the death penalty for only a handful of individuals, the State of Alabama might well have chosen to pursue Duke in lieu of other killers (including one of Duke's accomplices) who were adults at the time of their crimes. By taking away Alabama's option to seek the death penalty for all juveniles in the name of proportionality, the Court is permitting some highly culpable defendants to escape death while encouraging Alabama to redistribute its use of the death penalty to other murderers who may be less vicious and less culpable than the Mark Anthony Duke's of the world. As a result, some juveniles deserving of the death penalty will escape it, while some adults who are less culpable will receive it. Put simply, the Court's categorical approach is not a good proxy for ensuring that the death penalty is reserved for the worst of the worst.¹⁵³ Thus, arbitrariness continues.

Furthermore, even if the categorical exclusion of the mentally retarded and juveniles were good proxies, these exclusions would still fail to significantly reduce the arbitrariness of the death penalty because those groups account for only a small portion of prospective death-penalty cases. Experts believe that juveniles account for less than two percent of the death-row population,¹⁵⁴ while the mentally retarded are somewhere between four and twenty percent of that population.¹⁵⁵ Thus, at most, the Court's categorical

151. *See id.* at *6.

152. *Compare* Roper, 543 U.S. at 570 ("These differences [between juveniles and adults] render suspect any conclusion that a juvenile falls among the worst offenders. . . . From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult . . .").

153. *See* Joseph L. Hoffman, *On the Perils of Line-Drawing: Juveniles and the Death Penalty*, 40 HASTINGS L.J. 229, 233 (1989) ("[A]ge is simply a 'proxy,' and an imperfect one at that, for a combination of factors that determines the relative culpability of a juvenile murderer.").

154. VICTOR L. STREIB, *THE JUVENILE DEATH PENALTY TODAY: DEATH SENTENCES AND EXECUTIONS FOR JUVENILE CRIMES, JANUARY 1, 1973 - MARCH 15, 2004*, 8, 11, <http://www.internationaljusticeproject.org/pdfs/juvenile.pdf> (last visited May 25, 2007) (stating that the juveniles currently on death row constitute approximately two percent of the total death row population and that less than 3% of executions conducted since 1973 were of juveniles).

155. As courts are discovering in the wake of *Atkins*, the question of whether death-row prisoners are mentally retarded is far harder to answer. *See* Timothy S. Hall, *Legal Fictions and Moral Reasoning: Capital Punishment and the Mentally Retarded Defendant After Penry v. Johnson*, 35 AKRON L. REV. 327, 327-28 (2002) ("Estimates of the incidence of mental retardation in American's death row population range from 4% to as high as 20%." (footnotes omitted)).

exclusions of juveniles and the mentally retarded affects 25% of the death-row population and perhaps as little as six percent. Put more starkly, while the Court's recent categorical exclusion decisions may lead death-row prisoners to file more appeals, in the end the rules will have no effect on 75 to 94 percent of the nation's death-penalty cases and will therefore have little success in reducing arbitrariness.

Moreover, it is difficult to imagine what additional categorical exclusions the Court could adopt in an effort to further reduce arbitrariness. With categorical prohibitions against executing the mentally retarded, juveniles, felony murderers and rapists already in place, it looks as though the Court's substantive role in adopting categorical exclusions is at an end. Yet, the Court's approach will have had no effect on curbing the arbitrariness that pervades the vast majority of death-penalty cases.

* * *

In sum, the Court's current approach to reducing the arbitrariness of the death penalty has proven ineffective. The procedures and categorical exclusions adopted to date may make the death penalty look more palatable to outside observers by giving the appearance that the process is carefully regulated and that vulnerable groups of defendants will not be brought into the system.¹⁵⁶ Nevertheless, just because the system looks palatable does not mean that it is effective. The Court's goal of reducing the arbitrariness of capital punishment has been a failure because it has left tremendous and largely unregulated power in the hands of prosecutors to seek the death penalty often and in whichever cases they prefer.¹⁵⁷

156. See Carol S. Steiker, *Things Fall Apart, But the Center Holds: The Supreme Court and the Death Penalty*, 77 N.Y.U. L. REV. 1475, 1488-89 (2002) (explaining that the categorical exclusions have "ameliorat[ed] some of the more extreme applications of capital punishment" and that the procedural regulation of the death penalty results in reversals and new trials and thus "contributes both to the length of time that capital defendants spend on death row and the impression that their cases are, indeed, getting a thorough and searching review").

157. See LIEBMAN ET AL., *supra* note 12, at 394 (follow "Second Half" hyperlink) ("[T]he officials whose policies must be relied upon to moderate the risk of dangerous error by limiting opportunities to use the death penalty in marginal cases are the same officials who have been susceptible in the past to pressures to expand the death penalty, with the devastating and chronic effects [described in this study].").

IV. ELIMINATING ARBITRARINESS BY IMPOSING A CAP ON DEATH PENALTY PROSECUTIONS

A. *The Case for a Cap on Death-Penalty Prosecutions*

Rather than focusing on a maze of procedural protections and a handful of categorical exclusions, the Court could more effectively minimize the arbitrariness of the death penalty by providing incentives for the actors who hold substantial power in the criminal justice system: the prosecutors.¹⁵⁸ One way to curb prosecutorial discretion would be for the Court to impose a cap on the number of death-penalty prosecutions that each jurisdiction can pursue each year. Imposing a cap on capital prosecutions would reduce arbitrariness by forcing prosecutors to select their death-penalty cases more carefully. A cap would provide prosecutors with an incentive to focus on the very worst offenders, rather than seeking the death penalty often and leaving it to the courts to sort out the truly deserving through a maze of trial and appellate procedures and categorical exclusions.

Under the current system, prosecutors can pick the worst offenders¹⁵⁹ and “borderline cases,” in which the defendant’s crime, though terrible, is not as egregious as the worst capital cases.¹⁶⁰ Because prosecutors can seek the death penalty in these borderline cases, some defendants who are not particularly deserving of capital punishment find themselves embroiled in the capital punishment machinery. And while the capital charges are often used as leverage to pressure defendants to plead guilty to lesser sentences,¹⁶¹ a number of borderline cases do result in sentences of death. Indeed, many of the more

158. As Professor Liebman has explained “[m]ost proposals for curing [the ills of capital punishment] are doomed to make it worse. Typically, those proposals aim merely to treat one or another procedural symptom at either the stem or the stem, without attacking the disease itself (the skewed incentive system) or its principal substantive symptom (the overproduction of death).” James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2136 (2000). Professor Liebman offers ten reforms that states could impose in exchange for drastically limiting appellate and post-conviction proceedings. *See id.* at 2144-50. Capping the number of death-penalty prosecutions is not one of Professor Liebman’s suggestions.

159. This is not entirely correct. In some situations, prosecutors cannot select the “worst” offenders because categorical exclusions — such as prohibitions on executing the mentally retarded and juveniles — foreclose the death penalty for those offenders.

160. *See Liebman, supra* note 158, at 2073 (explaining that prosecutors in capital cases are “competent and energetic” with “a fair amount of resources” thus enabling them to “have their way at trial, essentially generating as many death sentences as it is professionally rewarding to generate”).

