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PROSECUTORIAL DISCRETION AND THE DEATH PENALTY: CREATING A COMMITTEE TO DECIDE WHETHER TO SEEK THE DEATH PENALTY

John A. Horowitz

On March 21, 1995, New York Governor George Pataki superseded Bronx County District Attorney Robert Johnson in the first degree murder case against defendant Angel Diaz. Governor Pataki claimed that District Attorney Johnson, by refusing to state whether he would ever seek the death penalty, failed to implement the laws of New York. Governor Pataki replaced Johnson with Attorney General Dennis Vacco, who subsequently elected to seek the death penalty. Johnson, in response to Pataki’s supersedeure, filed suit seeking

1. The power of a New York Governor to supersede a district attorney is granted by statute. See N.Y. Exec. Law § 63(2) (McKinney 1993). This law states that the attorney general shall:

   Whenever required by the governor, attend in person, or by one of his deputies, . . . for the purpose of managing and conducting . . . criminal actions or proceedings as shall be specified in such requirement; in which case the attorney-general or his deputy so attending shall exercise all the powers and perform all the duties . . . which the district attorney would otherwise be authorized or required to exercise or perform; and . . . the district attorney shall only exercise such powers and perform such duties as are required of him by the attorney-general or the deputy attorney-general so attending.

   Id.

2. In New York, a first degree murder conviction requires that the defendant be older than eighteen years of age and that: (1) the intended victim was a police officer; or (2) the intended victim was a peace officer; or (3) the intended victim was an employee of a state correctional institution; or (4) he was confined in a state correctional institution; or (5) the intended victim was a witness to a crime and killed to prevent his testimony; or (6) the defendant committed the killing pursuant to an agreement; or (7) the defendant killed the victim while committing an enumerated felony; or (8) the defendant, with intent to cause serious physical injury or death, caused the death of another person not part of the criminal transaction; or (9) the defendant has a prior conviction of murder; or (10) the defendant acted in an especially cruel and wanton manner inflicting torture upon the victim; or (11) the defendant intentionally caused the death of two or more persons within a twenty-four month period; or (12) the intended victim was a judge. N.Y. Penal Law § 125.27 (McKinney 1987 & Supp. 1997).


4. Id. Governor Pataki wrote:

   Whereas, a District Attorney who has instituted a blanket policy not to seek the death penalty violates his obligation to make informed, reasoned decisions on a case-by-case basis and thereby violates as well his sworn obligation to uphold the laws of this State. In addition, such a failure to exercise discretion must command my attention, for it implicates my sworn obligations to take care that the laws are faithfully executed, support the Constitution and faithfully discharge my duties as Governor.

   Id. at 2.

to nullify the supersede. Both the trial and appellate courts have rejected Johnson’s request.

Governor Pataki was not the first New York Governor to exercise his supersede power. This supersede, however, was unique. Instead of invoking his supersede power because of something as typical as a conflict of interest, Pataki superseded because he perceived Johnson abused his discretion by refusing to seek the death penalty. No other New York Governor had ever superseded a prosecutor due to a specific charging decision.

Governor Pataki’s supersede highlighted two related issues. First, the governor’s unfettered power to remove a popularly elected prosecutor creates a constant struggle between the prosecutor and the governor over who is the proper official to control the discretionary decision of whether to seek the death penalty. Regardless of who prevails in the specific conflict, it raises questions about the legitimacy of the state’s capital punishment regime.

Second, Pataki’s supersede focused attention on the danger of allowing a single individual to make the decision to seek the death penalty. Although the events that occurred in New York may not take place in every state, nonetheless they reveal the risks of granting prosecutors the tremendous power to decide independently which defendants will face a death sentence. As a result, state legislatures should remove this important decision from the whims and idiosyncrasies of any individual, whether it be the governor or a prosecutor.

Part I of this Note focuses on discretion generally and how it became the exclusive province of prosecutors. Part II examines the relationship between prosecutorial discretion and the death penalty. It first looks at the Supreme Court’s treatment of the issue, and then describes the dangers that result when prosecutors are given sole discretionary power to decide who will face the death penalty at trial. These dangers are illustrated in the context of New York’s Pataki-Johnson dispute. Part II then compares New York’s statutory provisions with those of California and Colorado to demonstrate how a scenario similar to New York’s Pataki-Johnson dispute could easily arise in other states. Part III discusses previous attempts at solving the problem of prosecutorial discretion in the capital punishment con-

8. See infra notes 88-102 and accompanying text.
9. See Rachel L. Swarns, Governor Removes Bronx Prosecutor from Murder Case, N.Y. Times, Mar. 22, 1996, at A1 (writing that Governor Pataki recognized his use of supersede was extraordinary).
10. See infra notes 186-90 and accompanying text.
11. Johnson, slip op. at 54-55.
12. Id. at 17-18.
text, and demonstrates that they have failed because the executive and judicial branches are incapable of independently removing the discretionary decision from a single individual. Finally, part IV proposes that the discretionary decision whether to seek the death penalty be removed from the local prosecutor and given to committees. A committee would be created for each county or area that has a district attorney. These committees would consist of three members appointed by the governor, three appointed by the district attorney, and one chosen by the other six members. This committee system would successfully prevent a situation similar to that which occurred in New York, and would avoid vesting this critical discretionary decision in a single person.

I. PROSECUTORIAL DISCRETION

Prosecutorial discretion is a staple of our criminal justice system.\textsuperscript{13} This part discusses prosecutorial discretion generally as a framework to understand the dangers of prosecutors having the sole power to decide whether to seek the death penalty. It includes a description of the reasons for entrusting prosecutors with this discretionary power. Generally, prosecutorial discretion means "the ability to make decisions about guilt and degree of punishment without the limits of rules or other constraints on freedom of action.\textsuperscript{14}" Prosecutors possess this discretion for a number of reasons: first, simply, they traditionally have had the power; second, they are experts in the criminal justice system; and third, society accepts that prosecutors have this power because it can be controlled through the electoral process.

American prosecutors have long possessed unrestrained power in the criminal process.\textsuperscript{15} This power peaked early this century when almost every state in the country had constitutional provisions naming prosecutors as the representative of the public in the criminal justice

\textsuperscript{13} See infra notes 15-19 and accompanying text.

\textsuperscript{14} James Vorenberg, Decent Restraint of Prosecutorial Power, 94 Harv. L. Rev. 1521, 1523-24 (1981). Vorenberg's definition also includes the lack of judicial review over a prosecutor's discretion. \textit{Id}. It was omitted in this Note because of the judiciary's inability to solve these discretionary problems.

Discretion affords prosecutors the power to independently make the important decisions in every phase of the prosecutorial process. See Kenneth J. Melilli, Prosecutorial Discretion in an Adversary System, 1992 B.Y.U. L. Rev. 669, 671-72. Because this Note focuses on the decision to seek the death penalty, the discretion at issue concerns only the decision of what sentence to seek. All other discretionary decisions in the capital punishment context, such as the aggravating circumstances the government will seek to prove or whether to allow the defendant to plead guilty in return for a sentence of life without parole, should remain with prosecutors.

After World War I, in response to this broad power and widespread increases in crime, the federal government and various state and city governments created commissions to investigate prosecutorial discretion. The only significant result of these commissions was that a majority of states required that all prosecutors be licensed attorneys; prosecutors have continued to have broad discretionary power. In addition to this tradition, other justifications for prosecutorial discretion have been offered.

Prosecutorial discretion might be due also to the fact that prosecutors have the greatest amount of administrative and legal expertise over criminal justice decisions. First, prosecutors may face budgetary restraints when determining whether to charge a defendant with a crime. This will force prosecutors to only investigate and prosecute cases of importance. Without a complete understanding of the criminal process, including the time and resources required to investigate and prosecute a certain case, scarce public resources may be spent unwisely. Second, the need to understand increasingly complex criminal codes requires prosecutors to be experts in the code. The discretionary power given to prosecutors guarantees that they will develop a specialized familiarity with the criminal code, thus ensuring a correct and fair application.

Although society may accept prosecutors as experts in criminal justice decisions, there nonetheless exists a desire to maintain some mea-

18. See Misner, supra note 17, at 731.
21. See Frank W. Miller, Prosecution: The Decision to Charge a Suspect with a Crime 159-61 (1970) (noting that in cases where prosecutors explain why less than maximum enforcement was sought, they must show that the distribution of available resources proves good faith policy of enforcement); Sarah J. Cox, Prosecutorial Discretion: An Overview, 13 Am. Crim. L. Rev. 383, 413 (1976) (recognizing that limited resources creates need for prosecutorial discretion); Joan E. Jacoby, The Charging Policies of Prosecutors, in The Prosecutor, supra note 20, at 75, 91-94 (hereinafter Jacoby, Charging Policies) (stating that funding may affect prosecutor's cause of action).
22. See William F. Wessel, From Cracker Barrel to Supermarket: Taking the Country out of Prosecution Management, in The Prosecutor, supra note 20, at 137, 138-39 (recommending that prosecutors in larger jurisdictions establish specific policies to deal with expanding case loads).
23. See Misner, supra note 17, at 746 ("Most states' legislatures, by creating too many policy choices, have effectively abdicated public policy-making to the prosecutor . . . .").
sire of control and accountability over prosecutorial conduct.\textsuperscript{24} If the people do not approve of prosecutors' use of their discretionary power, they can vote them out of office.\textsuperscript{25} Prosecutors, therefore, must be careful not to abuse their discretion. This threat of not being reelected ostensibly serves to protect the public from prosecutors' attempts to misuse this discretion, and warrants giving prosecutors this discretionary power.

Such fear of losing office forces popularly-elected prosecutors to address their constituents' concerns and accurately reflect their community's values when making discretionary decisions.\textsuperscript{26} Local prosecutors must stay in close contact with the people they represent, and prosecute only those crimes and those criminals which most concern people.\textsuperscript{27} The electoral process, therefore, ensures that a community's standards will be reflected in the criminal justice system. Of course, the focus on reelection might also cause some prosecutors to treat a particular defendant either harshly or leniently for political gain.\textsuperscript{28} The public accepts this risk in return for prosecutors' expertise, and to avoid having to make difficult prosecutorial decisions themselves.\textsuperscript{29}

Just as prosecutors are paid to make these discretionary decisions, the electorate is ill-informed to pass judgment on each individual decision.\textsuperscript{30} The public is not aware of the financial, legal, or political issues prosecutors consider before making decisions such as what crime

\textsuperscript{24} See William T. Pizzi, Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform, 54 Ohio St. L.J. 1325, 1338 (1993). In all but five states (Alaska, Connecticut, Delaware, New Jersey, and Rhode Island), the district attorney is popularly elected. See Jacoby, Charging Policies, supra note 21, at 95 n.2.

\textsuperscript{25} See Jacoby, Charging Policies, supra note 21, at 77; Misner, supra note 17, at 763 (asserting that prosecutors use resources efficiently or risk losing reelection).

\textsuperscript{26} See Jacoby, American Prosecutor, supra note 15, at 47 (“[T]he prosecutor is a locally elected official and, as such, must reflect the values and norms of the community if he is to attain (and retain) office.”); Kathryn Abrams, Relationships of Representation in Voting Rights Act Jurisprudence, 71 Tex. L. Rev. 1409, 1423 (1993) (“The prosecutor has at least a formal obligation to hear the concerns of her constituents, and her discretion gives her an avenue through which to apply these concerns to her task.”); Pizzi, supra note 24, at 1337-38.

