

# Challenging the Intrastate Disparities in the Application of Capital Punishment Statutes

ANDREW DITCHFIELD\*

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## INTRODUCTION

The Supreme Court's 1972 decision in *Furman v. Georgia*<sup>1</sup> and its 1976 decision upholding Georgia's death penalty statute in *Gregg v. Georgia*<sup>2</sup> set the stage for all modern discussions of the death penalty. Since these two decisions, states have aligned themselves on both sides of the capital punishment controversy. Today thirty-eight states, the United States military, and the United States government have in place statutory schemes permitting the use of the death

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1. 408 U.S. 238, 239–40 (1972) (per curiam) (holding that the imposition of the death penalty in the three cases before the Court was a violation of the Eighth and Fourteenth Amendments).

2. 428 U.S. 153, 207 (1976).

penalty for certain crimes.<sup>3</sup> These retentionist jurisdictions far outweigh the thirteen abolitionist jurisdictions (twelve states plus the District of Columbia) that do not have the death penalty in their statutory criminal codes.<sup>4</sup>

The thirty-eight states that have retained the death penalty do not apply it with comparable frequency. For instance, Alabama has a death row population of one hundred ninety inmates,<sup>5</sup> ten of whom were sentenced in 2005,<sup>6</sup> while Maryland has a death row population of eight inmates,<sup>7</sup> none of whom were sentenced in 2005.<sup>8</sup> This comparison is of the most rudimentary statistical nature, but it serves the basic purpose of demonstrating that some states apply their death penalty with greater frequency than others.<sup>9</sup>

Disparities in the availability of the death penalty between retentionist and abolitionist states are not constitutionally problematic. Nor are disparities in the frequency of application of the death penalty among those states retaining the death penalty. Such disparities are the product of a federalist system that grants states the right to develop their own systems of laws and government. But a third level of disparity exists in the application of the death penalty. Studies undertaken to evaluate the fairness of the application of the death penalty within retentionist states reveal that the death penalty is applied with disparate frequency among different counties within an individual state.<sup>10</sup> Such statistical analyses demonstrate that, even after controlling for the characteristics of individual crimes, one of the major predictor variables for whether a prosecutor

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3. See DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY 1 (2006), <http://www.deathpenaltyinfo.org/FactSheet.pdf>. The capital punishment statute in New York was declared unconstitutional in 2004. *Id.* Thus, while New York is listed as a retentionist jurisdiction, its status as a state employing the death penalty is unclear.

4. *See id.*

5. Deborah Fins, *State Lists of Prisoners on Death Row*, DEATH ROW U.S.A. (NAACP Legal Def. & Educ. Fund, New York, N.Y.), Winter 2006, at 32, 32–33, [http://www.naacpldf.org/content/pdf/pubs/drusa/DRUSA\\_Winter\\_2006.pdf](http://www.naacpldf.org/content/pdf/pubs/drusa/DRUSA_Winter_2006.pdf).

6. Alabama Department of Corrections, *Alabama Inmates Currently on Death Row*, <http://www.doc.state.al.us/deathrow.asp> (last visited Oct. 5, 2006).

7. Fins, *supra* note 5, at 47.

8. *Compare id.*, with Deborah Fins, *State Lists of Prisoners on Death Row*, DEATH ROW U.S.A. (NAACP Legal Def. & Educ. Fund, New York, N.Y.), Winter 2005, at 31, 47, [http://www.naacpldf.org/content/pdf/pubs/drusa/DRUSA\\_Winter\\_2005.pdf](http://www.naacpldf.org/content/pdf/pubs/drusa/DRUSA_Winter_2005.pdf). This was determined by comparing the Maryland inmates residing on death row at the beginning of 2006 with those residing on death row at the beginning of 2005.

9. The difference in death penalty application cannot be attributed to Alabama having a larger population than Maryland. Indeed, Maryland has over one million more residents. *Compare* U.S. Census Bureau, *Alabama QuickFacts*, <http://quickfacts.census.gov/qfd/states/01000.html> (last visited Oct. 5, 2006), *with* U.S. Census Bureau, *Maryland QuickFacts*, <http://quickfacts.census.gov/qfd/states/24000.html> (last visited Oct. 5, 2006). Nor is it attributable to a higher murder rate in Alabama. Maryland's murder rate of 9.9 homicides per 100,000 residents is much higher than Alabama's murder rate of 8.2 per 100,000 residents. *See* Death Penalty Information Center *State by State Information*, <http://www.deathpenaltyinfo.org/state> (last visited Oct. 5, 2006) (providing state-specific murder rate information for Maryland and Alabama).