161. *See id.* at 2097 (stating that the death penalty “provides the best plea-bargaining leverage imaginable”).

than 120 death-row inmates who have been exonerated since the Supreme Court reinstated the death penalty in 1976 fall into this borderline category.¹⁶²

For example, consider the case of Verneal Jimerson, a Chicago defendant who was prosecuted in Cook County, Illinois. Along with three other defendants, Jimerson, who had no prior criminal record, was arrested in 1978 for the brutal rape and murder of a young woman as well as the murder of her fiancé.¹⁶³ Unlike the other defendants, the only evidence against Jimerson was the testimony of an eyewitness who participated in the crime, Paula Gray.¹⁶⁴ When Gray was first interviewed about the crime, she placed the other three defendants at the crime scene but made no mention of Jimerson; only later did she implicate Jimerson.¹⁶⁵ A few months later, Gray retracted her statement and denied any knowledge of the crime.¹⁶⁶ Without any evidence to implicate Jimerson, the prosecutor dismissed the charges against him.¹⁶⁷ Six years later, after Gray herself had been convicted of the murders at issue and had her conviction reversed on appeal, she struck a deal with the prosecution. In exchange for testifying against Jimerson and the other three defendants, the prosecutor agreed to drop the murder charges against her. Despite the fact that Gray had changed her story multiple times, was acting out of self-interest, had an IQ of 57, and was unable to read, write or tell time, the prosecution relied on her allegations and charged Jimerson with capital murder.¹⁶⁸ He was convicted and sentenced to death. After nearly a dozen years on death row, DNA evidence demonstrated his innocence and he was released.¹⁶⁹

Similarly, consider the case of Steve Manning, another murder defendant from Cook County, Illinois. The primary witness against Manning was a jailhouse informant who had at least ten prior felony convictions and received a drastic sentencing reduction in exchange for his testimony.¹⁷⁰ At the request of the FBI, the jailhouse informant agreed to record his conversations with Manning.¹⁷¹ The informant thereafter claimed that Manning had confessed to

162. Death Penalty Information Center, Innocence: List of Those Freed From Death Row, <http://www.deathpenaltyinfo.org/article.php?scid=6&did=110> [hereinafter List of Those Freed From Death Row] (last visited May 26, 2007). For in-depth analysis of some of these cases, see JIM DWYER ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000); MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENCE (1992).

163. *People v. Jimerson*, 652 N.E.2d 278, 279-81 (Ill. 1995).

164. *Id.* at 280.

165. *Id.* at 282.

166. *Id.* at 280.

167. *Id.*

168. *Id.* at 282.

169. See Don Terry, *After 18 Years in Prison, 3 Are Cleared of Murders*, N.Y. TIMES, July 3, 1996 at A14.

170. *People v. Manning*, 695 N.E.2d 423, 426 (Ill. 1998).

171. *Id.* at 427.

murder, even though the confession did not show up on either of the two tape recorders that the informant was wearing.¹⁷² Based on the informant's testimony, Cook County prosecutors sought the death penalty for Manning and he was sentenced to death.¹⁷³ After the Illinois Supreme Court reversed Manning's conviction on evidentiary grounds, Cook County prosecutors declined to re-try him at all, much less seek the death penalty.¹⁷⁴

Cook County prosecutors seek the death penalty in dozens of cases each year and bring ten to fifteen death penalty trials in an average year.¹⁷⁵ If the Supreme Court had imposed a cap on death-penalty prosecutions and limited Cook County to a handful per year,¹⁷⁶ the District Attorney's office likely would not have sought the death penalty for Verneal Jimerson and Steve Manning. With the opportunity to seek the death penalty in a limited number of cases each year, prosecutors would have saved their capital prosecutions for cases where the evidence did not rest solely on the testimony of a jail-house informant or a severely mentally retarded witness who had changed her story numerous times.¹⁷⁷

Put simply, a cap on death-penalty prosecutions provides prosecutors with an incentive to save their capital prosecutions for cases with truly persuasive evidence of guilt. Accordingly, imposing a cap on death-penalty

172. *Id.*

173. *Id.* at 428.

174. Steve Mills & Ken Armstrong, *Another Death Row Inmate Cleared*, CHI. TRIB., Jan. 19, 2000, at 1.

175. See Jerry Crimmins, *When Cases Should Be Tagged for the Death Penalty Is Subject of Dispute*, CHI. DAILY LAW BULL., Oct. 24, 2001 (explaining that there are 10 to 15 death-penalty trials in Cook County, Illinois each year, and that between March and October 2001, prosecutors filed "notice of intent to seek the death penalty" in 80 cases in order to preserve all of their options).

176. See generally *infra* notes 193-203 and accompanying text (advocating a cap of two death-penalty prosecutions per 100 murders). Cook County had about 447 murders in 2005, though a perpetrator was arrested in only 42% of those cases. Frank Main, *Glitch in Improving Crime Stats: Police Not Clearing Homicides Any More Than in Recent Years*, CHI. SUN-TIMES, Jan. 25, 2006, at 8. Under a 2% cap, Cook County would be limited to 9 capital prosecutions per year, far less than the dozens of capital filings it usually makes, and even less than the 10 to 15 cases the jurisdiction regularly brings to trial.

177. Consider also the case of Clifford Henry Brown who was wrongly sentenced to death in Oklahoma County, Oklahoma despite the fact that twelve alibi witnesses placed him 300 miles from the crime scene. The prosecutor in the case — "Cowboy" Bob Macy — frequently sought the death penalty and, as of 1999, had personally put fifty-three defendants on death row. See Ken Armstrong, *Trial and Error: How Prosecutors Sacrifice Justice to Win*, CHI. TRI., Jan. 10, 1999, at C13. If Mr. Macy's ability to seek the death penalty had been capped, it is quite likely that he would have chosen to pursue a case with more convincing evidence.

prosecutions would reduce the risk of innocent people being sentenced to death.¹⁷⁸

Second, a judicial cap will reduce arbitrariness because the Court will no longer be dealing in imperfect proxies such as mental retardation and age. As discussed above, the Court has exempted certain categories of offenders from the death penalty because it believes they are less morally culpable writ large.¹⁷⁹ Yet, some juvenile offenders are *very* culpable, and society might make the decision that the crimes committed by a particularly vicious seven-year-old murderer are worse than those committed by an adult offender.¹⁸⁰ The Court's current jurisprudence prevents prosecutors from determining which offenders are the worst of the worst, because certain defendants are off limits from the very beginning. As a result, prosecutors turn their attention to other defendants who may not be as culpable but who are death-eligible. The result of the current system is arbitrariness: some juveniles or mentally retarded defendants deserving of the death penalty will escape it, while some adults who are less culpable will receive it.

By contrast, a judicial cap on death-penalty prosecutions would force prosecutors to focus on the worst of the worst. Given only a handful of potential death-penalty prosecutions per year, prosecutors would have to carefully decide whether one murderer is more deserving of the death penalty than another offender. With the facts of each case in hand, the prosecutors are in a much better position to make culpability decisions than the Supreme Court was when it imposed a blanket prohibition on certain categories of offenders. Thus, with a judicial cap on capital prosecutions, prosecutors will be more likely to charge the worst of the worst, rather than the worst of the remaining.