\textsuperscript{27} See Pizzi, supra note 24, at 1343-44.

\textsuperscript{28} See Vorenberg, supra note 14, at 1558.

\textsuperscript{29} Id. at 1559. Vorenberg's solution is to have prosecutors announce rationales for their decisions. Id. This, however, fails to resolve the struggle between the governor and the district attorney or the problem of having one person decide whether to seek the death penalty. In New York, District Attorney Johnson announced why he refused to seek the death penalty, and was subsequently superseded by Governor Pataki. It can be argued, therefore, that by announcing his rationales for not seeking the death penalty, Johnson exacerbated, rather then solved, the discretionary problems.

\textsuperscript{30} See Dwight L. Greene, Abusive Prosecutors: Gender, Race & Class Discretion and the Prosecution of Drug-Addicted Mothers, 39 Buff. L. Rev. 737, 777 (1991) (“[T]he public is generally not very sophisticated about the prosecutor's role in the criminal justice system.”).
to charge.\textsuperscript{31} Society, therefore, provides prosecutors with wide discretion, but, as noted above, limits this power by voting the prosecutor out of office if it believes the discretion has been abused.\textsuperscript{32}

II. Discretion and the Death Penalty

Although the dangers of prosecutorial discretion exist throughout the criminal process, they are most problematic in the context of the death penalty, where prosecutors are likely to have the greatest influence on whether a defendant is sentenced to death.\textsuperscript{33} The grave consequences facing the defendant, and the attention the media and public pay to capital punishment cases, demand that the decision to seek the death penalty be made correctly.\textsuperscript{34} This part first examines the Supreme Court's treatment of prosecutorial discretion in the death penalty context. It next focuses on the dangers which arise as a result of this prosecutorial discretion, and looks at the New York dispute between Governor Pataki and District Attorney Johnson in order to highlight what happens when these dangers arise. Finally, this part describes how states with statutory provisions similar to New York's may face a situation similar to what occurred between Pataki and Johnson, thereby making the solution proposed in this Note applicable beyond New York.

A. The Supreme Court Speaks

The Supreme Court has directly addressed the constitutionality of prosecutorial discretion in the decision whether to seek a capital sentence against a particular defendant.\textsuperscript{35} In \textit{Gregg v. Georgia},\textsuperscript{36} the Supreme Court found Georgia's capital punishment statute constitu-


\textsuperscript{32} Peter L. Davis, \textit{Rodney King and the Decriminalization of Police Brutality in America: Direct and Judicial Access to the Grand Jury as Remedies for Victims of Police Brutality when the Prosecutor Declines to Prosecute}, 53 Md. L. Rev. 271, 294 (1994) (arguing that this protection is a facade because most of the decision-making process is kept private).

\textsuperscript{33} See Stephen B. Bright, \textit{Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty}, 35 Santa Clara L. Rev. 433, 450 (1995) ("The most important decisions that may determine whether the accused is sentenced to die are those made by the prosecutor.").


\textsuperscript{36} 428 U.S. 153 (1976).
More importantly for the purposes of this Note, however, was the Court's rejection of the defendant's challenge to what he called the "unfettered authority" afforded prosecutors by the Georgia death penalty statute. In affirming prosecutors' authority to select the cases in which to pursue the death penalty, the Court held that "[a]t each of these [discretionary] stages an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty. . . . Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution." Prosecutorial discretion, therefore, does not render a state's death penalty unconstitutional.

B. Dangers of Discretion

Despite its constitutionality, the breadth of prosecutorial discretion has received much criticism. Even the Supreme Court, which found prosecutorial discretion in death penalty cases constitutional, nevertheless, recognized the serious policy issues which arise due to the death penalty.

Prosecutorial discretion is essentially unrestricted, resulting in arbitrary and capricious sentences due to the sentencer's discretion. The Court held that by requiring a jury to consider both the circumstances of the crime and the criminal in deciding whether to seek a sentence of death, the Georgia legislature successfully eliminated any arbitrariness in sentencing.

Prosecutors, therefore, have unbridled authority to select which defendants to seek the death penalty against defendants accused of first degree murder.

Prosecutorial discretion has been explicitly rejected by the Supreme Court (citations omitted), cert. denied, 488 U.S. 948 (1988).

See, e.g., Kenneth C. Davis, Discretionary Justice: A Preliminary Inquiry 188-91 (1969) [hereinafter Davis, Discretionary Justice] (attacking American prosecutorial discretion and its basic assumptions); Vorenberg, supra note 14, at 1554 ("The existence and exercise of prosecutorial discretion are inconsistent with the most fundamental principles of our system of justice and our basic notions of fair play and efficient criminal administration."). But see Pizzi, supra note 24, at 1329 (stating that "a defense of the American prosecutor has been long overdue").

The Supreme Court has repeatedly stated that the death penalty, despite its constitutionality, should receive special treatment because "death is different." See Ford v. Wainwright, 477 U.S. 399, 411 (1986) (plurality opinion) ("In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability. This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." (citations omitted)); Gardner v. Florida, 430 U.S. 349, 357-58 (1977) (plurality opinion) ("From the point of view of the defendant, [death] is different in both its severity and its finality."); Woodson v. North Carolina, 428 U.S. 280, 2577
thus creating a number of dangers.\textsuperscript{43} Using the New York dispute as a case study, this section highlights some of these dangers.

1. Prosecutors May Refuse to Apply Particular State Laws

As noted above, the local prosecutor has extensive power to decide what cases to pursue and what charges to bring.\textsuperscript{44} One commentator has noted, "[t]he problem of prosecutorial discretion [is] so acute . . . [because the] prosecutor has a monopoly over the criminal process."\textsuperscript{45} As a result, prosecutors may, through non-prosecution of certain crimes, ignore laws passed by the legislature.\textsuperscript{46} This threat has increased as legislatures have broadened the criminal code without providing prosecutors additional resources.\textsuperscript{47} With more conduct being considered criminal and a limited resource pool, prosecutors cannot enforce every criminal statute.\textsuperscript{48} As a result, some crimes go unpunished—in effect, the law is ignored.

Although the danger of a prosecutor ignoring a law exists generally within a system of unfettered prosecutorial discretion, it poses a particular problem in the death penalty context. If prosecutors refuse to seek the death penalty, the result may resemble New York's scenario—supersedeure and litigation.\textsuperscript{49}

\textsuperscript{305} (1976) (plurality opinion) ("[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long."). Whether the Supreme Court still adheres to this mantra has been questioned in light of recent habeas corpus decisions. See Diane Wells, Federal Habeas Corpus and the Death Penalty: A Need for a Return to the Principles of Furman, 80 J. Crim. L. & Criminology 427, 449-65 (1989) ("Regardless of the Court's earlier assertions that death is a unique penalty, therefore entitling capital defendants greater procedural protections than noncapital defendants, the Court has recently indicated a willingness to abandon this concern.").

\textsuperscript{43}. See Davis, Discretionary Justice, supra note 41, at 188; Cox, supra note 21, at 418; Vorenberg, supra note 14 at 1525.

\textsuperscript{44}. See supra note 43.


\textsuperscript{46}. See Miller, supra note 21, at 184 (noting that prosecutors do not enforce certain laws, such as prohibition, adultery, and fornication); Aubrey M. Cates, Jr., Can We Ignore Laws?—Discretion Not to Prosecute, 14 Ala. L. Rev. 1, 3-6 (1961) (describing laws in Alabama which society would not enforce); Greene, supra note 30, at 738 (stating that "prosecutors choose which laws to enforce, how to enforce them, and whom they should be enforced against."); Sidney I. Lezak & Maureen Leonard, The Prosecutor's Discretion: Out of the Closet—Not Out of Control, 63 Or. L. Rev. 247, 248 (1984) (labelling Sunday closing and gambling laws as examples).

\textsuperscript{47}. See Langbein, supra note 45, at 451 (noting that financial pressures, due to "overcriminalization," are so great that "hardly a serious American writer on criminal law" fails to call for decriminalization of some crimes); Vorenberg, supra note 14, at 1525 (describing how increase of crimes without additional resources forces prosecutors to consider financial issues when deciding whether to charge).

\textsuperscript{48}. See Miller, supra note 21, at 179-85 (citing extradition as an example where the decision whether to proceed is directly influenced by the amount of resources available to prosecutors); Langbein, supra note 45, at 451 (" Prosecutorial discretion is largely a resource question.").

\textsuperscript{49}. See infra part II.C for a full discussion.
In addition, despite the constitutionality of vesting the discretionary decision of whether to seek the death penalty in one person, this power subjects each defendant to the whims of local prosecutors. Prosecutors may introduce other factors into the decision—most likely their religious, ethical, or philosophical beliefs. Hence, whether defendants will face the death penalty may be more a result of prosecutors' belief systems than the characteristics of the criminal's conduct. This subjective system for such a serious decision is fundamentally unfair to the defendant.

2. Laws May Be Applied Disproportionately Throughout a State

Although placing discretionary power with popularly-elected prosecutors ensures that the public can retain some control over this power, it also creates the risk that laws will be applied disproportionately throughout a state. The laws that constituents find objectionable differ between counties; therefore due to prosecutorial discretion, most criminal laws are enforced disproportionately. This lack of uniformity amongst counties occurs because of differences between counties, such as the number of crimes committed and the amount of available resources. Each county wants its own prosecutor to have the ability to select the crimes he will enforce; the residents thus accept as part of prosecutorial discretion that the different counties may not uniformly enforce the criminal code.