10. *See, e.g.*, RAYMOND PATERNOSTER ET AL., AN EMPIRICAL ANALYSIS OF MARYLAND'S DEATH SENTENCING SYSTEM WITH RESPECT TO THE INFLUENCE OF RACE AND LEGAL JURISDICTION 28–31 (2003) [hereinafter MARYLAND STUDY].

will seek a death sentence and whether the offender will be sentenced to death is the location within the state in which the capital crime occurred. This intrastate disparity—a disparity that introduces constitutional issues—is the focus of this Note.

Often, the intrastate disparity is explained by prosecutorial discretion. Reliance on prosecutorial discretion to justify differences in the application of a state's capital punishment statute is likely attributable to two factors. First, the United States Supreme Court in *Bordenkircher v. Hayes*<sup>11</sup> set the parameters for the exercise of prosecutorial discretion very broadly.<sup>12</sup> Second, the Supreme Court recognized in *Gregg v. Georgia* the importance in death penalty cases of measuring the local moral consensus of the efficacy of that punishment.<sup>13</sup> At first glance, the Court's statements regarding prosecutorial discretion seem to preclude constitutional challenges based on disparities arising out of the exercise of that discretion. But the Court's death penalty jurisprudence also suggests that the decision to seek the death penalty against a capital offender cannot be based on arbitrary factors.<sup>14</sup>

This Note will address the issue of prosecutorial discretion in the application of the death penalty at the county level within a state. Part I will address the existence of interstate and intrastate variations in the application of capital punishment statutes, and why it is not constitutionally problematic for one state to apply the death penalty in a different manner than another state. Part II will assess evidence that indicates that within states, capital punishment statutes are applied with drastically different frequencies among counties. While the focus will be on the application of the death penalty in Maryland, this Note will present evidence that the results of statistical analyses in Maryland have been replicated in several other states, thus indicating the widespread applicability of the arguments presented. Part III examines the typical explanation for the variation in frequencies of application of the death penalty: prosecutorial discretion. While prosecutors often are given broad discretion in applying a jurisdiction's law, Part IV presents several arguments suggesting that this is problematic in the capital punishment context. First, this Note argues that the Supreme Court's decision in *Bush v. Gore*<sup>15</sup> raises the possibility that unguided prosecutorial discretion with respect to the capital punishment charging decision violates the Equal Protection Clause of the Fourteenth Amendment. Second, this Note argues that geography, which is a powerful predictor of whether a capital crime will be charged as such, is the sort of arbitrary factor mentioned in *Furman v.*

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11. 434 U.S. 357 (1978).

12. *Id.* at 364.

13. 428 U.S. 153, 186–87 (1976).

14. *See Oyler v. Boles*, 368 U.S. 448, 456 (1962) (stating that petitioner failed to show an equal protection violation because he did not demonstrate that an arbitrary classification led to his prosecution).

15. 531 U.S. 98 (2000).

*Georgia*<sup>16</sup> that leads to the “wanton[] and . . . freakish[]”<sup>17</sup> imposition of death sentences that violate the Eighth Amendment.<sup>18</sup> Lastly, this Note argues that in death penalty cases where the locus of the crime is ambiguous, variation among counties in the application of a capital punishment statute creates the incentive for prosecutors to forum shop to find the venue offering the greatest likelihood that the death penalty will be pursued. This incentive raises significant policy concerns that have been addressed by the Supreme Court in its forum-shopping jurisprudence. Though it remains unclear whether any of these avenues will ultimately prove successful if used to challenge a state’s capital punishment system, they at least serve to raise concerns that erode the legitimacy of many states’ death penalty statutes. It is this erosion of legitimacy that should urge states to revisit the manner in which capital crimes are charged.