178. A cap will also encourage prosecutors to be cautious not to use their capital prosecutions too early in the calendar year. Prosecutors will not seek the death penalty in borderline cases in April or May, because they will be too concerned about losing their opportunity to seek the death penalty for worse offenders who become known in later months. Thus, prosecutors who fear that someone deserving of the death penalty will be caught in November or December will hold at least one capital prosecution in their pocket, just in case. Of course, prosecutors behaving strategically might also delay their charging decisions until the next calendar year. Thus, rather than indicting a vicious criminal on December 20th, prosecutors might wait until January 2nd. This problem is particularly vexing given that most states do not have a statute of limitations for murder. See Alan L. Adelstein, *Conflict of the Criminal Statute of Limitations With Lesser Offenses at Trial*, 37 WM. & MARY L. REV. 199, 251-52 (1995) ("Nearly all statutes of limitations exclude limitations periods for capital offenses and noncapital murder . . ."). Nevertheless, while there would certainly be a small amount of "gaming the system," prosecutors still would be under pressure from their constituents to promptly charge a vicious murderer who has been apprehended. See, e.g., STEVE BOGIRA, *COURTROOM 302: A YEAR BEHIND THE SCENES IN AN AMERICAN CRIMINAL COURTHOUSE* (2005) (discussing a high-profile cross-racial assault case and the pressure it placed on the prosecutor and the court).

179. See *supra* notes 146-47 and accompanying text.

180. See *supra* notes 148-53 and accompanying text.

Third, imposing a cap on death-penalty prosecutions will make more resources available for capital cases, thus improving the paltry defense currently afforded to capital defendants. Most capital defendants are too poor to afford private counsel.¹⁸¹ There is little dispute that public defenders are terribly overworked, underpaid, and have far fewer litigation resources than prosecutors.¹⁸² Accordingly, many public defenders are unable to provide an adequate defense for their capital clients.¹⁸³

A judicial cap on prosecutors' ability to seek the death penalty will not solve the problem of inadequate resources — only the legislature can do that by properly funding indigent defense services¹⁸⁴ — however a cap will improve the situation. A judicial cap on death-penalty prosecutions will result in fewer capital prosecutions in certain jurisdictions. Public defenders who work on capital cases, therefore, will have more time to work on each one.¹⁸⁵ Investigators who are spread too thin will have more opportunity to follow-up on each lead that suggests a defendant's innocence or which could serve as a mitigating factor at the sentencing stage of the trial.

Moreover, a judicial cap on death-penalty prosecutions will minimize (though certainly not eliminate) the pervasive use of lazy and incompetent counsel in jurisdictions that use appointed lawyers rather than public defenders.¹⁸⁶ With a cap in place, there necessarily will be fewer death-penalty prosecutions in certain jurisdictions and therefore there will be a less pressing need for capital defense lawyers. Judges who appoint capital defense lawyers are in a good position to know which attorneys are competent and which are inadequate. Yet, under the current system, judges often have to dig deep into

181. See Robert Weisberg, *Who Defends Capital Defendants*, 35 SANTA CLARA L. REV. 535, 535 (1995) ("The State virtually always pays for the defense of those whom it seeks to execute."); see also *supra* note 24.

182. See Stephen B. Bright, *Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake*, 1997 ANN. SURV. AM. L. 783, 816-820.

183. See AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* 18 (Dec. 2004) ("Oftentimes caseloads far exceed national standards, making it impossible for even the most industrious attorneys to deliver effective representation in all cases.").

184. See Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731 (2005) (lamenting the lack of funding for indigent defense, discussing the failure of courts to ensure effective assistance of counsel, and advocating more robust judicial intervention).

185. See Joe Margulies, *Criminal Law: Resource Deprivation and the Right to Counsel*, 80 J. CRIM. L. & CRIMINOLOGY 673, 678-679 (1989) (discussing the current state of excessive caseloads for public defenders generally and explaining that "[i]nadequate funding forces appointed counsel to ration his or her time, which inevitably compromises his or her ability to prepare the case").

186. See Bright, *Counsel for the Poor*, *supra* note 87, at 1841-44 (describing the "pervasive" inadequacy of appointed counsel).

the bench and use inadequate lawyers to staff some of their capital cases.¹⁸⁷ With a smaller number of capital cases, judges will be able to rely primarily on the better capital defense lawyers and pass over the less able and less industrious lawyers who are currently appointed.¹⁸⁸

In sum, a cap on death-penalty prosecutions will enable competent public defenders to spend more time on their cases, and it will permit judges to assign fewer cases to lawyers they know to be ineffectual. The result will be a better defense for capital defendants and a less arbitrary capital punishment system.

B. Imposing a Cap of 2 Death-Penalty Prosecutions Per 100 Murders

Having argued in favor of a judicial cap on executions, the next (and most challenging) issue is how the cap should be formulated. There are a variety of possible proposals.

1. Population and Politically Based Proposals

One simple possibility would be to set a cap on death-penalty prosecutions based on population. Jurisdictions with one million residents could seek the death penalty a certain number of times per year, and jurisdictions with two million residents could seek the death penalty twice as often per year. Although such an approach has the virtue of being an easily enforced bright-line rule, it fails to take account of variations in the crime rate between regions. For instance, while Louisiana is twenty-fourth of the fifty states in total population, it has the highest murder rate of the fifty states.¹⁸⁹ By contrast,

187. See *McFarland v. Scott*, 512 U.S. 1256 (1994) (Blackmun, J., dissenting from the denial of certiorari) (decrying the lack of qualified defense counsel for capital cases); Mary Flood, *What Price Justice?*, HOUS. CHRON., July 1, 2000, at 1 (discussing the lack of effective capital defense lawyers in Harris County, Texas because the salaries are too low to attract quality lawyers); Paul M. Barrett, *Lawyer's Fast Work on Death Cases Raises Doubts About System*, WALL ST. J., Sept. 7, 1994, at 1 (describing the late Joe Frank Cannon, a lawyer in Harris County who was repeatedly appointed to handle capital cases even though he had ten separate clients sentenced to death and reportedly fell asleep during a number of their trials).

188. *But see* Cole, *supra* note 142, at 123 (contending that some judges purposefully “appoint less than qualified counsel, and oppose the appointment of demonstrably effective lawyers” because those lawyers would file dozens of pre-trial motions, make the trial far longer, and “make the task of convicting defendants more difficult”).

189. With respect to population, see U.S. CENSUS BUREAU: STATE RANKINGS (2005), <http://www.census.gov/statab/ranks/rank01.html>. With respect to murder rates, see Death Penalty Information Center, *Nationwide Murder Rates: By 2005 Rank*, Highest to Lowest, <http://www.deathpenaltyinfo.org/article.php?scid=12&did=169#MRord> [hereinafter

Kentucky's population is nearly identical to Louisiana's but its murder rate is about two-thirds lower.¹⁹⁰ Thus, a cap based on population would be a poor proxy.

Another problem in setting the cap on a state-by-state basis would be the question of how the death-penalty prosecutions should be distributed within the state. For instance, if Pennsylvania were allotted 25 capital prosecutions per year, the Governor or Attorney General would then be called upon to dole out the prosecutions to competing Pennsylvania counties. If the distribution were made simply based in proportion to the county population, it would still suffer from a lack of congruence with the crime rate. A large county with a lower crime rate would be allotted more capital prosecutions than a smaller county with more murders.

An alternative possibility would be to allow each county to lobby the Governor or Attorney General for an allotment of capital prosecutions. In theory, the Governor or the Attorney General could then study the crime statistics and distribute the capital prosecutions in a way that minimized arbitrariness problems. In reality, however, governors and attorneys general are political animals, and rational choice theory suggests that they would dole out the capital prosecutions based on their political interests.¹⁹¹ Thus, jurisdictions that most valued the use of the death penalty would lobby for their counties to be allotted a large, perhaps even disproportionately large, number of the state's capital prosecutions.¹⁹²

Nationwide Murder Rates] (last visited May 26, 2007). Both Puerto Rico and Washington D.C. have higher murder rates than Louisiana.