The situation differs in a death penalty case, however, because of the political significance attached to this issue. Counties which sup-

51. Id.; see also John S. Edwards, Professional Responsibilities of the Federal Prosecutor, 17 U. Rich. L. Rev. 511, 522 (1983) (urging prosecutors not to allow personal considerations to affect choosing who to charge); McCann, supra note 34, at 668 ("The danger arises . . . that the prosecutor will be guided not by the appropriate legal considerations of a particular case but rather by extraneous pressures . . . ."); Fred C. Zacharias, Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?, 44 Vand. L. Rev. 45, 58 (1991) (noting that prosecutors' discretion "creates a risk that prejudice or self-interest will govern [their] decisions").
52. See supra note 51.
53. See supra notes 24-32 and accompanying text.
54. See Jacoby, American Prosecutor, supra note 15, at 275-78 (recognizing that different environments within a state affect prosecutors decisions).
55. See Pizzi, supra note 24, at 1343-44.
56. See Jacoby, American Prosecutor, supra note 15, at 276 (noting that different types of crimes are committed in urban, suburban, and rural areas and that prosecutors' actions reflect the norms of these various communities); Pizzi, supra note 24, at 1344 (stating that "it is almost guaranteed that prosecutors who are elected in highly rural counties will have quite different constituencies and will face very different criminal problems from those prosecutors elected in heavily urban counties").
57. See supra note 26 and accompanying text.
58. This importance was highlighted in the 1994 gubernatorial race where one in five voters cited the death penalty as the most important issue of the election.
port the death penalty want to know that a person charged with committing a heinous murder will stand trial facing the possibility of a death sentence regardless of where the crime is committed. On the other hand, counties, like the Bronx in New York, that elect a district attorney partly due to his opposition to the death penalty, do not want this preference usurped by the desires of the majority of counties in the state. This struggle between the interests of a local community and those of the state-at-large creates a fundamental problem in the administration of the death penalty. In an attempt to solve this problem, this Note proposes that the decision whether to seek the death penalty be made by committees in which both local and state-wide interests are represented. 59

3. The Threat of Supersedure May Force Prosecutors to Make Decisions Contrary to Democratic Ideal

Prosecutors in the American criminal justice system can, and must, freely employ their prosecutorial discretion. 60 Prosecutorial discretion in deciding to seek the death penalty, in combination with either the governor or attorney general having the power to remove the prosecutor, however, creates a problematic situation for prosecutors. Prosecutors opposing the death penalty must choose between: (1) telling their constituents of their opposition to the death penalty and their reluctance to seek it, only to be superseded in those cases; (2) acting against their conscience by remaining vague on the subject and then seeking capital punishment only in particularly heinous cases; or (3) denying a blanket refusal to seek capital punishment but nonetheless proceeding under such a policy. 61

Although the system would function under such circumstances, it is an inefficient way to conduct a capital punishment regime. Allowing a


59. See infra part IV.A.

60. See Tracey L. Meares, Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives, 64 Fordham L. Rev. 851, 861 (1995) (stating that a prosecutor requires discretion to effectively perform duties); Melilli, supra note 14, at 674 (acknowledging consensus that prosecutorial discretion is inevitable in our criminal system); Murray R. Garnick, Note, Two Models of Prosecutorial Vindictiveness, 17 Ga. L. Rev. 467, 470 (1983) (noting that criminal justice system requires broad prosecutorial discretion).

61. One example is Manhattan District Attorney Robert Morgenthau, who while publicly announcing his opposition to the death penalty has nevertheless said there might be cases where he would apply the statute. By clearly denying a refusal to ever seek the death penalty, Morgenthau has thus far successfully avoided the scrutiny that has plagued District Attorney Johnson. See Jan Hoffman, Death Penalty Raises Issue of Obligation of Prosecutor, N.Y. Times, Mar. 17, 1996, at 33, 35. In the future, public pressure may force Morgenthau to seek the death penalty if faced with a particularly gruesome case.
district attorney to announce that he will never seek the death penalty might not, on its own, present much of a problem—the voters of the county would know his views and could indicate their support or disapproval at the voting booth. When combined, however, with a pro-death penalty governor entrusted with unlimited supersede power, the process becomes costly, contentious, and counter-productive. A closer examination of the Pataki-Johnson struggle, which follows below, reveals the depth of the problems engendered by such a system.

C. Pataki v. Johnson: A Dispute in New York

In March 1995, the New York State legislature passed a statute making first degree murder punishable by death or life imprisonment. Under the statute, individual district attorneys have absolute discretion whether to seek a death sentence; this grant of prosecutorial power led to a legal firestorm.

On the day the statute passed, Bronx District Attorney Robert T. Johnson announced: "[W]hile I will exercise my discretion to aggressively pursue life without parole in every appropriate case, it is my present intention not to utilize the death penalty provisions of the statute." Johnson's reluctance to seek the death penalty was based on his concern about the possibility of the innocent being put to death,

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62. See supra note 58.
63. One could argue that the decision reached in the Johnson case makes future executive orders to supersede straightforward. Even so, costs still exist in transferring the case from the district attorney's office to the attorney general. In addition, the time lost in moving the case could be significant because the state has only 120 days to decide whether to seek the death penalty. See infra note 66.
64. See supra note 2.
65. N.Y. Penal Law § 60.06 (McKinney 1987 & Supp. 1997). The statute provides in part: "When a person is convicted of murder in the first degree . . . , the court shall . . . sentence the defendant to death, to life imprisonment without parole . . . or to a term of imprisonment for a class A-1 felony other than a sentence of life imprisonment without parole . . . ." Id.
66. Although the statute makes no mention of what factors to consider in seeking the death penalty, prosecutors have only 120 days to decide whether to seek the death penalty. N.Y. Crim. Proc. § 250.40 (McKinney Supp. 1997). The statute states in pertinent part:

2. In any prosecution in which the people seek a sentence of death, the people shall, within one hundred twenty days of the defendant's arraignment . . . serve upon the defendant and file with the court . . . a written notice of intention to seek the death penalty.

3. [W]here the people file a notice of intent to seek the death penalty . . . the defendant shall be entitled to an additional sixty days for the purpose of filing new motions or supplementing pending motions.

4. A notice of intent to seek the death penalty may be withdrawn at any time by a written notice of withdrawal filed with the court and served upon the defendant. Once withdrawn the notice of intent . . . may not be refiled.

Id.
the uncertainty of a jury actually sentencing a defendant to death, the probability of unfair application of the death penalty, and the "enormous" price of death penalty cases in both time and resources.\(^6^8\) Johnson announced his views on the death penalty to alert his constituents that his office would not aggressively pursue it.\(^6^9\) Eight months after publicly refusing to apply the death penalty statute, District Attorney Johnson was overwhelmingly reelected.\(^7^0\)

Soon after this election, in December 1995, Johnson's reluctance to seek the death penalty became an issue again when Michael Vernon was arrested and accused of killing five people in a shoe store in Bronx County.\(^7^1\) New York Governor George Pataki wrote a letter to Johnson inquiring whether Johnson would seek the death penalty in the case, and requested a response that day.\(^7^2\) Pataki also inquired "whether [the decision not to seek the death penalty] was based on a review of the specific facts in the exercise of your professional discretion or reflects a policy decision not to seek the death penalty in any case in Bronx County."\(^7^3\) Johnson answered that he would "exercis[e] [his] statutory discretion to seek a term of incarceration of life imprisonment without the possibility of parole."\(^7^4\) Governor Pataki reluctantly accepted Johnson's decision based on the fact that the district attorney had "deliberated with [his] executive staff . . . and . . . the decision not to seek the death penalty was based on [his] 'statutory discretion.'"\(^7^5\) Pataki added, however, that he would "take all appropriate action needed to ensure that [the capital] sentencing option is available to all the residents of the State, including Bronx County."\(^7^6\)

This dispute peaked on March 14, 1996, when a New York City Police Officer was murdered in Bronx County.\(^7^7\) After three men were arrested, police quickly identified Angel Diaz as the man who shot the officer; Diaz thus became eligible to face the death penalty.\(^7^8\) Governor Pataki again wrote to Johnson—this time directly asking Johnson

\(^{68}\) Id.
\(^{72}\) Letter from George E. Pataki, Governor of New York, to Robert T. Johnson, Bronx District Attorney (Dec. 20, 1995) (on file with the *Fordham Law Review*).
\(^{73}\) Id.
\(^{74}\) Letter from Robert T. Johnson, Bronx District Attorney, to George E. Pataki, Governor of New York (Dec. 20, 1995) (on file with the *Fordham Law Review*).
\(^{75}\) Response from George E. Pataki, Governor of New York, to Robert T. Johnson, Bronx District Attorney (Dec. 20, 1995) (on file with the *Fordham Law Review*).
\(^{76}\) Id.
to elaborate the circumstances under which he would seek the death penalty.\textsuperscript{79} He did not, however, inquire whether Johnson would seek the death penalty in this particular case. At the same time, Pataki reiterated that, as governor, he had the power to supersede the district attorney.\textsuperscript{80} Johnson responded by calling Pataki’s request a form of “don’t ask, don’t tell.”\textsuperscript{81} Johnson claimed Pataki’s deadlines and ultimatums represented punishment for Johnson’s announcement of his views on the death penalty prior to an election.\textsuperscript{82} He called Pataki’s threat of supersedure “tantamount to the disenfranchisement of the voters of the Bronx.”\textsuperscript{83}

Before Johnson was statutorily required to decide whether to seek the death penalty against Angel Diaz, Pataki issued an executive order superseding Johnson with Attorney General Dennis Vacco.\textsuperscript{84} This order effectively removed Johnson as the prosecutor and entrusted Vacco with the responsibility for deciding whether to seek the death penalty against Diaz. Almost four months later, but within the statutorily mandated 120 days,\textsuperscript{85} Vacco declared his intention to seek the death penalty.\textsuperscript{86} New York’s history reflects significant use of the supersedure power and provides precedent for Governor Pataki’s supersedure of District Attorney Johnson in the Diaz case. New York law codifies the governor’s power to supersede a local district attorney\textsuperscript{87} and the practice has been widely accepted.\textsuperscript{88} In New York, an executive branch mem-

\textsuperscript{79} Letter from George E. Pataki, Governor of New York, to Robert T. Johnson, Bronx District Attorney (Mar. 19, 1996) (on file with the \textit{Fordham Law Review}). The tone of this letter was much harsher then previous letters. Pataki wrote, “As Governor, I cannot permit any District Attorney’s personal opposition to a law to stand in the way of its enforcement. No one, including a District Attorney, can substitute his or her sense of right and wrong for that of the Legislature.” \textit{Id.}.

\textsuperscript{80} \textit{See id.}

\textsuperscript{81} Letter from Robert T. Johnson, Bronx District Attorney, to George E. Pataki, Governor of New York (Mar. 20, 1996) (on file with the \textit{Fordham Law Review}).

\textsuperscript{82} \textit{Id.}

\textsuperscript{83} \textit{Id.}

\textsuperscript{84} Exec. Order No. 27 (1996). The history of supersedure in New York is well-examined in Robert M. Pitler, \textit{Superseding the District Attorneys in New York City—The Constitutionality and Legality of Executive Order No. 55}, 41 \textit{Fordham L. Rev.} 517 (1973). Pitler concludes that “[t]he constitutional history of New York State demonstrates that a district attorney, despite his local election in the county in which he serves, is a state executive officer performing a state function and is therefore subject to the exercise of the governor’s executive power.” \textit{Id.} at 545. This paper does not argue that the supersedure of District Attorney Johnson was unconstitutional, but rather that it fails to solve the discretionary problem; it simply effects an intra-executive branch transfer of this discretion.

\textsuperscript{85} \textit{See supra} note 66.

\textsuperscript{86} Dao, \textit{supra} note 5, at B3.

\textsuperscript{87} \textit{See supra} note 1.

\textsuperscript{88} See Johnson v. Pataki, No. 1714/96, slip op. at 66-67 (N.Y. Sup. Ct. July 9, 1996) (on file with the \textit{Fordham Law Review}) (holding that New York Governor has
ber's ability to supersede the district attorney dates back to the creation of the district attorney's office. At that time, either the governor or trial court judge, through a written order, could direct the attorney general to conduct a prosecution in any county of the state.

Though many governors expressed a general reluctance to use the supersedure power, most nevertheless used it, albeit in varied ways. For example, Governors Flower, Dewey, and Harriman all expressed a reluctance to supersede a district attorney absent evidence that he was incapable of performing his duties. In fact, between 1910 and 1928, governors superseded district attorneys more than twenty times and almost every time the order described either the specific persons involved or the specific crimes committed. Other governors were willing to issue executive orders on a much broader scale. Both Governor Smith in 1928 and Governor Lehman in 1938 issued broad supersedure orders in cases involving various unnamed corrupt acts by public officers and persons connected with them.