## I. INTERSTATE VERSUS INTRASTATE VARIATION IN THE APPLICATION OF CAPITAL PUNISHMENT STATUTES

### A. INTERSTATE DISPARITY

The coexistence of states that have death penalty statutes on the books (retentionist states) and states that have abolished the death penalty (abolitionist states) is not constitutionally problematic. The structure of this nation’s federalist system of government was designed to give states the power to create their own laws and systems of self-governance. The Constitution enumerates certain specific powers granted to the federal government; any power not specifically enumerated is considered to be left to the individual states.<sup>19</sup> The state, as a governmental unit, is considered an independent sovereign entity with the power to make and enforce laws separate from the federal government. The importance of such a federalist structure has been recognized since before the ratification of the Constitution.<sup>20</sup> The Framers incorporated language into the Constitution requiring that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”<sup>21</sup>

The Supreme Court has recognized the power of each state to make its own laws,<sup>22</sup> and has even gone so far as to hold that the Double Jeopardy Clause does not bar two different states from prosecuting an individual for crimes

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16. 408 U.S. 238 (1972) (per curiam).

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

18. *Id.* at 239 (per curiam).

19. U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

20. *See, e.g.*, THE FEDERALIST NO. 32, at 186 (Alexander Hamilton) (Henry Cabot Lodge ed., 1888) (“[T]he State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States.”).

21. U.S. CONST. art. IV, § 1.

22. *See Moore v. Illinois*, 55 U.S. 13, 18 (1852) (“The power to make municipal regulations for the restraint and punishment of crime, for the preservation of the health and morals of her citizens, and of the public peace, has never been surrendered by the States, or restrained by the Constitution of the

arising out of a single homicide.<sup>23</sup> *Heath v. Alabama* presented a case in which a murder took place in Georgia, but prior to that murder the victim was kidnapped in Alabama, a state with a statute that permitted a murder arising out of a kidnapping to be charged in the jurisdiction in which the kidnapping took place.<sup>24</sup> Heath was arrested first in Georgia, where the murder occurred, and pled guilty to that murder to avoid the death penalty.<sup>25</sup> Subsequent to that guilty plea, Heath was tried for the same murder in Alabama and sentenced to death.<sup>26</sup> The Court upheld the death sentence against claims that it violated the Double Jeopardy bar, arguing that each sovereign entity had the right to enforce its own laws.<sup>27</sup>

Given the importance of state sovereignty in the federalist system of government, it is neither surprising nor constitutionally problematic that thirty-eight states have death penalty statutes while twelve states and the District of Columbia do not.<sup>28</sup> Thus, an offender could commit a murder in Virginia and, if the statutory elements were satisfied, be eligible for the death penalty under that state's capital punishment laws;<sup>29</sup> but had that same crime been committed in West Virginia or the District of Columbia, two bordering abolitionist jurisdictions, the offender could not be sentenced to death.

#### B. INTRASTATE DISPARITY

Reference to sovereignty rights supports interstate variations in the application of the death penalty, but it does not support variations in the application of a capital punishment statute among different legal jurisdictions within the same state. Nevertheless, the Supreme Court has held, as far back as 1879, that the Fourteenth Amendment is not violated by the diverse application of laws among distinct legal jurisdictions within the same state. In *Missouri v. Lewis*,<sup>30</sup> the Court held that “[i]f diversities of laws . . . may exist in the several States without violating the equality clause of the Fourteenth Amendment, there is no solid reason why there may not be such diversities in different parts of the same State.”<sup>31</sup> Two years later, the Court stated that the Fourteenth Amendment “does

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United States.”); see also *United States v. Lanza*, 260 U.S. 377, 382 (1922) (recognizing the simultaneous right of both state and federal governments to pass laws concerning the same subject matter).

23. See *Heath v. Alabama*, 474 U.S. 82, 92 (1985) (holding that states are distinct sovereign entities and that the “Court has plainly and repeatedly stated that two identical offenses are *not* the ‘same offence’ within the meaning of the Double Jeopardy Clause if they are prosecuted by different sovereigns”).

24. *Id.* at 83–85.

25. *Id.* at 84.

26. *Id.* at 85–86.

27. *Id.* at 94.

28. See DEATH PENALTY INFO. CTR., *supra* note 3, at 1.

29. See VA. CODE ANN. § 19.2-264.2 (2005).

30. 101 U.S. 22 (1879).