190. See *Nationwide Murder Rates*, *supra* note 189. In 2004, Louisiana had 12.7 murders per 100,000 residents, compared to 5.7 murders per 100,000 Kentucky residents. In 2003, the disparity was wider with 13.0 murders per 100,000 Louisiana residents, compared with 4.6 murders per 100,000 Kentucky residents.

191. See Stephen B. Bright, *The Politics of Capital Punishment: The Sacrifice of Fairness for Executions*, in *AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION* 120-22 (James R. Acker et al. eds., 1998) (describing politicians' efforts to take political credit for executions). A parallel to politicians doling out capital prosecutions might be their decisions whether to grant clemency, which most observers believe is influenced by politics. See Adam M. Gershowitz, *The Diffusion of Responsibility in Capital Clemency*, 17 *J.L. & POL.* 669 (2001) (arguing that governors attempt to leave responsibility for executions with pardon boards and the courts because it is politically expedient); but see Michael Heise, *Mercy By the Numbers: An Empirical Analysis of Clemency and its Structure*, 89 *VA. L. REV.* 239, 296-97 (2003) (finding no statistical evidence that political factors influenced clemency decisions, but cautioning that "political factors may exist in the clemency context in ways that resist empirical detection").

192. A more structured version of this approach can be found in some areas of environmental law, where emissions are capped but those entities wishing to exceed the cap can "trade" with those below their cap. See Susan J. Kurokowski, Note, *Distributing the Right to Pollute in the European Union: Efficiency, Equity, and the En-*

On the plus side, this approach would maximize political preferences by giving jurisdictions that most value the death penalty the opportunity to use it most often.¹⁹³ But such an approach is little different than the current system in which prosecutors are already maximizing their preferences by pursuing the death penalty if they value it, and by declining to file capital cases if they do not. Put simply, allowing politicians to distribute capital prosecutions and maximize preferences probably would result in a geographic distribution of the death penalty that is just as arbitrary as the current system.

In short, there are serious problems with basing a cap on death-penalty prosecutions solely on population or with relying on politicians to minimize arbitrariness rather than to maximize their own interests.

2. Setting the Cap Based on the Number of Murders

A preferable approach would be for the Court to set a cap on death-penalty prosecutions by looking to the number of murders occurring in each county. Two jurisdictions with a similar number of murders per year should be permitted to seek the death penalty in roughly the same number of cases. By contrast, a jurisdiction with a larger number of murders should be afforded the opportunity to pursue capital punishment more often. The FBI's Uniform Crime Reports have long done a thorough job of collecting murder data, and each jurisdiction's annual number of murders is well documented.¹⁹⁴ Thus, if the Court were to set a benchmark authorizing a specific number of capital prosecutions per 100 murders, it would be very simple to specify the number of death-penalty prosecutions each county could pursue. For example, a jurisdiction with 200 murders per year could seek the death penalty twice as often as a county with only 100 murders per year.¹⁹⁵

vironment, 14 N.Y.U. ENVTL. L.J. 698, 704-05 (2006) (describing the "cap-and-trade scheme").

193. See DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* 11 (1994) ("Individuals are rational in the sense that they consistently prefer outcomes with higher payoffs to those with lower payoffs.").

194. See FEDERAL BUREAU OF INVESTIGATION, *CRIME IN THE UNITED STATES: 2004 UNIFORM CRIME REPORTS*, http://www.fbi.gov/ucr/cius_04/documents/CIUS2004.pdf [hereinafter 2004 UNIFORM CRIME REPORTS].

195. A game theorist might object that this approach will encourage prosecutors to re-classify as many crimes as possible as murders in order to maximize the jurisdiction's number of death-penalty prosecutions. This concern fails for two reasons. First, prosecutors are usually elected and often are in pursuit of higher office. Artificially inflating the crime rate on "their watch" might be politically counter-productive. Second, to succeed in increasing the jurisdiction's number of death-penalty prosecutions, the district attorney would have to *drastically* increase the number of murders in a jurisdiction. Under the 2% proposal I advocate below, prosecutors would have to find an additional fifty murders in order to add a single death-penalty prosecution. Given

The harder question is what the benchmark should be. In other words, how many capital prosecutions per 100 murders should each county be permitted to pursue? The logical starting point for setting the benchmark is to determine the national average of death-penalty prosecutions per year. Unfortunately, this information is difficult to access. Because there are thousands of counties in the thirty-eight states that authorize the death penalty, and adequate records are not centralized, it is not possible to pinpoint exactly how many capital prosecutions are initiated each year.¹⁹⁶

Accordingly, in order to determine the nationwide average of capital prosecutions each year, we must make an educated estimate by working backward. Although there are no reliable statistics on the number of capital prosecutions, the Bureau of Justice Statistics does record the number of individuals sentenced to death each year. Between the 1970s and 2000, approximately 300 death sentences were handed down per year.¹⁹⁷ In recent years, that number has declined, and over the period from 2000 to 2005 prosecutors nationwide have procured, on average, 160 death sentences per year.¹⁹⁸

Knowing that there are approximately 160 death sentences per year, the next step is to determine how often prosecutors file unsuccessful death-penalty cases. Again, there are no definitive statistics. Nevertheless, scholars and journalists have estimated that prosecutors who seek the death penalty are successful in about fifty percent of cases.¹⁹⁹ For instance, a Houston Chroni-

that even large jurisdictions have only a few hundred murders per year, this would be a daunting task.

196. See Baldus et al., *Arbitrariness and Discrimination*, *supra* note 28, at 135 (explaining that “no authoritative statistics exist”).

197. See Liebman, *supra* note 158, at 2052 (“Since *Furman*, an average of about 300 of the approximately 21,000 homicides committed in the United States each year have resulted in a death sentence.”); see also HUGO ADAM BEDAU, *KILLING AS PUNISHMENT: REFLECTIONS ON THE DEATH PENALTY IN AMERICA* 11 (2004) (estimating approximately 250 death sentences per year).

198. SNELL, *supra* note 28, at 14. Notably, there has been a downward trend in the number of death sentences over the last ten years. A possible reason for the trend is the publicity surrounding the more than 120 death-row inmates who have been exonerated since capital punishment was reinstated in 1976. Approximately half of these inmates have been exonerated during the last ten years, which may have led prosecutors to pursue fewer capital cases or juries to return fewer death sentences. For the list of exonerees, see List of Those Freed From Death Row, *supra* note 162. Whether the trend of fewer death sentences will continue is unclear. Before the Court’s decision in *Furman v. Georgia*, 408 U.S. 238 (1972), the number of death sentences had trickled to approximately 100 per year. See WELSH S. WHITE, *THE DEATH PENALTY IN THE EIGHTIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT* 5 (1987). Yet in the years after *Furman*, a resurgence quickly took hold. See BONCZAR & SNELL, *supra* note 90, at 14.