The New York courts have upheld a governor's right to supersede a district attorney. In Mulroy v. Carey, a county executive filed suit to enjoin the governor from superseding the district attorney in an investigation of public officials accepting bribes. The court initially held that the New York Governor has the power to supersede a district attorney. The court wrote: "Since the People of the State, by specific provision in the Constitution (Article IV, § 3) have charged the Governor with the duty to 'take care that the laws are faithfully executed,' and the Legislature has expressly implemented that provision . . . it appears prima facie that [the Governor's power to supersede] is valid." The court also held that the governor did not have to persuade a court that reasonable grounds existed to supersede the
district attorney in a criminal matter); Pitler, supra note 84, at 522-27 (providing history of use of supersedure in New York).

89. See Pitler, supra note 84, at 519.
90. Id. at 520.
91. Id. at 522-27.
92. Id. at 523, 526. Governor Flower, however, did acknowledge that there may be cases "where, by reason of personal or local complications, the interests of a thorough and impartial prosecution demand that the Attorney-General should supersede the district attorney. . . . But they are rare, and resort to this statute, therefore, ought to be equally rare." 1894 Public Papers of Governor Flower 67.
93. See Pitler, supra note 84, at 524.
94. Id. at 524-25.
95. Id.
96. See B. Turecamo v. Bennett, 21 N.Y.S.2d 270, 275 (App. Div. 1940) (holding that governor's statutory supersedure power was constitutional).
98. Id. at 930-31.
99. Id. at 931.
100. Id. (citations omitted).
district attorney. In affirming the lower court, the Court of Appeals refused, however, to decide "whether in any or all circumstances the exercise of the executive power to supersede an elected district attorney would be beyond judicial review or correction in a direct or collateral action."

Against this backdrop, the struggle between Governor Pataki and District Attorney Johnson moved to the courts. Johnson filed suit in the Supreme Court of Bronx County seeking a writ of mandamus to prevent the governor from implementing the executive order. The court was to decide "whether the Governor of the State of New York can supersede the District Attorney of Bronx County with respect to a criminal prosecution under the [death penalty] statute." Johnson's primary claim was that Pataki's executive order was unprecedented—indeed, no governor had ever superseded a district attorney in a criminal matter over a disagreement about what particular sentence to seek. Johnson claimed that the governor misinterpreted the death penalty statute as giving him absolute and unfettered supersedure authority. The purpose of supersedure, Johnson argued, is to ensure that the laws are faithfully executed; hence, because the death penalty statute never requires the district attorney to pursue the death penalty, the law was, in fact, faithfully executed. Under this interpretation of New York's Death Penalty statute, therefore, the governor never has the power to remove the district attorney.

Governor Pataki, not surprisingly, had a different view. First, he contended that the separation of powers doctrine dictated that the governor's ability to remove one executive officer for another was a

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101. Id. at 932-34 (stating that governors self-imposed limitations on their supersedure power "did not reflect any statutory compulsion nor an abdication by the governors to the courts, thereby permitting the courts to impose a burden of proof ... that they have adhered to an appropriate executive standard" (citations omitted)).
103. Mandamus is:
   a writ ... which issues from a court of superior jurisdiction, and is directed to ... an executive, administrative or judicial officer, or to an inferior court, commanding the performance of a particular act ... or directing the restoration of the complainant to rights or privileges of which he has been illegally deprived.
105. Id. at 1.
106. Id. at 17.
107. Id. at 18.
108. Id. at 19-20.
109. Id. at 20.
plenary power and beyond judicial review. He argued that superse-
dure is a political act, and as such, the court’s role was limited to de-
termining whether the governor’s act is rooted in an express grant of
constitutional or statutory authority. Next, Pataki defended gener-
ally his use of the executive order; if the legislature had intended to
limit a governor’s use of his supersedure power, he maintained, it
would have expressly written as much into the statute. Pataki
claimed that the legislature granted this plain and unambiguous power
to the governor and, therefore, the court should interpret it according
to its plain meaning. Finally, Pataki insisted that the facts of this
particular case warranted his executive order. Pataki argued that,
as Governor of New York, his responsibility is to ensure “that the laws
are faithfully executed.” Since the death penalty statute requires
prosecutors to exercise their discretion on a case-by-case basis, Pataki
claimed that Johnson’s refusal to assure the governor that he would
abide by the law forced him to supersede Johnson to ensure that the
law was followed.

The court agreed with Governor Pataki that its role was limited to
determining whether the legislature and constitution have granted the
governor the power to supersede. Relying primarily on New York
state case law, the court held: “In the performance of judicial review,
it is not for the court to decide on the wisdom or necessity of the
Governor’s supersedure of the Bronx District Attorney. Nor will the
court pass judgment on the appropriateness of the Governor’s motives
in superseding the Bronx District Attorney.” The court noted that
the governor simply designated the attorney general to prosecute the
case against Angel Diaz. The governor did not, according to the
court, direct the outcome of the case because he did not mandate the
attorney general to pursue the death penalty. Because the legisla-
ture granted the governor this power, and he had not abused it, the
court refused to rule on the merits of the supersedure.

111. Johnson, slip op. at 31.
112. Id.
113. Id. at 32-33.
114. Id. at 33.
115. Id. at 51-52.
116. N.Y. Const. art. IV, § 3.
117. Johnson, slip op. at 53-55.
118. Id. at 65.
119. Id. at 67.
120. Id. at 66.
121. Id. One must question the likelihood that Attorney General Vacco had any
choice but to seek the death penalty against Angel Diaz. Governor Pataki had ex-
pended significant political capital by superseding Johnson and he certainly would not
have been pleased to see his efforts go for naught.
122. Id. at 67. The court did state that, “[w]hile acknowledging that the power to
supersede a district attorney rests solely with the Governor, the court does not accept
the contention that the superseder authority of the Governor allows for unfettered
discretion in the exercise of that power.” Id. The New York Court of Appeals has
Finally, the court rejected the claim that because the death penalty statute granted the district attorney absolute discretion he could never fail to execute the law faithfully.\(^{123}\) Again noting that the issue was ultimately nonjusticiable and beyond review of the courts,\(^ {124}\) the court nonetheless stated that even if it could review the governor's actions, under a rational basis review, "the Governor had genuine doubt that the death penalty sentencing option would be employed, a policy which would belie the faithful execution of the Murder One Statute and trigger the Governor's constitutional obligation."\(^ {125}\) Thus, although ultimately holding that the case was nonjusticiable, the court seemed to indicate its support for Pataki's actions.

The criminal litigation ended abruptly when Angel Diaz killed himself while incarcerated.\(^ {126}\) The litigation between Johnson and Pataki, however, moved to the appellate level which affirmed the trial court's decision.\(^ {127}\) The appellate court held, similar to the trial court, that Pataki's exercise of discretion was not subject to judicial review because he had acted within his broad constitutional powers.\(^ {128}\) The appellate court also recognized that although a New York District Attorney has wide discretionary power, this power is "subservient" to the governor's responsibility to ensure that the laws of New York are uniformly applied.\(^ {129}\) This decision further entrenched the unlimited power of the Governor of New York to supersede a local district attorney.

D. Discretionary Dangers Present in Other States

The battle in New York between Governor Pataki and District Attorney Johnson potentially may be repeated in other states with capital punishment statutes. States with provisions mirroring New York's should heed New York's experience, and recognize that a similar situation could result in their states as well. The simple requirements include a popularly elected local prosecutor and a provision in the state constitution or a state statute granting the governor or attorney general power to supersede prosecutors. Although the need for change

\(^{123}\) Johnson, slip op. at 68.
\(^{124}\) Id.
\(^{125}\) Id. at 68-69.
\(^{128}\) Id. at 27.
\(^{129}\) Id. The court noted, however, that "the door has not been closed on the possible justiciability" of a challenge to the governor's authority. Id. The court was referring to language in Mulroy v. Carey, discussed earlier in this Note, where the Court of Appeals refused to state that these types of cases are never justiciable. See supra note 102.
might not be as immediate as in New York, these states should nevertheless act to avoid these discretionary problems.

1. California

California’s death penalty statute is similar to New York’s. The statute states that murder in the first degree is punishable by death. Prosecutors decide whether to seek the death penalty against a particular defendant in conformity with the general power to handle all prosecutions in their jurisdiction. In People v. Keenan, the California Supreme Court upheld prosecutors’ discretion in deciding whether to seek the death penalty against a particular defendant. It wrote that “prosecutorial discretion to select those eligible cases in which the death penalty will actually be sought does not in and of itself evidence an arbitrary and capricious capital punishment system or offend principles of equal protection, due process, or cruel and/or unusual punishment.” In California, therefore, prosecutors have discretionary power to decide whether to seek the death penalty, similar to district attorneys in New York.

The district attorney in California, however, is supervised by the attorney general. The California legislature subsequently enumerated the attorney general’s supercede power over district attor-

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131. Id. Crimes punishable by death include intentional murder for financial gain, multiple murders, murder of a peace office, and felony-murder for a specified series of crimes. Id.
132. See Cal. Gov’t Code § 26500 (West 1988) (“The public prosecutor shall attend the courts, and within his or her discretion shall initiate and conduct on behalf of the people all prosecutions for public offenses.”).
134. 758 P.2d at 1097-98.
137. Cal. Const. art. 5, § 13. The section reads:
Subject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the State. It shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced. The Attorney General shall have direct supervision over every District Attorney . . . in all matters pertaining to the duties of their respective offices . . . . Whenever in the opinion of the Attorney General any law of the State is not being adequately enforced in any county, it shall be the duty of the Attorney General to prosecute any violations of law . . . and in such cases the Attorney General shall have all the powers of the District Attorney. When required by the public interest or directed by the Governor, the Attorney General shall assist any District Attorney in the discharge of the duties of that office.

Id.
This supersedeure power has been affirmed and generally found unreviewable by the California courts.139 For example, in People v. Superior Court,140 the government sought a writ of mandamus after the trial court removed the district attorney from a criminal case due to a conflict of interest.141 The trial court, after disqualifying the district attorney, ordered the attorney general to appear before the court.142 The attorney general obtained a stay and applied to the higher court for a writ requiring the trial court to vacate its order.143 The attorney general's motion was granted by the appellate court.144 The appellate court found that the trial court could remove the district attorney only upon a failure of the attorney general to act. According to the appellate court, the attorney general did not fail to act, but rather elected to allow the prosecutor to try the case despite the appearance of a conflict of interest.145 The Supreme Court of California, however, reversed the appellate court and upheld the trial court's removal of the district attorney, directing the attorney general to assume responsibility for the case.146 It stated that by replacing the district attorney with the attorney general, the trial judge only changed the state's representative, he did not infringe on the executive branch's charging discretion.147 The Supreme Court of California noted, however:

138. The power is enumerated in two places. California Penal Code section 923 states: "Whenever the Attorney General considers the public interest requires, he may, with or without the concurrence of the district attorney, direct the grand jury to convene for the investigation and consideration of such matters of a criminal nature as he desires to submit to it." Cal. Penal Code § 923 (West 1985). In addition, California Government Code section 12550 states:

The Attorney General has direct supervision over the district attorneys of the several counties of the State . . . . When he deems it advisable or necessary in the public interest, or when directed to do so by the Governor, he shall assist any district attorney in the discharge of his duties, and may, where he deems it necessary, take full charge of any investigation or prosecution of violations of law . . . . In this respect he has all the powers of a district attorney . . . .