31. *Id.* at 31. The Court then went on to say that “[a] uniformity which is not essential as regards different States cannot be essential as regards different parts of a State, provided that in each and all there is no infraction of the constitutional provision.” *Id.*

not prohibit legislation which is limited . . . by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed."<sup>32</sup> While the Court's interpretation of the Fourteenth Amendment has evolved since these decisions were rendered, the main theme of the cases still persists. The Court revisited the issue of differential application of laws among distinct legal jurisdictions within the same state in *Reinman v. City of Little Rock*<sup>33</sup> and arrived at a similar result.<sup>34</sup> Even more recently, the Court upheld state school funding laws that provide disparate levels of resources among different legal jurisdictions.<sup>35</sup>

But these cases are not dispositive, because "death is different."<sup>36</sup> The phrase "death is different" is incorporated into more than a handful of Supreme Court opinions<sup>37</sup> and has become the mantra of death penalty opponents—a catchphrase that denotes the additional concerns present when the death penalty is the punishment under consideration. Indeed, academic commentators have noted the unique position that the death penalty holds in American jurisprudence, and have argued that such a position heightens the procedural requirements for its legitimate application.<sup>38</sup> Commentators have also noted that when intrastate geographic disparity exists in the application of laws, such disparity calls into

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32. *Hayes v. Missouri*, 120 U.S. 68, 71–72 (1887).

33. 237 U.S. 171 (1915).

34. *Id.* at 177 ("[S]o long as the regulation in question is not shown to be clearly unreasonable and arbitrary, and operates uniformly upon all persons similarly situated in the particular district . . . it cannot be judicially declared that there is a . . . denial of the equal protection of the laws, within the meaning of the 14th Amendment.").

35. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 54–55 (1973) (applying rational basis review to the funding laws, and holding that education is not a fundamental right, the deprivation of which might be subject to heightened scrutiny).

36. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (concluding that "the penalty of death is qualitatively different from a sentence of imprisonment" and that "[b]ecause of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case"); *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (noting that in *Furman v. Georgia* the Court "recognize[d] that the penalty of death is different in kind from any other punishment imposed under our system of criminal justice").

37. *See, e.g., Schiro v. Summerlin*, 542 U.S. 348, 357 (2004) ("The dissent also advances several variations on the theme that death is different."); *Wiggins v. Smith*, 539 U.S. 510, 557 (2003) (Scalia, J., dissenting) ("Today's decision is extraordinary—even for our 'death is different' jurisprudence."); *Ring v. Arizona*, 536 U.S. 584, 605–06 (2002) ("As Arizona's counsel maintained at oral argument, there is no doubt that '[d]eath is different.'"); *Streetman v. Lynaugh*, 484 U.S. 992, 995–96 (1988) (mem.) (Brennan, J., dissenting from a denial of stay of execution) ("But death is different. Due to the unique nature of the penalty, the relief that we could give any other type of habeas corpus petitioner is unavailable to Streetman.").

38. *See* AUSTIN SARAT, *WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE AMERICAN CONDITION* 89 (2001) ("Because capital punishment is irrevocable and unique, the prospect of state killing challenges law to be fairer and more scrupulous than it would otherwise be."). Sarat argues that "meet[ing] the burden of fairness" requires resistance to external pressures created by calls of vengeance and the presence of victim's rights advocates, while at the same time providing safeguards to protect both the capital defendant's rights and the legitimacy of the process. *Id.*; *see generally* Margaret Jane Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143 (1980) (discussing the super due process required in capital punishment cases).

question the integrity of those laws.<sup>39</sup>

States are clearly concerned with the presence of geographic disparity in the application of their capital punishment statutes, as demonstrated by the increasing number of state-commissioned studies undertaken to determine the extent of the disparity. In the next Part, this Note will discuss the results of one of those studies.

## II. THE MARYLAND STUDY<sup>40</sup>

In 2002, the governor of Maryland, amid growing concerns that the capital punishment system in the State was applied in a racially and geographically biased manner, declared a moratorium on executions while a group of researchers at the University of Maryland conducted an empirical evaluation of the punishment system.<sup>41</sup> This was at least the fifth time in Maryland that the death penalty system had been evaluated, at least with respect to race and geography.<sup>42</sup> The study sought to examine all murders occurring in Maryland from 1978—when the death penalty was reinstated after the decision in *Gregg v. Georgia*<sup>43</sup>—until the end of 1999, culling from that universe the subset of cases that met the statutory requirements of death-eligible homicide.<sup>44</sup> Extensive data were collected about each of these homicide events; the researchers then examined the role that race and geography played at each of four points in the application of the capital punishment system:

1. the decision of the state's attorney to file a formal notification to seek a death sentence.
2. the decision of the state's attorney not to withdraw a death notification once filed, in other words, the decision to make the death notification "stick".
3. the decision of the state's attorney to advance a death-eligible offense to a penalty trial upon conviction for first degree murder.
4. the decision of the jury or judge to sentence a defendant to death.<sup>45</sup>

The State of Maryland is divided into twenty-four separate jurisdictional

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39. See Joshua E. Bowers, Note, "*The Integrity of the Game is Everything*": *The Problem of Geographic Disparity in Three Strikes*, 76 N.Y.U. L. REV. 1164, 1181 (2001). While Bowers discusses intrastate geographic disparity in the framework of three strikes laws, the analysis applies with equal force to capital punishment laws because of the special status that those laws warrant. See also William S. Lofquist, *Putting Them There, Keeping Them There, and Killing Them: An Analysis of State-Level Variations in Death Penalty Intensity*, 87 IOWA L. REV. 1505, 1508 n.7 (2002) ("The persistence of substantial [intrastate] variations challenges the goals of Gregg.")

40. While the following in-depth analysis focuses on the county-by-county disparity in Maryland, the analysis could just as easily focus on any number of states that have conducted similar studies.

41. See DEATH PENALTY INFO. CTR., DEATH PENALTY TIMELINE (2006), <http://www.deathpenaltyinfo.org/GreggTimeline.pdf>.

42. See MARYLAND STUDY, *supra* note 10, at 4.

43. 428 U.S. 153 (1976).

44. See MARYLAND STUDY, *supra* note 10, at 11–20 (presenting the methodology of the study).

45. *Id.* at 4–5 (footnote omitted).

entities. Twenty-three are counties and one is a city. The study addresses the variation among those twenty-four geographically and legally distinct jurisdictions using two levels of analysis. First, the researchers presented unadjusted results, consisting of descriptive statistics without controlling for various other influences.<sup>46</sup> Second, the researchers presented adjusted results using “multiple-variable logistic regression analysis,” a statistical technique that permits control and analysis of many variables to locate factors that have the greatest impact on a given outcome.<sup>47</sup> The multiple-variable logistic regression analysis is necessary because the “unadjusted analysis does not take into account numerous facts/circumstances about these homicides which may legitimately explain [the apparent geographic disparities].”<sup>48</sup> The unadjusted results indicated “statistically significant variation across the different jurisdictions in the probability of a death sentence for all death-eligible cases, due primarily to the way the charging decisions are handled.”<sup>49</sup> In other words, if prosecutors in a county were more likely to charge a death-eligible offender with a capital crime, they were also more likely to continue pursuing that charge all the way through the sentencing phase.<sup>50</sup>

The adjusted results provide some even more powerful conclusions. The researchers found statistically significant variations in whether a jurisdiction was likely to file a notification of its intention to seek a death sentence (a “death notice”), whether that jurisdiction would make that notification “stick,” and whether that process would lead to the application of a death sentence upon conviction.<sup>51</sup> Baltimore County was the least defendant-favorable jurisdiction at each of the decisionmaking points where a significant variation existed.<sup>52</sup> For instance, “the probability that a notification to seek death will be filed in Baltimore County is over 13 times higher than in Baltimore City, . . . five times greater than . . . Montgomery County and three times greater than . . . Anne Arundel County.”<sup>53</sup> This disparity in the first step of a capital murder prosecution results in an even more powerful disparity in the likelihood that a death

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46. *See generally id.* at 24–26.

47. *See generally id.* at 26–31. For a straightforward description of multiple-variable logistic regression analysis, see RONE T BACHMAN & RAYMOND PATERNOSTER, *STATISTICAL METHODS FOR CRIMINOLOGY AND CRIMINAL JUSTICE* 489–529 (1997).

48. MARYLAND STUDY, *supra* note 10, at 26.

49. *Id.* at 25.