199. See Erik Lillquist, *Absolute Certainty and the Death Penalty*, 42 AM. CRIM. L. REV. 45, 55 n.49 (2005) (estimating “that capital defendants successfully argue for a non-death sentence about half the time”); Tolson & Brewer, *supra* note 11, (indicat-

cle review of Harris County prosecutions from 1994 to 1998 found that prosecutors obtained death sentences in about 75 percent of the cases in which they sought death.²⁰⁰ More recent data place the Harris County success rate at closer to 50 percent. From 1999 through 2003, Harris County tried approximately 82 death-penalty cases and procured the death penalty in 37 of them: a success rate of approximately 45 percent.²⁰¹

Assuming that prosecutors nationwide succeed in procuring the death penalty in approximately half of their cases, that would mean there are somewhere in the neighborhood of 330 capital prosecutions per year. A national average of 330 capital prosecutions means that prosecutors are seeking the death penalty in about 2% of the approximately 16,000 murders in the United States each year.²⁰² Accordingly, I posit that prosecutors in every jurisdiction should be limited to this national average: two capital prosecutions per 100 murders.²⁰³ Put differently, a jurisdiction would have to experience fifty murders in a given year for each capital prosecution it seeks to undertake.²⁰⁴

Of course, many counties are small and have only a handful of murders each year. A rule preventing prosecutors from seeking a single death sentence unless the county had at least fifty murders might prevent those jurisdictions

ing a higher percentage for certain Texas counties); David C. Baldus et al., *Law and Statistics in Conflict: Reflections on McKleskey v. Kemp*, in RANDALL COYNE & LYN ENTZEROTH, *CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS* (3d ed. 2006) (“[P]enalty trial juries impose death sentences in about 50% of the cases they hear.”).

200. See Flood, *supra* note 187.

201. See Database of Harris County Cases, *supra* note 13 (listing all capital cases from 1999 through 2003, as well as partially listing cases from 2004). It is difficult to pin down the exact number of death-penalty prosecutions in Harris County because some cases from the 1999-2003 period are still pending, some cases have been reversed and retried, and some defendants have been charged with multiple homicides that are reported in overlapping years. Nevertheless, the Database appears to demonstrate that Harris County prosecutors succeeded in procuring death sentences in 8 of 15 cases in 1999, 8 of 16 cases in 2000, 6 of 14 cases in 2001, 7 of 15 cases in 2002, and 8 of 22 cases in 2003. See also *Death Penalty Being Sought in Fewer Cases*, HOUS. CHRON., Aug. 16, 2003, at A32 (“When prosecutors asked for death sentences, juries did so about 70 percent of the time from 1995 to 1999 and 65 percent since then.”).

202. See Sniffen, *supra* note 23. Compare Blume et al., *supra* note 28, at 172 (conducting state-by-state analysis of the number of death-row inmates compared to the number of known murders and finding a median of 2%).

203. Of course, not all of the approximately 16,000 murders committed annually are “death-eligible.” One noted scholar has estimated that less than 4,000 murders each year are death eligible. See Baldus et al., *Arbitrariness and Discrimination*, *supra* note 28, at 154.

204. Obviously, once jurisdictions that frequently seek the death penalty – for instance counties that file 5 capital prosecutions for every 100 murders – are limited to 2 prosecutions per 100 murders, the national average will fall. Thus, the Court would be called upon to reassess the benchmark.

from seeking the death penalty for a truly vicious murderer. Accordingly, for small jurisdictions, prosecutors should be able to file one death-penalty case per year, regardless of whether the jurisdiction has experienced fifty murders.

In sum, the Supreme Court should adopt a cap that limits larger jurisdictions to two capital prosecutions for every 100 murders in the jurisdiction. Smaller counties should be assured a single capital prosecution each year, regardless of whether the jurisdiction experiences a sufficient number of murders.

C. Beneficial Effects of a Cap

Imposing a judicial cap on death-penalty prosecutions should drastically minimize the arbitrariness of the death penalty. First, and most obviously, a judicial cap will prohibit certain jurisdictions from seeking the death penalty in droves while neighboring counties use it sporadically or not at all. For example, as explained in Part II, Harris County prosecutors seek the death penalty between fifteen and twenty times per year²⁰⁵ while Dallas County, which typically has a higher murder rate, seeks the death penalty only a handful of times per year.²⁰⁶ If the Court were to adopt a cap on death-penalty prosecutions, Harris County would be brought into the mainstream. In an average year, there are between 260 and 340 murders in the City of Houston, and an additional 50 murders in the remaining portion of Harris County.²⁰⁷ Capping death penalty prosecutions at two per every 100 murders would reduce Harris County's capital filings from fifteen or twenty per year to between six and eight per year, thus bringing it into line with Dallas County and other jurisdictions.

Second, by reducing the number of death-penalty cases jurisdictions can bring, a judicial cap will encourage prosecutors to choose their death-penalty cases far more carefully, thus minimizing other, non-geographic types of arbitrariness. Once prosecutors are limited to a smaller number of capital

205. See *supra* notes 13, 99-103, and accompanying text.

206. The city of Dallas – with a population of 2.3 million – had 244 murders in 2004 and 198 murders in 2005. See Jason Trahan & Tanya Eiserer, *Dallas Crime Down in '05: Big Drop in Homicides, Cuts in All Categories Fuel Optimism; Chief Sees 'Lots of Work Ahead,'* DALLAS MORNING NEWS, Jan. 6, 2006, at A1. By contrast, Houston, with a population of more than 3.6 million people ordinarily has about 270 murders per year, though the number spiked to 336 in 2005, in part due to the influx of evacuees from Hurricane Katrina. See Mike Snyder, *No Quick Fix for Rising Homicides: City is Looking for Creative Ways to Combat Violence*, HOUS. CHRON., Jan. 2, 2006, at B1.

207. See Snyder, *supra* note 206, at B1 (explaining that the Houston homicide rate had remained relatively steady around 270 per year until a recent jump to 336 in 2005); 2004 UNIFORM CRIME REPORTS, *supra* note 194, at 178 & 211 (indicating that the City of Houston reported 272 murders in 2004 and that the remainder of Harris County reported 56).

prosecutions they will have greater incentive to choose carefully, rather than seek the death penalty in any case that meets the technical qualifications. District attorneys who seek re-election (or election to higher office) will want to avoid criticism for prosecuting the wrong capital cases. Thus, they will work hard to figure out which crimes the community finds most appalling and will use their capital prosecutions for those offenses.

Moreover, with only a handful of capital prosecutions, district attorneys will want to ensure that the cases will “stick” and end in actual executions, rather than reversals on appeal. Under the current system, death-penalty cases are “overproduced,” meaning that up to six death sentences are handed down for each execution that is actually carried out.²⁰⁸ Prosecutors who secure these overproduced death sentences generally suffer little political fallout when the cases are reversed on appeal as a result of prosecutorial misconduct or other avoidable errors.²⁰⁹ Perhaps the reason for the lack of fallout is that some of the “overproduced” death sentences are still ending in executions each year. However, if the number of death-penalty prosecutions were capped, a high reversal rate might preclude a jurisdiction from carrying out any executions in a given year (or even multiple years in a row). Prosecutors then might be more vulnerable to political attack for squandering capital punishment opportunities. Thus, capping the number of death-penalty prosecutions might draw more attention to the reversible errors and might dissuade prosecutors from engaging in the misconduct that leads to those reversals.²¹⁰ The result would be a less arbitrary imposition of the death penalty.²¹¹

Relatedly, a judicial cap will have systemic benefits in protecting against wrongful convictions. With only a handful of death-penalty prosecutions per year, prosecutors will be more likely to focus on cases with more convincing evidence. Because prosecutors “overproduce” death under the current system, they drag “borderline” cases into the system in which the defendant is more likely to be innocent. As Professor Liebman and his colleagues have found, jurisdictions that make greater use of the death penalty

208. See Liebman, *supra* note 158, at 2048 (“[T]rial [level] actors have strong incentives to overproduce death sentences – putting two to as many as six or more individuals on death row for every one who would be there if trial actors bore the cost of their mistakes.”).