139. See People v. Honig, 55 Cal. Rptr. 2d 555, 595 (Ct. App. 1996) ("[Article V, section 13 of the state constitution] confers broad discretion upon the Attorney General to determine when to step in and prosecute a criminal case. And that [section] does not suggest that the Attorney General's discretion is reviewable by the superior court at the behest of a defendant.").

140. 130 Cal. Rptr. 241 (Ct. App. 1976).

141. Id. at 243. The conflict arose because the mother of the deceased was employed as a "discovery clerk" for the Contra Costa District Attorney. Id. Additionally, the mother and the defendant were involved in a dispute over the custody of a child, and the mother would gain custody if the defendant was convicted. Id.

142. Id. at 245.

143. See People v. Superior Court, 561 P.2d 1164, 1168 (Cal. 1977).

144. See People v. Superior Court, 130 Cal. Rptr. 241, 245 (Ct. App. 1976).

145. Id. at 244.

146. People v. Superior Court, 561 P.2d at 1166.

147. Id. at 1169.
The relative dearth of cases [of trial courts removing the district attorney] confirms that such conflicts rarely reach the trial courts. In this state it appears the issue is often resolved by intervention of the Attorney General acting under his statutory powers, and nothing we say herein is intended to discourage that practice.  

Although the Supreme Court of California upheld the power of the trial court to remove the district attorney from a case, it nevertheless indicated its support of the attorney general's power to independently remove the district attorney.

Because the California courts have upheld the legislature's grant of power to the attorney general to supersede a popularly elected district attorney, the possibility exists that a scenario similar to the one that happened in New York may occur.

2. Colorado

Colorado's death penalty statute is also similar to New York's. In Colorado, first degree murder is a Class 1 felony, punishable by a minimum of life imprisonment and a maximum of death. The statute grants prosecutors the power to decide whether to seek the death penalty. In People v. Davis, a defendant challenged the state's death penalty statute on the basis that prosecutors' unlimited discretion violated the defendant's due process guarantee and his protection against cruel and unusual punishment. The Colorado Supreme Court rejected the challenge, relying on Supreme Court precedent to uphold the broad prosecutorial discretion granted by the state legislature.

Colorado has also afforded the governor wide latitude in superseding local, popularly-elected prosecutors. The statutory provision

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148. Id. at 1173-74 (citation omitted).
149. Id. at 1174. It must again be noted that this case involved a conflict of interest. It remains unclear how a California court would view a supersede by the California attorney general similar to Governor Pataki's in New York.
152. See id. § 20-1-102(3) (Supp. 1996).
154. Id. at 172.
155. See supra part II.A.
156. See Davis, 794 P.2d at 172.

shall appear for the state and prosecute and defend all actions and proceedings, civil and criminal, in which the state is a party or is interested when required to do so by the governor, and he shall prosecute and defend for the state all causes in the appellate courts in which the state is a party or interested.

Id.
granting this power is similar to New York's, in that, unlike California, the attorney general can act only upon an order from the governor.\textsuperscript{158}

In \textit{People ex rel. Witcher v. District Court},\textsuperscript{159} the Colorado Supreme Court interpreted this statute to grant the attorney general the authority to prosecute cases on behalf of the state when required to do so by the governor.\textsuperscript{160} In \textit{Witcher}, the governor issued an order directing the attorney general to investigate incidents occurring within the Colorado state penitentiary.\textsuperscript{161} Representatives of the district attorney and the attorney general initially cooperated, but when the defendant filed a motion requesting designation of the prosecuting attorney, the attorney general contended that the case should be prosecuted by his office.\textsuperscript{162} The district attorney challenged the attorney general's authority to prosecute the charges on the grounds that such an attempt conflicted with another state statute providing that "[e]very district attorney shall appear in behalf of the state and the several counties of his district."\textsuperscript{163} The Colorado Supreme Court rejected the district attorney's challenge by quoting language from \textit{People v. Gibson}:\textsuperscript{164}

\textit{When the Governor . . . requires the attorney general to prosecute a criminal case in which the state is a party, he becomes to all intents and purposes the district attorney, and may in his own name and official capacity exercise all the powers of such officer, for he is then, and in that case, the public prosecutor. Being authorized and empowered to appear and prosecute, he can do each and everything essential to prosecute . . . .}\textsuperscript{165}

Although the court in \textit{Witcher} upheld the right of the attorney general to assume the prosecutorial duties from the district attorney, in \textit{People ex rel. Tooley v. District Court},\textsuperscript{166} a companion case decided the same day, the court held that absent a command from the governor, the attorney general was not authorized to prosecute criminal cases.\textsuperscript{167} In \textit{Tooley}, the district attorney requested the help of the attorney general's office in investigating an auto theft ring.\textsuperscript{168} The two offices worked together to discover information and to obtain indictments.\textsuperscript{169} Later, however, the district attorney requested that the trial court order him to prosecute the case.\textsuperscript{170} The Colorado Supreme Court held that the statute, which granted the attorney general the

\begin{thebibliography}{99}
\bibitem{158} Id.
\bibitem{159} 549 P.2d 778 (Colo. 1976) (en banc).
\bibitem{160} Id. at 779-80.
\bibitem{161} Id. at 779.
\bibitem{162} Id.
\bibitem{164} 125 P. 531 (Colo. 1912).
\bibitem{165} Id. at 536.
\bibitem{166} 549 P.2d 774 (Colo. 1976) (en banc).
\bibitem{167} Id. at 776.
\bibitem{168} Id. at 775.
\bibitem{169} Id. at 776.
\bibitem{170} Id.
\end{thebibliography}
power to supersede the district attorney,\textsuperscript{171} confined the attorney general's authority to replace the district attorney to commands from the governor or general assembly.\textsuperscript{172} Thus, in Colorado, similar to New York, the governor has the power to supersede the local district attorney.

In states such as New York, California, and Colorado, district attorneys run the risk of supersedeure in death penalty cases. The risk of supersedeure and subsequent litigation highlights the dangers of placing the decision to seek the death penalty in a single individual. The solutions available to ameliorate these dangers must, therefore, be clarified.

III. Attempted Solutions to the Discretionary Dilemma

Given the dangers of discretion in the capital context, it is necessary to evaluate the existing solutions to the problem. This part examines why states, such as New York, California, and Colorado must avoid depending exclusively on either the executive or judiciary branch for a solution to this problem. This part first highlights the fact that acts within the executive branch, like Governor Pataki's supersedeure, merely transfer this discretionary power. Next, it discusses how the judiciary has consistently refused to entertain cases involving control of prosecutorial discretion unless the legislature expressly mandates that they do so. Finally, this part examines the laws of two states, Louisiana and Pennsylvania, to show that even when state legislatures have succeeded in passing legislation that avoids a dispute between the governor and the district attorney, their legislation nonetheless fails to solve the discretionary dangers inherent in making prosecutors solely responsible for deciding who will face the death penalty.

A. The Executive Branch—Pataki's Supersedeure

Governor Pataki's executive order was intended to ensure enforcement of the prosecutorial discretion written into New York's capital punishment statute.\textsuperscript{173} His attempted solution, however, failed to solve the danger of having one person decide whether to seek the death penalty.\textsuperscript{174}

Governor Pataki's unprecedented supersedeure of District Attorney Johnson did not achieve its intended purpose of curtailing discretion, but instead merely transferred discretion away from the local prosecutor and into the hands of the attorney general. The same concern, however, presents itself with respect to both Johnson's refusal ever to seek the death penalty and Pataki's superseding him: As long as the

\textsuperscript{171} See supra note 157.
\textsuperscript{172} Tooley, 549 P.2d at 776-77.
\textsuperscript{173} See supra note 4 and accompanying text.
\textsuperscript{174} See supra part II.B.
death penalty decision remains in the hands of a single individual, the
problems of prosecutorial discretion remain.\textsuperscript{175} Whether the responsibility lies with local prosecutors, the governor, or the state attorney
general, each official's own personal agenda will influence the decision.\textsuperscript{176}

The attorney general, when ordered by the governor to replace the
district attorney, will face pressure from the governor to pursue the
death penalty. The governor does not want to supersede a district
district attorney for refusing to seek the death penalty only to have the attorney
general reach the same conclusion.\textsuperscript{177} By superseding the district
district attorney, the governor has, in effect, taken the discretion into his own
hands without changing the nature or effectiveness of the discretion itself. The sole difference is that the discretion is used to always, rather than never, seek the death penalty.

Finally, the attorney general, as an elected state official, will likely
be seen by the citizens of local community as advancing the interests
of the state over their own.\textsuperscript{178} The people vote for their local prosecu-
tor, at least in part, because of his stance on the death penalty.\textsuperscript{179} When the prosecutor seeks to respond to these views by prosecuting
few, if any, capital prosecutions, the people find their elected official—who carried out their mandate—removed by a state-wide
elected officer. The litigation in New York, therefore, provides a clear
example of what happens when discretion is placed solely in the hands
of one person and why supersede fails to solve the problem. Super-
sedure, in this context, results in litigation and political chaos—clearly
an unsatisfactory result.

B. Judicial Control of Discretion

Because a governor's supersede fails to correct the discretionary
problem, allowing the judiciary to supervise the use of supersede
power represents another possible solution. The judicial branch, however, has historically been reluctant to supervise the use of

\textsuperscript{175} Id.
\textsuperscript{176} See supra part II.B.1.
\textsuperscript{177} See Dao, supra note 5, at B3 ("In appointing Mr. Vacco, a fellow Republican
and staunch supporter of the death penalty, the Governor made clear that he felt the
death penalty would be appropriate . . . .").
\textsuperscript{178} See supra part II.B.2.
\textsuperscript{179} See, e.g., Hoffman, supra note 61, at A33 (writing that Johnson announced his
opposition to the death penalty shortly after the law went into effect); George James,
(noting that politician's death penalty stance put him at odds with Governor Mario
Cuomo); Maria Newman, \textbf{Vacco Savors Victory as a Mandate for the Death Penalty},
N.Y. Times, Nov. 10, 1994, at B16 (noting that majority of Vacco supporters stated
that they believed in the death penalty).
prosecutorial discretion. In *United States v. Cox*, the United States Attorney refused to indict defendants accused of perjury in contravention of the decision of a grand jury and an order from the court. In a plurality opinion, the Fifth Circuit wrote that "courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions." Courts' reluctance to interfere can generally be attributed to a respect for the separation of powers doctrine.