50. *See id.* The following serves as an illustration: Baltimore County showed the highest probability (0.65) that a case meeting the statutory elements of capital murder would actually result in a notification to the offender that the State’s Attorney’s Office had decided to seek the death penalty. *Id.* at tbl.4. Baltimore County was also the jurisdiction in which prosecutors were most likely to seek the death penalty and where an offender was most likely to be sentenced to death. *Id.* The adjusted results retain this strong effect. *Id.* at tbl.10F (demonstrating that the probability that a death notice will be filed given a death-eligible case varies widely by jurisdiction, from as high as 0.62 in Baltimore County and 0.50 in Harford County to as low as 0.117 in Montgomery County and 0.046 in Baltimore City).

51. *Id.* at 29.

52. *Id.*

53. *Id.* at 30 (emphasis omitted).



sentence will result: a death-eligible case in Baltimore County is twenty-three times more likely ultimately to result in a death sentence than a death-eligible case in Baltimore City.<sup>54</sup> The results indicate that “differences in how different jurisdictions handle death eligible cases cannot be attributed to the kinds of homicides committed in those jurisdictions.”<sup>55</sup> Consequently, “[i]n the Maryland death penalty system, the jurisdiction where the crime occurs and legal prosecution begins is clearly one of the most important factors [in the differing treatment of death-eligible cases], and cannot be ignored.”<sup>56</sup>

The Maryland study and the results arising from it are not unique. Similar studies have been conducted in California,<sup>57</sup> Illinois,<sup>58</sup> Georgia,<sup>59</sup> Kansas,<sup>60</sup> and Nebraska,<sup>61</sup> and all provide accounts or raise concerns of geographic disparity

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54. See Raymond Paternoster et al., *Justice by Geography and Race: The Administration of the Death Penalty in Maryland, 1978–1999*, 4 MARGINS 1, 72 tbl.6F (2004).

55. MARYLAND STUDY, *supra* note 10, at 31 (emphasis omitted).

56. *Id.* at 37. The researchers considered the importance of geographic disparities—the subject of this Note—with the role that race played in the decisionmaking process. The study presents evidence indicating that those counties that pursue the death penalty more often are those counties in which more homicides involving white victims occur relative to other counties. See *id.* at 38. The study concludes “that any attempt to deal with any racial disparity in the imposition of the death penalty in Maryland cannot ignore the substantial variability that exists in different state’s attorneys’ offices in the processing of death cases.” *Id.* at 39; see also Paternoster et al., *supra* note 54, at 67 tbl.6A (demonstrating the overwhelmingly powerful effect that the jurisdiction where the crime occurred has on the decision to file a death notice).

57. See Robert M. Sanger, *Comparison of the Illinois Commission Report on Capital Punishment with the Capital Punishment System in California*, 44 SANTA CLARA L. REV. 101, 146 (2003) (“Since California re-instituted the death penalty in 1977, thirty percent of the condemned inmates were sentenced out of Los Angeles County . . . . On the other hand, sixteen counties have never imposed the death penalty and eleven have only done so once.”) (citations omitted). The limitation of this statement is that no statistical analysis has been undertaken to determine whether these disparities are attributable to other factors, such as the absence of capital crimes in the sixteen counties that have never imposed the death penalty. Sanger merely concludes that the numbers “apparent[ly show] that there is geographical disparity in California.” *Id.* For a more robust statistical analysis of the geographic disparity in the California capital punishment system, see Glenn L. Pierce & Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990–1999*, 46 SANTA CLARA L. REV. 1, 25–31 (2005) (concluding “that death sentencing in California is highest in counties with a low population density and a high proportion of non-Hispanic white residents”).

58. See GOVERNOR’S COMM’N ON CAPITAL PUNISHMENT, REPORT OF THE GOVERNOR’S COMMISSION ON CAPITAL PUNISHMENT (2002) [hereinafter ILLINOIS REPORT]; see also Glenn L. Pierce & Michael L. Radelet, *Race, Region, and Death Sentencing in Illinois, 1988–1997*, 81 OR. L. REV. 39 (2002).

59. See AM. BAR ASS’N, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE GEORGIA DEATH PENALTY ASSESSMENT REPORT, at v (2006) (recommending that Georgia should undertake an additional study to determine whether geographic disparity exists within that state’s capital punishment system).