209. See LIEBMAN ET AL., *supra* note 12, at 41 (follow “First Half” hyperlink) (describing prosecutorial misconduct as the second most common reason for reversal of death sentences at the state post-conviction stage).

210. See *id.* at iv (“The lower the rate at which a state imposes death sentences — and the more it confines those verdicts to the worst of the worst — the less likely it is that serious error will be found.”).

211. Of course, the counter-argument is that with fewer capital prosecutions per year, prosecutors might be more, not less, inclined to pull out all the stops and break the rules in order to ensure a victory.

have higher error rates.²¹² For instance, Cook County, Illinois, which frequently seeks the death penalty, was responsible for eight of the thirteen Illinois cases in which a death-row inmate was exonerated.²¹³ If prosecutors in Cook County and other jurisdictions that frequently use the death penalty were limited to a handful of death-penalty prosecutions, the system would likely produce fewer mistakes. Prosecutors who are subject to substantive constraints imposed by the Supreme Court therefore will perform more effectively.

V. THE DEFENSE AGAINST THE CHARGE OF IMPERMISSIBLE JUDICIAL ACTIVISM

There are obviously numerous objections to the proposal that the Supreme Court impose a cap on the number of death-penalty prosecutions that jurisdictions can pursue each year. Most significantly, critics will likely object that the proposal amounts to impermissible judicial activism and is nothing more than a “naked political judgment” by un-elected judges that capital punishment is undesirable.²¹⁴ I briefly address this concern with three arguments: first, judicial intervention is justified under political process theory and would be nothing more than the already commonplace use of prophylactic rules in criminal procedure jurisprudence; second, a cap on death penalty prosecutions is actually far less activist than the Court’s current jurisprudence of ill-fitting categorical exclusions; and third, while the current Supreme Court is unlikely to adopt the proposal, it is plausible that a differently constituted Court would adopt it in the near future.

A. *Political Process Theory and the Use of Prophylactic Rules*

The primary objection to a proposal that the judiciary limit the number of death-penalty prosecutions is that, assuming the proposal is sound, the decision whether to adopt it belongs to the legislatures, not the courts. Put simply, prosecutors, not the courts, have always determined how many defendants should be charged with capital offenses, and if that practice is to be changed it should be elected officials that do so.

The response to that objection, as is so often the case in the criminal procedure realm, is to point to political process theory. It is the judiciary’s job to intervene when discrete and insular minorities stand no chance of receiving

212. See LIEBMAN ET AL., *supra* note 12, at 349 (follow “Second Half” hyperlink) (“[T]he more death verdicts per homicides a county imposes, the higher its capital-error rates are likely to rise.”).

213. See Ken Armstrong & Steve Mills, *Flawed Murder Cases Prompt Calls for Probe*, CHI. TRIB., Jan 24, 2000, at N1 (explaining that 8 of the 13 men wrongly sentenced to death in Illinois were prosecuted in Cook County).

214. Posner, *A Political Court*, *supra* note 36.

relief from the political process.²¹⁵ As scholars have repeatedly observed, criminal defendants' unpopularity makes them the quintessential discrete and insular minority.²¹⁶ Legislators have little to lose by enacting laws that prejudice criminal defendants, and virtually nothing to gain by adopting laws that would help them.²¹⁷ Among criminal defendants, those charged with capital offenses are the most despised and the least likely to get a fair shake from the political process.

Accordingly, legislators in death-penalty states would be extremely unlikely to vote for a cap on prosecutions because it would be politically unpopular. Notably, it has been over twenty years since a state has outlawed the use of the death penalty.²¹⁸ Moreover, while elected officials have enacted pro-defendant measures in recent years, it has been in response to isolated and unpopular practices such as the execution of juveniles or the mentally retarded. Even the moratorium on executions imposed in Illinois can be traced to public outrage over the large number of exonerations of death-row prisoners, rather than with a desire in-and-of-itself to remedy the general arbitrariness of the death penalty.²¹⁹

215. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 102-03 (1980).

216. See William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 785 (2006) ("Scholars generally agree that American politics is too punitive, discriminatory, and unconcerned with the interests of the criminal justice system's targets."); William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 20 (1996) ("A lot of constitutional theory has been shaped by the idea . . . that constitutional law should aim to protect groups that find it hard or impossible to protect themselves through the political process. If ever such a group existed, the universe of criminal suspects is it.").

217. See Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; or Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1081 (1993) ("Legislatures undervalue the rights of the accused at both the investigatory and adjudicatory stages of the criminal process. . . . It follows that the active judicial development of constitutional rules governing police, prosecutors, and the criminal trial process is a legitimate exercise of judicial review.").

218. See Death Penalty Information Center, *States Without the Death Penalty*, <http://www.deathpenaltyinfo.org/article.php?scid=11&did=276> (last visited May 26, 2007) (explaining that Rhode Island and Massachusetts abolished capital punishment in 1984). To the extent there is any trend it is in the opposite direction. During the 1990s, New Hampshire, Kansas, and New York reinstated capital punishment. See Death Penalty Information Center, *State by State Information*, <http://www.deathpenaltyinfo.org/state> (last visited May 26, 2007).

219. See Maureen O'Donnell, *Illinois to Stop Executions: Ryan Panel to Study 13 Wrongful Convictions*, CHI. SUN-TIMES, Jan. 31, 2000, at 3. In Maryland, outgoing Governor Parris Glendening imposed a moratorium on executions following the release of Professor Paternoster's study demonstrating geographic and racial arbitrariness in the use of capital punishment. Unlike the moratorium in Illinois that has been in effect since early 2000, the Maryland action was short lived. Only eight months

Thus, if one accepts the argument that a cap on death-penalty prosecutions will reduce the arbitrariness of the death penalty, it is implausible to wait for legislatures to take action. Indeed, the Court's decision to create "super due process" death-penalty jurisprudence in the first place belies the suggestion that the legislature will solve the problems associated with capital punishment.²²⁰ As a result, the judiciary, as the counter-majoritarian branch, must act.

However, even assuming the Court's involvement is necessary, critics might still object that the proposal goes too far. They likely would point out that neither the Eighth Amendment nor any other provision of the Constitution countenances any type of bright-line numerical limit on the number of death-penalty prosecutions. Put another way, opponents would contend that even if the Supreme Court is the appropriate institutional actor, the proposal goes too far because capping death-penalty prosecutions to root out arbitrariness is an over-inclusive remedy that unduly restricts the province of legislatures and prosecutors.

The answer to this criticism is two-fold. First, the Supreme Court has previously imposed a numerical limit in its punitive damages decisions, where it limited the ratio of punitive to compensatory damages to single digits.²²¹ If the Court can take such action to protect defendants — often wealthy corporations — in civil cases, it surely can take a comparable step to protect politically powerless criminal defendants when life, as opposed to merely money, is on the line.²²²

Second, a cap on death-penalty prosecutions would be a prophylactic rule, which is common in criminal procedure jurisprudence. Prophylactic measures are rules not specifically authorized by the Constitution but which serve to prevent violations of specific constitutional rights.²²³ The classic example of a prophylactic rule is the requirement that police officers read

after its institution, after Governor Robert Erlich took office, the moratorium was halted. See Stephanie Desmon, *Senate Votes Death Penalty Bill Debate: Moratorium is Sought in Order to Conduct Study*, BALT. SUN, March 7, 2003, at B5.