Judicial reluctance to encroach upon the executive's power to prosecute exists on the state level. In *Inmates of Attica Correctional Facility v. Rockefeller*, plaintiffs brought a class action suit seeking to require federal and state officials to investigate and prosecute per-

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180. See Davis, Discretionary Justice, *supra* note 41, at 209; Miller, *supra* note 21, at 295. The reluctance of the judiciary was expressed in a 1949 federal district court opinion:

[The prosecutor] must appraise the evidence on which an indictment may be demanded and the accused defendant tried, if he be indicted, and in that service must judge of its availability, competency and probative significance. He must on occasion consider the public impact of criminal proceedings, or, again, balance the admonitory value of invariable and inflexible punishment against the greater impulse of the "quality of mercy." . . . Into these and many others of the problems committed to his informed discretion it would be sheer impertinence for a court to intrude. And such intrusion is contrary to the settled judicial tradition.


181. 342 F.2d 167 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965).

182. *Id.* at 169-70.

183. *Id.* at 171. Additionally, if a judge is permitted to review a charging decision, a host of procedural questions are raised such as when the review would occur and whether a judge could add or subtract charges while keeping others. This would force the judge to ensure that prosecutors' charging decisions were fair, while attempting to remain neutral. See Pizzi, *supra* note 24, at 1354.

184. See *supra* note 110. This section is limited to a focus on the hesitancy of the judiciary to involve itself in limiting prosecutorial discretion; whether it should become more active in this realm will be left unaddressed. See generally Pizzi, *supra* note 24, at 1351-55 (analyzing practical problems of judiciary attempting to curb prosecutorial discretion).

185. See, e.g., People v. Keenan, 758 P.2d 1081, 1097-98 (Cal. 1988) (in bank) ("[P]rosecutorial discretion to select those eligible cases in which the death penalty will actually be sought does not in and of itself evidence an arbitrary and capricious capital punishment system . . . "), *cert. denied*, 490 U.S. 1012 (1989); People v. Cole, 665 N.E.2d 1275, 1289 (Ill. 1996) ("[W]e have determined that the [death penalty] statute is not invalid for the discretion it affords the prosecutor in deciding whether to request the death penalty in a particular case." (citations omitted)); State v. Garner, 459 S.E.2d 718, 725 (N.C. 1995) ("This Court has consistently recognized that a system of capital punishment is not rendered unconstitutional simply because the prosecutor is granted broad discretion."). *cert. denied*, 116 S. Ct. 948 (1996); Commonwealth v. DeHart, 516 A.2d 656, 670 (Pa. 1986) ("Absent some showing that prosecutorial discretion is being abused in the selection of cases in which the death penalty will be sought, there is no basis for [defendant's] assertions."). *cert. denied*, 483 U.S. 1010 (1987).

186. 477 F.2d 375 (2d Cir. 1973).
sons for their alleged mistreatment of inmates. Plaintiffs claimed that the deputy state attorney appointed by the governor to supersede the local district attorney could not neutrally investigate claims against the governor and other state officials. The federal court rejected this claim, based on New York law, they found no mandatory responsibility for the district attorney to prosecute. Instead, the law allows prosecutors wide discretion not subject to judicial review.

This judicial hesitancy to encroach on prosecutorial discretion extends to the capital context. In State v. Bloom, the Supreme Court of Florida spoke directly to this issue. The defendant was indicted and charged with two counts of first degree murder. The defendant made a motion on each count that the state lacked sufficient evidence to warrant a sentence of death. The circuit judge granted the motion in one count and ordered that the state proceed on a non-capital count. The state appealed, and ultimately the Florida Supreme Court held that the Florida Constitution, which grants the state attorney complete discretion in deciding what crime to charge against a defendant, forbade the judiciary from interfering with this discretion. Furthermore, the Florida Supreme Court held that allowing the trial judge to make a determination on the death penalty's applicability would modify the state's death penalty statute, which mandates that the decision to sentence a defendant to death be made after a determination of guilt. To grant the trial judge this decision making power would create a "trifurcated death sentence procedure." The Florida Supreme Court, therefore, made it clear that it would not encroach upon prosecutors' discretion in deciding whether to seek the death penalty.

In the suit filed in New York by District Attorney Johnson, the court similarly refused to encroach upon the governor's ability to su-

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187. Id. at 376. This suit arose in response to an inmate uprising at Attica Correctional Facility ("Attica"). Id. The plaintiffs consisted of former and present inmates of Attica, a mother of a slain inmate and a New York State Assemblyman. Id. The complaint alleged that the defendants, including the Governor of New York, the Commissioner of Correctional Services, and state police and correction officers had been involved in the commission of various crimes against the plaintiffs and the class they sought to represent. Id.

188. Id. at 377.
189. Id. at 382 (citations omitted).
190. Id.
191. 497 So. 2d 2 (Fla. 1986).
192. Id. at 3.
193. Id. at 3.
194. Id.
195. Id. (citing Fla. Const. art. II, § 3).
196. Id. (citing Fla. Stat. Ann. § 921.141(1) (West 1985)).
197. Id.
persede a district attorney finding the issue nonjusticiable. It viewed its role as limited to determining if the governor's act of supersede was based on an express power granted by the New York State Constitution or statutory authority. The reluctance of the judiciary, on both the federal and state level, to control prosecutorial discretion renders its presence an inadequate solution to the discretionary problem.

C. Attempted Legislative Solutions

Despite the judiciary's reluctance to restrict prosecutorial discretion, most legislative solutions aimed at curtailing this discretion include judicial intervention. Although states employing these solutions have had success in preventing a situation similar to what happened in New York, their reliance on the judiciary renders them unhelpful as a model for states like New York, California, and Colorado. Additionally, although these states have avoided a Pataki-Johnson type dispute, they have failed to address the dangers arising from having one person make the discretionary decision of whether to seek the death penalty. This section examines attempts by state legislatures to restrict the ability of executive officials to usurp prosecutors of their discretionary power.

1. The First Attempt—Louisiana

The Louisiana legislature has deemed the judiciary the sole arbiter of conflicts between the attorney general and a district attorney. An attorney general cannot, under any circumstance, supersede a district attorney without obtaining the permission of the court. District attorneys, therefore, have broad power to prosecute cases.

The Attorney General of Louisiana has sought to use this power only twice in state history. In 1981, the attorney general sought to supersede the district attorney, by applying for a writ of mandamus, on the basis that the district attorney had obstructed the activities of

199. Id. at 66-67.
200. Id. at 65 (finding grant of power of supersedure to governor was valid grant of authority).
201. La. Const. art. IV, § 8(3). The section reads:
   As necessary for the assertion or protection of any right or interest of the state, the attorney general shall have authority . . . (3) for cause, when authorized by the court which would have original jurisdiction and subject to judicial review, (a) to institute, prosecute, or intervene in any criminal action or proceeding, or (b) to supersede any attorney representing the state in any civil or criminal action.

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the grand jury. The court held that if the attorney general could prove the allegations against the district attorney, then:

the district court shall immediately authorize the attorney general to (1) institute and prosecute, or to intervene in any proceeding, as he may deem necessary for the assertion or protection of the rights and interests of the state in the matters under investigation by the additional grand jury or any other matters arising therefrom; (2) supersede the district attorney in any criminal action resulting from the activities of the additional grand jury, including any prosecutions against members of the grand jury.

In the second case, the attorney general sought to supersede the district attorney because missing funds from the district attorney's office were allegedly used to pay informants. Although no definite answer was reached because the district attorney's plea bargain mooted the issue, the case provides another example of the attorney general successfully superseding the district attorney subject to judicial approval.

If a district attorney under Louisiana's death penalty statute elected not to seek the death penalty, the attorney general would have to show cause in order to supersede the district attorney. The determination made by the court is "whether or not the Attorney General possesses information sufficient to warrant official inquiry into the actions of the district attorney." Louisiana, therefore, does not face the same problems as New York, California, and Colorado because its constitution forbids supersedeure without judicial intervention and without satisfying certain conditions. Additionally, the Louisiana judiciary has shown a willingness to interfere in the relationship between the attorney general and the district attorney. Although Louisiana's judicial approval requirement prevents a situation similar to New York's Pataki-Johnson dispute, the dangers of placing the discretionary power to decide whether to seek the death penalty in one person still exist—regardless of the attorney general's ability to supersede the district attorney.

In the dispute between Governor Pataki and District Attorney Johnson, the court refused to challenge the governor's ability to super-

204. Id. at 807.
206. Yeager & Hargrave, supra note 202, at 738.
207. La. Rev. Stat. Ann. § 14:30 (West 1986). The statute states that "[w]hoever commits the crime of first degree murder shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence in accordance with the recommendation of the jury." Id.
208. "Cause," in Louisiana, has been defined as "a showing that the district attorney is not adequately asserting some right or interest of the state." Plaquemines Parish Comm'n Council v. Perez, 379 So. 2d 1373, 1377 (La. 1980).
209. In re Guste, supra note 205, at 752.
sede the district attorney.210 Courts in California and Colorado have mirrored this reluctance.211 These states, especially New York, have a body of precedent evidencing the judiciary's refusal to interfere with the governor's supersedeure decisions, regardless of whether the superseded party is popularly elected. Though the legislature could follow Louisiana's lead and mandate judicial involvement, they would still face the discretionary dangers that exist when a single person is responsible for deciding whether to seek the death penalty.212

2. The Second Attempt—Pennsylvania

Pennsylvania's attempted solution relies on the involvement of the electorate. In 1978, the residents of Pennsylvania passed a constitutional amendment creating the elective office of the attorney general.213 The legislature codified this amendment by passing the Commonwealth Attorneys Act.214 Under the statute, the attorney general must obtain judicial approval to supersede the district attorney unless the district attorney requests the attorney general's intervention.215 There are, however, only two situations in which the district attorney can make such a request: (1) the district attorney lacks the resources to conduct an adequate investigation; or (2) the district attorney envisions the potential for a conflict of interest.216

This provision had two primary effects. First, it transferred the authority to influence criminal prosecutions through supersedeure from the governor to the attorney general.217 More importantly, the act limited the attorney general's power to remove the district attorney to the situations enumerated in the act or upon judicial approval.218 Prior to the Attorneys Act's adoption, the attorney general had a common law power to supersede the district attorney in local prosecutions.219

210. See supra notes 118-25 and accompanying text.
211. See supra parts II.D.1-2.
212. See supra part II.B.
215. Id. § 732-205(a)(3)-(4).
216. Id. § 732-205(a)(3).
217. See Jugovic, supra note 213, at 1380.
218. Id. at 1381.
219. See Packel v. Mirarchi, 327 A.2d 53, 54-55 (Pa. 1974) ("Pennsylvania... has approved the supersession of a district attorney on the basis of common law powers."); Commonwealth v. Fudeman, 152 A.2d 428, 430 (Pa.) ("[T]he Attorney General... may... supersede or act in conjuction with a district attorney."); cert. denied, 361 U.S. 902 (1959). At approximately the same time that the Pennsylvania legislature passed the Attorneys Act, the Pennsylvania Supreme Court, reversing years of precedent, concluded that the attorney general had no common law power to supersede a district attorney. See Commonwealth v. Schab, 383 A.2d 819, 822 (Pa. 1978).
Pennsylvania courts have upheld the Attorneys Act. In *Commonwealth v. Khorey*, Pennsylvania's Supreme Court upheld the provision of the Attorneys Act restricting the attorney general's ability to control criminal prosecutions. The court held that the statute expressly limited the attorney general's ability to supersede to cases where the district attorney requested his involvement because of a lack of resources or a conflict of interest. In *Khorey*, the attorney general's office received permission from the district attorney to handle the prosecution because it already had charges pending against the defendant. The Pennsylvania Supreme Court reversed the defendant's conviction because the attorney general failed to claim the presence of either statutory scenario that would have enabled the district attorney to request that the attorney general replace him.