220. The term "super due process" was coined by Margaret J. Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1143 (1983).

221. See *State Farm v. Campbell*, 538 U.S. 408, 425 (2003) ("[I]n practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.").

222. I have previously made this argument with respect to excessive prison sentences. See Adam M. Gershowitz, Note, *The Supreme Court's Backwards Proportionality Jurisprudence: Comparing Judicial Review of Excessive Criminal Punishments and Excessive Punitive Damages Awards*, 86 VA. L. REV. 1251, 1288-1301 (2000).

223. See Brian K. Landsberg, *Safeguarding Constitutional Rights: The Uses and Limits of Prophylactic Rules*, 66 TENN. L. REV. 925 (1999); Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100 (1985).

suspects *Miranda* warnings.²²⁴ Nowhere does the Constitution require that suspects be read specific warnings about their right to remain silent or their right to consult an attorney, however those warnings do serve to protect against a violation of the specifically enumerated Fifth Amendment right against self-incrimination. The Court adopted the prophylactic *Miranda* warnings because its longstanding efforts to eliminate unconstitutionally coercive confessions had been unable a failure. As Professor Susan Klein has explained:

The Court tried for thirty years to ensure that coerced confessions were not admitted in criminal trials by examining each confession which came before it. The use of the “totality of the circumstance” test, requiring the Court to thoroughly examine every detail about the individual defendant and the particular interrogation at bar, taught the Court two things. One, it was incapable of correctly identifying which custodial interrogations resulted in compulsion and which did not. The Court never offered a workable definition of “voluntary”; there were too many factors which went into the indeterminate “voluntariness” equation; it was too difficult to reconstruct an often lengthy interrogation session after the fact; and it could not review a sufficient number of cases. Second, the Court discovered that law enforcement was receiving no guidance on which interrogation techniques were acceptable and which were not, which in turn led to further constitutional violations. Thus the Court, in deciding to institute the *Miranda* warnings, did not have the option of precisely adhering to the constitutional clause at issue; rather, it was forced either to under- or overprotect the constitutional right. Without the *Miranda* warnings, the Court will inadvertently admit some confessions that are compelled. With the *Miranda* warnings, the Court will exclude some confessions that were not compelled.²²⁵

The Court’s failure to adopt workable standards for dealing with coerced confessions before creating the prophylactic *Miranda* rule is very similar to its experience with capital punishment. For over thirty years, the Supreme Court has attempted to root out the arbitrariness of the death penalty on a case-by-cases basis and through a handful of categorical exclusions. Yet, as discussed in Part II, the Court’s effort has proved to be a failure. If the Court is to accomplish the constitutional goal it has set for itself — rooting out arbi-

224. See *United States v. Patane*, 542 U.S. 630, 636 (2004) (explaining that “the *Miranda* rule is a prophylactic employed to protect against violations of the Self-Incrimination Clause”).

225. Susan R. Klein, *Identifying and Re-Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1035-36 (2001) (footnotes omitted).

trariness — a prophylactic measure of capping death-penalty prosecutions is a logical approach. While a cap on death-penalty prosecutions might be over-inclusive in that it limits the flexibility of states that might not otherwise have run afoul of the Constitution, such a situation is no different than the *Miranda* rule or the countless other prophylactic rules that exist in criminal procedure jurisprudence.²²⁶ A certain number of “false-negatives” that overly restrict the government are inevitable in any prophylactic rule adopted by the Supreme Court.²²⁷ Moreover, as I argue below, the false-negatives associated with a cap on death-penalty prosecutions are actually less invasive and activist than the Court’s current substantive death-penalty jurisprudence.

B. Judicial Activism Compared to What?

While the vast majority of the Supreme Court’s death-penalty jurisprudence is procedural, the Court has already imposed substantive restrictions on prosecutors’ ability to seek the death penalty.²²⁸ As explained in Part I.B, the Court has decided that certain offenders — the mentally retarded, juveniles, and certain felony-murders and rapists — cannot be sentenced to death. The question therefore should not be whether it would be activist for the Supreme Court to impose a cap on the annual number of death-penalty prosecutions,

226. As Professor Klein has illustrated, criminal procedure is “rife with prophylactic rules.” *Id.* at 1037 (identifying, *inter alia*, the requirement of counsel at post-indictment lineups, the departmental policy requirement for the inventory exception to the warrant requirement, and the “*Bruton*” rule excluding a non-testifying co-defendant’s confession as prophylactic rules). As Professor Klein points out, these rules are not specifically required by the Constitution nor do they themselves embody any constitutional values. Rather, they are “instrumental” in that they help to protect a different value that is embodied in the Constitution. *Id.* at 1039.

227. Evan H. Kaminker, *Miranda and Some Puzzles of “Prophylactic” Rules*, 70 U. CIN. L. REV. 1, 25 (2002) (explaining the problem of over-inclusiveness in prophylactic rules but defending them under the theory that “we aim for a constitutionally tolerable level of false-negatives, taking into account the government interests on the other side”).

228. *See supra* Part I.B. The Court’s substantive death-penalty jurisprudence stands in stark contrast to its non-capital jurisprudence. When the Court has considered non-capital substantive criminal procedure matters — such as whether a lengthy prison sentence is so excessive as to violate the Constitution — it has signaled to lower courts that such substantive interference should occur seldom, if at all. *See, e.g.*, Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: “Proportionality” Relative to What?*, 89 MINN. L. REV. 571 (2005). An illustrative metaphor is to think of the Supreme Court as a swimmer standing on the edge of a pool. In the non-capital context, the Court has dipped its toe in the water and decided it would rather stay out. In the capital context, the Court has waded knee-deep into the water, determined that it is not getting out of the pool, and contemplated submerging additional appendages.

but instead whether such a cap would be any more activist than the Court's current substantive death-penalty jurisprudence.

There are colorable arguments that a cap on death-penalty prosecutions would be less activist than the Court's other substantive restrictions on the death penalty. First, unlike the Supreme Court's decisions in *Roper* and *Atkins* forbidding the death penalty for juveniles and the mentally retarded, a judicial cap on death-penalty prosecutions would not involve the Court selecting which types of offenders are immune from the death penalty. That decision would still remain in the hands of prosecutors and juries. All that would change is that a small number of jurisdictions that pursue numerous capital prosecutions per year would be brought into line with hundreds of other American jurisdictions that seek the death penalty sparingly. In other words, a handful of outliers would be brought into compliance with the mainstream. By contrast, in *Atkins* and *Roper* the Supreme Court outlawed the execution of juveniles and the mentally retarded even though twenty states — a majority of the states with the death penalty — authorized the execution of such defendants.²²⁹

Second, unlike the *Roper* and *Atkins* decisions, which have been vilified for considering foreign sources of law in rejecting the death penalty for juveniles and the mentally retarded,²³⁰ there would be no basis for the Supreme Court to look abroad when imposing a cap on death-penalty prosecutions. The basis for a cap on death-penalty prosecutions would be national statistics demonstrating the frequency of death-penalty prosecutions, not any type of international trends.

Third, unlike the mental retardation and juvenile execution cases, the Court would not be called upon to extrapolate a national consensus from the fact that a handful of legislatures recently had changed their state laws. For instance, in *Roper* the Court pointed to the fact that four states and the federal government had recently changed their laws to forbid the execution of juveniles.²³¹ As the dissent observed, this is thin evidence upon which to base a

229. *Roper v. Simmons*, 543 U.S. 551, 609 (2005) (Scalia, J., dissenting) (arguing that no national consensus exists because only 47% of states with the death penalty forbid the execution of juveniles who were 16 or 17 years old when they committed their crimes); *Atkins v. Virginia*, 536 U.S. 304, 342 (2002) (Scalia, J., dissenting) (“The Court . . . miraculously extracts a ‘national consensus’ forbidding execution of the mentally retarded from the fact that 18 States — less than *half* (47%) of the 38 States that permit capital punishment (for whom the issue exists) — have very recently enacted legislation barring execution of the mentally retarded.” (citation omitted)). Of course, if Justice Scalia had considered the 12 states that refused to authorize *any* executions, the evidence of a national consensus — though not overwhelming — would be far stronger.

230. See, e.g., Posner, *No Thanks*, *supra* note 80.

231. See *Roper*, 543 U.S. at 597 (O'Connor, J., dissenting) (“[S]ince our decision 16 years ago in *Stanford* [upholding the execution of 16 and 17 year old offenders],

national consensus.²³² By contrast, in imposing a cap on death-penalty prosecutions, the Court could rely on decades of statistics compiled by the Bureau of Justice Statistics and the FBI. Those statistics forcefully demonstrate that most jurisdictions reserve the death penalty for a very small number of cases, while a handful of jurisdictions — such as Baltimore County, Cook County, Harris County, Philadelphia County and a few others — make drastically greater use of the death penalty.²³³

In sum, while the idea of a judicial cap on death-penalty prosecutions seems extremely activist at first blush, it is actually far less activist than the Court's existing substantive death-penalty jurisprudence.

C. Today's Unlikely Solution Can Be a Realistic Possibility Tomorrow

The final obvious criticism of a proposal for a judicial cap on death-penalty prosecutions is that the current Supreme Court would be unlikely to adopt it. While I concede this criticism today, I am less pessimistic about the long-term chances for the proposal.²³⁴ The history of the American death penalty over the last century is one of twists and turns. What looked inconceivable at one snapshot in time became readily accepted only a few decades later.

First, consider that in the first half of the Twentieth Century, executions were carried out in substantial numbers. During every year of the 1930s and 1940s, the United States executed between 119 and 190 individuals, far greater numbers than the current execution rate of about 60 people per year.²³⁵ Faced with the thriving use of capital punishment, a death-penalty scholar would have been hard pressed to predict that executions would stead-

only four States that previously permitted the execution of under-18 offenders, plus the Federal Government, have legislatively reversed course.”).

232. See *id.* at 612 (Scalia, J., dissenting) (“It is amazing to think that this subtle shift in numbers can take the issue entirely off the table for legislative debate.”).

233. Another “activism” objection to a judicial cap on death-penalty prosecutions is that it would affect a larger number of cases than the *Roper* or *Atkins* decisions. This may be true, but such an objection would render most of the 20th Century's significant criminal procedure decisions invalid. For instance, *Gideon v. Wainwright*, 372 U.S. 335 (1963), affected an enormous number of cases by requiring appointed counsel in all felony cases. Few would contend today that *Gideon* was wrongly decided.

234. See Mark A. Godsey, *Reformulating the Miranda Warnings in Light of Contemporary Law and Understandings*, 90 MINN. L. REV. 781, 783 n.9 (2006) (responding to the objection that the current Supreme Court would be uninterested in reformulating the *Miranda* warnings by explaining that “the Court's views may change in time”).

235. See Hugo Adam Bedau, *Background and Developments, in THE DEATH PENALTY IN AMERICA*, *supra* note 93, at 11 (drawing statistics from BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT 1978, at 16).

ily decline to zero by 1968 and that every death-penalty statute in the nation would be held unconstitutional in 1972.²³⁶

Then consider the next series of events. After watching executions decline throughout the 1950s and 1960s and seeing the Supreme Court strike down all death-penalty statutes in 1972, most observers would not have predicted that the Court would reinstate the death penalty in 1976 and sign off on nearly 100 executions over the following decade.²³⁷

In the 1980s and 1990s, the death penalty began to thrive again. The Court vastly deregulated numerous procedural safeguards associated with capital trials,²³⁸ and it rejected constitutional challenges to the execution of the mentally retarded²³⁹ and juveniles who were 16 or 17 years old when they committed their crimes.²⁴⁰ The number of executions per year reached 98 in 1999, the highest number in nearly 50 years.²⁴¹ The Court seemed to be signaling that it would no longer stand in the way of executions. Yet, in 2002 the Court reversed a precedent that was only thirteen years old and forbid the execution of the mentally retarded.²⁴² And in 2005, the Court reversed another recent precedent and forbid the execution of all juveniles.²⁴³ During the same time-period the annual number of death sentences and executions began to decline again.²⁴⁴

Whether these series of events are labeled “shifts,” “cycles,” or something else, it is apparent that the Supreme Court and the institutions carrying out the death penalty in America have not followed a linear path. Put simply, predicting the Court’s death-penalty jurisprudence is not easy. Thus, while it is not likely that the current Court will impose a cap on death-penalty prosecutions, that does not preclude the proposal from gaining substantial support in the next few decades.²⁴⁵

236. *See id.*; *see also* Lain, *supra* note 40, at 28 (explaining that “support for the death penalty fell 25-30 percentage points in a little over a decade”).

237. *See* Lain, *supra* note 40, at 37 (“When the Supreme Court decided *Furman* in 1972, most everyone — including the Justices themselves — believed that America had seen its last execution.”).

238. *See* Weisberg, *supra* note 25.

239. *See* Penry v. Lynaugh, 492 U.S. 302 (1989).

240. *See* Stanford v. Kentucky, 492 U.S. 361 (1989).

241. *See* BONCZAR & SNELL, *supra* note 90.

242. *See* Atkins v. Virginia, 536 U.S. 304 (2002).

243. *See* Roper v. Simmons, 543 U.S. 551 (2005).

244. *See* BONCZAR & SNELL, *supra* note 90, at 8, 10.

245. Indeed, if scholars such as Michael Klarman are correct that the Supreme Court follows public opinion, the Court might become more open to capping death-penalty prosecutions if public opposition to capital punishment reaches a sufficient consensus. *See* Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 16 (1996) (explaining that the Court tends to “seiz[e] upon a dominant national consensus and impos[es] it on resisting local outliers”).

VI. CONCLUSION

In its three-decade struggle with the death penalty, the Supreme Court has tried and failed to root out arbitrariness. The Court's efforts have failed largely because it has focused on regulating the procedure of capital punishment, rather than forcing substantive changes in the criminal justice system. To the extent that the Court has dabbled in substantive restrictions, it has chosen poor proxies such as mental retardation and age, which do not force prosecutors to confront the core problem of selecting only the worst of the worst offenders from the outset. A preferable approach would be for the Supreme Court to impose a cap on the number of death-penalty prosecutions that each jurisdiction can pursue each year. Such a cap — if drawn based on the national average of death-penalty prosecutions — would bring outlying jurisdictions into the mainstream, rather than allowing those counties to seek the ultimate punishment in both the worst cases *and* some borderline cases. Imposing a cap on capital punishment would allow more resources to be devoted to each capital defense and would lower the risk of wrongful convictions. A cap on capital punishment therefore would minimize, though certainly not eliminate, the arbitrariness of the death penalty.