Pennsylvania's method of controlling prosecutorial discretion, however, does not work in death penalty cases. Pennsylvania's death penalty statute, by not expressly assigning the charging decision to any other part of the executive branch, leaves the discretion up to the district attorney. Because of this unbridled prosecutorial discretion, Pennsylvania could possibly find itself in a predicament mirroring that of New York. As in Louisiana, however, the attorney general's only recourse would be to appeal to the courts to remove the district attorney because abuse of discretion is not one of the two enumerated factors of the Attorneys Act. Once again, this would result in litigation, but at least, unlike New York, the judiciary would be willing to provide an answer. Pennsylvania's solution does not, however, resolve the dangers of placing the discretionary decision whether to seek the death penalty with one person.

Neither the executive branch, the judicial branch, nor the legislative branch through legislation similar to Louisiana's and Pennsylvania's can address successfully the problem of placing the discretionary decision whether to seek the death penalty with one person. For a solution to adequately address the problems of prosecutors' having the discretionary power to decide whether to seek the death penalty,

220. 555 A.2d 100 (Pa. 1989).
221. *Id.* at 109.
222. *Id.*
223. *Id.* at 103.
224. *Id.* at 109-10.
225. Pa. Stat. Ann. tit. 18 § 1102(a) (1983 & Supp. 1996). The statute states, in pertinent part: "A person who has been convicted of a murder of the first degree shall be sentenced to death or to a term of life imprisonment ...." *Id.* Murder is of the first degree "when it is committed by an intentional killing." *Id.* § 2502(a). Intentional killing is "[k]illing by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing." *Id.* § 2502(d).
226. *See supra* part III.C.1.
227. *See supra* note 216.
228. *See supra* part II.B.
IV. A New Solution

The attempted solutions addressed above fail to solve all of the discretionary problems present in the capital context. Governor Pataki’s solution—simply changing which individual wields the discretionary power—does not solve the discretionary problems, but rather shifts discretion from one part of the executive branch to another.229 Most solutions relying on the judicial branch must confront a reluctant judiciary.230 The legislature, if merely mandating judicial resolution of discretionary disputes between executive branch officials, fails to address the fundamental dangers arising out of prosecutors’ sole discretion in seeking the death penalty. This part argues, however, that if state legislatures confine their focus to discretion in death penalty cases, a solution emerges.

State legislatures should remove primary responsibility for the discretionary decision whether to seek the death penalty from both local prosecutors and the governor by creating committees responsible for making this decision. The dangers resulting from unbridled prosecutorial discretion231 merit completely removing prosecutors from this discretionary decision. Although this solution is most applicable for New York and those states with similar supercedure and death penalty statutes, it would be appropriate in any state. The danger of placing the discretion to seek the death penalty in one person exists regardless of a state’s statutory scheme.232 This proposal, therefore, should be enacted in every capital punishment state.233

A. State Legislatures Should Create Committees

State legislatures should amend their death penalty statutes to include a provision creating committees empowered to decide whether to seek the death penalty. These committees would resemble tripartite arbitration boards—an equal number of members appointed by each side with the last member chosen by the other arbitrators.234 These death penalty committees would consist of seven members: three appointed by the governor, three appointed by the district attor-

229. See supra part III.A.
230. See supra part III.B.
231. See supra part II.B.
232. See supra parts II.B, III.C.
233. This is without regard to each individual state’s constitutional or statutory provisions which may prohibit the use of committees to make a discretionary decision for prosecutors.
ney, and one chosen by those already appointed. The seventh member would be selected during a meeting of the other six members who would be statutorily required to elect a seventh member.\(^{235}\) The advantage of this procedure is that the seventh member would be seen by the public, and the other committee members, as a neutral party who would decide each case on its merits.\(^{236}\) A majority vote of the committee, as in tripartite arbitration boards, would decide each case.\(^{237}\)

The powers of a prosecutor would remain basically intact. Prosecutors' broad responsibilities include: (1) investigating crimes; (2) interacting with victims and prospective witnesses; (3) deciding which crimes to charge; (4) controlling all aspects of the grand jury process; (5) appearing in court for all preliminary hearings; (6) offering and accepting any plea bargains; (7) handling all aspects of the trial including juror selection, presentation of the opening and closing statements, and examining all witnesses; and (8) offering a sentence recommendation.\(^{238}\) These committees would thus assume a small part of the prosecutors' responsibility. Prosecutors would still decide whether to charge a defendant with first degree murder, but if they did, the decision whether to seek the death penalty would then be made by this committee.\(^{239}\) Every other prosecutorial function would remain with prosecutors. These committees, therefore, would only marginally infringe on the prosecutors' role in the criminal justice system.

The criminal process would also be altered only slightly. Prosecutors would investigate a crime, arrest a defendant, and select which crimes to charge. If the defendant became statutorily eligible for the death penalty, the committee would be alerted. The government and the defense, however, would continue to perform their own investigations. After a statutorily determined amount of time,\(^{240}\) each party would present the results of their investigation to the committee. The committee would listen to the arguments, review the evidence, request additional information if desired, and render a decision. After making

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\(^{235}\) The legislature or the committee members themselves could request an outside party to provide a list of individuals interested and qualified to serve on the committee.

\(^{236}\) See Elkouri & Elkouri, supra note 234, at 129-30 (referring to the neutral party as "impartial").

\(^{237}\) Id. at 130.


\(^{239}\) It is possible that a rogue prosecutor, to avoid ever trying a death penalty case, might never indict a defendant under a state's first degree murder statute. He would, therefore, never be bound by the committee's decision. Despite the unlikelihood of such a bold maneuver, problems such as these will be left for the individual state legislatures to resolve.

\(^{240}\) For example, New York prosecutors are given 120 days to decide whether to seek the death penalty. See supra note 66.
a decision, the committee would release a memorandum explaining the rationale behind its decision, but each member's vote would remain anonymous. The district attorney's office would then prosecute each case accordingly, and retain responsibility for every further discretionary decision.

1. The Constitutionality of Legislatively Created Committees

A legislatively-created committee is not a radical idea. In fact, legislatures clearly have the ability to create a committee whose members are appointed by the executive branch. This is evidenced at both the federal and state levels.

a. Congress

In 1974, in response to the Watergate scandal, Congress created the Federal Election Commission (the "FEC"), to exclusively oversee the election process. The original legislation required Congress to appoint the members of the FEC, but the Supreme Court struck down this arrangement. Today, the FEC is comprised of the Secretary of the Senate and the Clerk of the House of Representatives—without voting rights—and six members appointed by the President, with the advice and consent of the Senate. No more than three members can come from the same political party.

The creation of the FEC supports the legislative power to create a commission responsible for executive functions. Although the responsibilities of the FEC would vary greatly from the death penalty committees, the continued existence of the FEC supports the inference that state legislatures could create a committee within the executive branch without fear of running afoul of their state constitution.


243. See Buckley v. Valeo, 424 U.S. 1, 140-41 (1976) (holding that under Appointments Clause, Congress cannot appoint members to the FEC because the FEC has responsibility for law enforcement and this power is delegated to the Executive Branch by the Constitution).

244. 2 U.S.C. § 437c(a)(1).

245. Id.

246. See, e.g., Opinion of the Justices to the Senate, 376 N.E.2d 810, 825-26 (Mass. 1978) (holding that legislature may authorize a member of the executive branch, besides the governor, to appoint members of a commission).

247. The FEC, unlike these committees, has the power to compel testimony, pay witnesses, and to initiate civil actions. 2 U.S.C. § 437d (a)(4)-(6).
b. State Legislatures

Similar to Congress' creation of the FEC, some state legislatures have created agencies within the executive branch. In Colorado, the state legislature created the Colorado Civil Rights Commission. The commission's powers are "[t]o receive, investigate, and pass upon charges alleging unfair or discriminatory practices . . . [a]nd to hold hearings upon any complaint issued." The commission consists of seven members appointed by the governor. The members of the commission include, at all times, representatives of small businesses, state or local governmental entities, and the community at-large. At least four members of the commission must also represent minority communities.

The proposed death penalty committees share characteristics with Colorado's civil rights commission. Each is empowered to make a critical decision involving personal issues for the defendant. Additionally, both types of cases are generally high profile and involve disreputable acts allegedly committed by those accused. These similarities serve to bolster the view that if a state legislature involves itself in civil rights, it should also become involved in capital punishment. If the state legislature, therefore, can assign the broad responsibility to hear cases for an entire section of the criminal code to a commission, it should have the power to delegate to committees the sole discretionary decision of whether to seek the death penalty from prosecutors to committees.

2. How Death Penalty Committees Would Be Dissimilar to Independent Prosecutors

These proposed death penalty committees, however, are not analogous to independent prosecutors. The office of the independent prosecutor, at the federal level, was created by the Ethics in Government Act of 1978. The United States Attorney General may appoint independent prosecutors where there is "reasonable grounds to believe

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250. Id. §§ 24-34-305(1)(b), (d)(1). The commission is responsible for cases involving "unfair or discriminatory practices." Id. § 24-34-305(1)(b). These practices include: (1) discriminatory acts by entities such as employers, employment agencies, and labor unions; (2) unfair housing practices; (3) discrimination in public accommodation; and (4) discriminatory advertising. Id. §§ 24-34-402, -302, -601, -701.
251. Id. § 24-34-303.
252. Id.
253. Id.
that further investigation is warranted." These prosecutors are delegated the responsibility to investigate and prosecute high ranking officials. The committees proposed in this Note would have the limited power to make one discretionary decision: does this particular crime (or crimes) warrant a capital charge? The district attorney would retain all other prosecutorial functions, including any discretionary decisions.

This distinction is important because courts in at least two states, Maryland and Rhode Island, have found legislative attempts to create independent prosecutors unconstitutional. In Murphy v. Yates, the Maryland Court of Appeals held that the State Prosecutor Act, which created the office of the State Prosecutor and granted it the power to investigate specific criminal acts, violated Maryland's Constitution.261

The court invalidated the act because the legislature, in creating the office of the State Prosecutor, impermissibly intruded on the state attorney's discretionary powers. The rule, according to the court, is "[i]f an office is created by the Constitution, and specific powers are granted or duties imposed by the Constitution, . . . the position can neither be abolished by statute nor reduced to impotence by the transfer of duties . . . to another office created by the legislature." The Maryland legislature, therefore, in attempting to create an office with prosecutorial duties had encroached on the state attorney's constitutional right to investigate and initiate criminal prosecutions. In response to Murphy, the Maryland General Assembly proposed and ratified a constitutional amendment which prescribed the powers and duties of the State Prosecutor by the General Assembly. The State Prosecutor's powers no longer came from the constitution, so therefore, the Murphy court's objections were mooted.266 In an opinion which mirrors Murphy, the Supreme Court of Rhode Island, in response to a request by the House of Representatives, answered that

255. Id. § 592(b)(1). The Supreme Court held that the independent counsel statute was constitutional. See Morrison v. Olson, 487 U.S. 654, 659-60 (1988).
257. See supra note 238 and accompanying text.
258. 348 A.2d 837 (Md. 1975).
260. Id. § 33B(b). A special prosecutor could act on his own or upon the request of certain executive officials or the General Assembly. Id.
261. Murphy, 348 A.2d at 848.
262. Id.
263. Id. at 846 (citations omitted).
264. Id. at 848.
266. This change has proven successful as the statute creating the Office of the State Prosecutor is still valid. See supra note 259 and accompanying text.
proposed legislation to create procedures to appoint special prosecutors would violate the duties and powers of the attorney general.267

States can therefore respond to constitutional challenges to these committees in two different ways: (1) they can claim that simply removing the discretionary decision whether to seek the death penalty fails to render prosecutors impotent because prosecutors retain the power to make every other decision in capital cases; or (2) they can amend their constitution to create these committees. Either alternative provides an acceptable avenue for states to deal with constitutional challenges which have proven successful with respect to independent prosecutors.

Unlike the creation of independent prosecutors, prosecutors might not challenge, but rather support, these committees. Some district attorneys have, in fact, created their own informal death penalty committees. In New York City, the Manhattan and Brooklyn District Attorneys have established committees to assist them in making the decision whether to seek the death penalty.268 These committees will analyze the available information and make a recommendation to the district attorney on whether to seek the death penalty.269 These committees enable the district attorney to deflect some of the pressure Governor Pataki put upon District Attorney Johnson.270 Although a district attorney's creation of informal committees lends credence to this proposal, concrete reasons exist to justify why these death penalty committees would improve the present structure.

B. Advantages of a Death Penalty Committee

The entire process will benefit by removing the discretionary decision to seek the death penalty from an elected official and placing it with a committee. The committee will ensure a less political decision, increase the legitimacy of the system, increase the public accountabil-


268. See Jan Hoffman, Lawyers Prepare for New York's Death Penalty, N.Y. Times, Aug. 31, 1995, at A1, B4 ("Robert M. Morganthau . . . said . . . that he has set up a committee to scrutinize first-degree murder cases. . . . In Brooklyn, . . . Mr. Hynes has set up a screening panel that he says will evaluate . . . potential death penalty cases.").

269. See id. These committees differ significantly from the death penalty committees proposed in this Note. In contrast to the committees district attorneys have created, the death penalty committees would be statutorily based providing them with a more assured existence. Additionally, the decision of the death penalty committees would be binding on the prosecutor. Finally, the members of the death penalty committees would be appointed by both the governor and the district attorney rather than solely by the district attorney.

ity of the decision maker, and avoid discriminatory application of the death penalty.

1. The Committees Allow Politicians Openly to Use Death Penalty As a Political Issue

The death penalty and politics are intertwined. By allowing prosecutors and the governor to appoint members of these committees, politicians would openly espouse their views on the death penalty and use these views as a way to distinguish themselves from their opponents without fear of later repercussions. Governors and prosecutors would announce their views on the death penalty, and if elected, claim a public mandate to appoint like-minded committee members.

Allowing politicians to express freely their views supports a functioning representative democracy. If a purpose of democracy is to ensure the representation of all, especially minorities, then voters need to know politicians' views prior to an election. If district attorneys are unable, because of a fear of supersedure, to announce their views on the death penalty, then voters who feel strongly either way are forced to vote blindly on this issue. These committees, by assuming the discretionary decision whether to seek the death penalty, allow prosecutors to reveal their views on the death penalty, and thus educate the voters.

Having political officials appoint the committee members guarantees that politics will continue to play a role in the decision whether to seek the death penalty. It would, however, be one layer removed because committee members would be immune to public opinion. The committee members would be guaranteed a position on the committee for as long as their appointer remained in office. This ensures that no member could be removed for refusing to be a puppet for the per-

271. See supra note 58 and accompanying text.
272. See Kenneth Bresler, Seeking Justice, Seeking Election, and Seeking the Death Penalty: The Ethics of Prosecutorial Candidates' Campaigning on Capital Convictions, 7 Geo. J. Legal Ethics 941, 944 (1994) (“It is of course not unethical for candidates to campaign on their support for capital punishment.”).
273. See Jacoby, American Prosecutor, supra note 15, at 198 (“[I]f one knows the policy of the prosecutor, one should expect a pattern of dispositions consistent with that policy.”).
275. See Ely, supra note 274, at 135-79 (discussing the need for protecting the voting power of minorities).
276. See Abrams, supra note 26, at 1427 (“[A] correspondence between [prosecutors] preferences of [their] constituents will usually be achieved, and when it is not, [prosecutors] will often be at pains to justify [their] divergence from the advice proffered.”).
son who appointed him. Once either the governor or district attorney retired or lost office, the replacement would be entitled to name new members. If, however, either government official left in the middle of his term, the replacement would not have the power to name new members because his appointments may not accurately reflect the views of the electorate.

This fear of political influence and partisanship played a large role in the creation and make-up of the FEC. To combat this fear, Congress mandated that no more then three members of the FEC could be members of the same political party. Congress thus protected the legitimacy of the FEC against assertions of partisanship and a lack of independence. These death penalty committees would likely accomplish the same because the interests of local communities and of the state-wide population would be equally represented, and therefore, the committees’ decision would reflect the views of both populations.

2. The Committees Increase Legitimacy in the Discretionary Decision-Making Process

Although these committees would allow the politicizing of the death penalty, they would, at the same time, depoliticize the decision whether to seek the death penalty. Although the Supreme Court has found prosecutorial discretion in this context to be constitutional, the policy concerns of holding a single individual responsible for such a monumental decision are too great to ignore. Unbridled prosecutorial discretion exposes the decision to personal and political issues. Prosecutors can be influenced by issues from their past.
their relationship with the defendant's attorney, political factors including a need to be tough on crime, or personal revenge (e.g., the victim is a police officer, from the district attorney's office, a family member, or a friend). Removing the decision from local prosecutors alerts the public that an individual's personal agenda will not be the decisive factor. The public also will be assured that the decision was made based on factors other than politics. Even if one person votes for an application of the death penalty because of a personal agenda, at least three other people have to be convinced on the merits. One member's personal bias will unlikely affect any given case.

The presence of the seventh member also will serve to increase the legitimacy of these committees. The seventh member will be seen by the public as immune from the pressures of public opinion as his appointment was a result of negotiation between the appointees, not a response to a political mandate. It may often be the case that local prosecutors and the governor have diametrically opposed views on the death penalty. The seventh member, chosen by the other six members, necessarily will represent the moderate view because the three members from each side will have to reach a compromise and select the seventh member. Thus, even if the governor and the district attorney are on the extremes of the death penalty debate, the presence of the seventh member assures a thoughtful and even-handed decision.

3. The Committees Increase Accountability of the Decision Maker

Committees would reduce the secrecy and thereby increase the accountability surrounding their decisions by publishing the reasons for their decisions. A district attorney must make discretionary decisions on a daily basis, and to require him to publish the rationale behind his decision in this one category of cases would create an increased burden on an already strained budget. It might also raise the possibility

285. See Hancock et al., supra note 50, at 1564-65.
286. The FEC, with only six members, has received criticism. See Conference, supra note 256, at 223-26.
287. The distance between the views on capital punishment of Pataki and Johnson will not likely be as extreme in other jurisdictions. More likely, the party who opposes the death penalty will recognize that the legislature passed it into law, and although opposing the law in general, will recognize that rigid opposition results in an effective nullification of the law. Brooklyn District Attorney Charles Hynes, although publicly opposed to the death penalty, has already announced his intention to seek it and is going to try the first case himself. See Fried, First Seeking Death, supra note 270, at A1; Neuwirth, supra note 284, at 38 ("Hynes's moral position is well known: he is against capital punishment. . . . He doesn't think it is fair. But now that it is the law in New York State, Hynes is practically licking his chops at the prospect of bringing a capital case to court in Brooklyn.”). Nevertheless, even if a scenario similar to the Pataki-Johnson dispute is unlikely, these committees remain necessary to resolve the dangers of having one person decide whether to seek the death penalty. See supra part II.B.
that people would extrapolate his logic into other more simple criminal decisions. These committees, however, would deal solely with capital cases, so their rationales would ideally be consistent. Additionally, publishing these decisions would establish an informal set of precedent that future committee members could look to for guidance.\(^{288}\) As the number of decisions reached by the committee increased, they would be able to use prior cases as benchmarks to guide their own conclusions.\(^{289}\) This would ensure consistency in two fact similar cases.\(^{290}\) At the least, this would ensure some measure of consistency within each county.

4. The Committees Decrease the Possibility of Discriminatory Application of Death Sentences

Finally, greater accountability will improve the chances of preventing discriminatory application of capital sentences.\(^{291}\) Both the governor and district attorney will hopefully appoint members who adequately reflect the diversity of a county's population.\(^{292}\) Pressure would be on both the governor and the district attorney to ensure minority representation because both are elected officials and need the support of the people of the county for reelection. In this way, those claiming that capital punishment is sought disproportionately against minorities will have to counter the fact of minority representation on the committee. Furthermore, neither official would want to be labeled as the person who entrenched continued discriminatory application of the death penalty.

State legislatures should act to create committees empowered to make the decision whether to seek the death penalty. These committees would resolve the issues present when prosecutors individually make these decisions without infringing greatly on prosecutors' discretionary power.

\(^{288}\) See, e.g., Vorenberg, supra note 14, at 1565-66 (calling for prosecutors to publish a record of the factual bases and reasons of their significant decisions).

\(^{289}\) See Robert W. Sweet et al., Towards a Common Law of Sentencing: Developing Judicial Precedent in Cyberspace, 65 Fordham L. Rev. 927, 940 (1996) (advocating requirement that judges provide written statements regarding factual information of the case to assist judges in later cases).

\(^{290}\) Vorenberg, supra note 14, at 1566. The downside of having committees publish their decisions is that it might be seen as eliminating the discretion these committees are designed to protect. Committees might feel bound to follow prior committee's decisions, thus restricting their ability to decide each case on its individual facts. This risk, however, is outweighed by the need to inform the public how and why committees are making these discretionary decisions. Voters could then use this knowledge when evaluating the politicians who appointed committee members.

\(^{291}\) See Bright, supra note 33, at 450-54 (highlighting that in Georgia's Chattahoochee Judicial Circuit from 1973 to 1990, African-Americans were victims of sixty-five percent of the homicides, yet these cases made up only fifteen percent of capital cases in the circuit).

\(^{292}\) Id. at 451-54 (stating that white prosecutors may believe certain murders to be more heinous if victims are white and often only meet with white victims' families).
Conclusion

The dangers of placing the discretionary decision of whether to seek the death penalty with prosecutors existed long before Governor Pataki superseded District Attorney Johnson. By focusing attention on the potential abuse of this discretion, this controversy provided the impetus for change. The only way to avoid a situation similar to New York's is to transfer this discretionary decision to committees. Committees will allow prosecutors, attorneys general, and governors to freely express their views on the death penalty without compromising the need for consistency and legitimacy in the decision making process. Given the seriousness of the death penalty, state legislatures with a death penalty statute should amend their statute and create a committee in every county empowered to decide whether to seek the death penalty against a particular defendant.