60. See REPORT OF THE KANSAS JUDICIAL COUNCIL DEATH PENALTY ADVISORY COMMITTEE ON CERTAIN ISSUES RELATED TO THE DEATH PENALTY 4 (2004) (“In potential capital cases, capital charges are brought relatively uniformly throughout the state. But there is a geographic disparity in whether these capital charges are brought to trial.”); see also *id.* at 11 (“[A] capital defendant in Sedgwick County is much more likely to proceed to trial than one in Wyandotte [County]. Thus, a capital defendant in Sedgwick County is also much more likely to receive a death sentence than a capital defendant in Wyandotte County.”).

61. See DAVID C. BALDUS ET AL., THE DISPOSITION OF NEBRASKA CAPITAL AND NON-CAPITAL HOMICIDE CASES (1973–1999): A LEGAL AND EMPIRICAL ANALYSIS 60–78 (2001, amended 2002).

in the application of those states' death penalty systems.<sup>62</sup> For instance, David Baldus concluded in his study of Nebraska's capital punishment system that "death-eligible cases in the major urban counties are about twice as likely as comparable cases in other counties to advance to a penalty trial with the state seeking a death sentence."<sup>63</sup> This disparity could not be explained by varying levels of defendant culpability, jurisdictional financial considerations, prosecutorial experience, or attitudes of trial judges towards the death penalty.<sup>64</sup>

These studies provide varying explanations for the geographical disparity in the application of each state's capital punishment system. One explanation offered, and the one most frequently offered in Maryland, is that different prosecutors in different counties approach the application of the death penalty differently. For example, the state's attorney for Baltimore County "seeks the death penalty in every case where there's 'competent, credible evidence' to produce a guilty verdict for first-degree murder and to prove certain aggravating circumstances."<sup>65</sup> In other words, Baltimore County will seek the death penalty whenever the statutory elements required to apply the punishment have been satisfied. In contrast, the State's Attorney for Baltimore City—one of the legal jurisdictions adjacent to Baltimore County and the jurisdiction with the state's highest homicide rate—has not sought the death penalty in any case since 1998.<sup>66</sup>

Thus, the statistically significant differences between counties in the likelihood that the death penalty will be sought, at least in Maryland, seem to arise out of prosecutorial discretion. Is prosecutorial discretion an appropriate justification for geographic disparities in the application of the death penalty among legal jurisdictions within the same state?

### III. PROSECUTORIAL DISCRETION

Prosecutors are given extremely broad leeway in deciding whether to charge an individual with a crime; this decision is generally not reviewable by the courts. The Supreme Court in *Bordenkircher v. Hayes*<sup>67</sup> stated that "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute . . . generally rests entirely in his discretion."<sup>68</sup> The exercise of prosecutorial discretion is subject to review only to determine whether it falls within broad constitutional

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62. See also Richard Willing & Gary Fields, *Geography of the Death Penalty*, USA TODAY, Dec. 20, 1999, at 1A (presenting results of a study showing geographic disparities by county within the states of Maryland, Ohio, South Carolina, Pennsylvania, Oklahoma, Georgia, Alabama, New York, and Texas).

63. BALDUS, *supra* note 61, at 110.

64. See *id.*

65. Lori Montgomery, *Md. Questioning Local Extremes on Death Penalty*, WASH. POST, May 12, 2002, at C1 (quoting Assistant State's Attorney for Baltimore County S. Ann Brobst).

66. See *id.*

67. 434 U.S. 357 (1978).

68. *Id.* at 364.

limitations,<sup>69</sup> primarily because “the decision to prosecute is particularly ill-suited to judicial review.”<sup>70</sup>

The broad prosecutorial discretion permissible in general criminal prosecutions exists to the same extent in capital murder cases, although the process to which it applies is somewhat modified. The first step in the prosecution of any death-eligible homicide event is the prosecutor’s decision whether to seek the death penalty.<sup>71</sup> In *Gregg v. Georgia*,<sup>72</sup> the Court upheld a statutory approach to the death penalty that permitted discretion at various stages of the death penalty process.<sup>73</sup> The petitioner attacked the Georgia capital punishment statute as unconstitutional because it created “opportunities for discretionary action that are inherent in the processing of any murder case under Georgia law.”<sup>74</sup> Those areas of discretion existed at (1) the point where the prosecutor “select[s] those persons whom he wishes to prosecute for a capital offense,” (2) the point where “the jury may choose to convict a defendant of a lesser included offense rather than find him guilty of a crime punishable by death, even if the evidence would support a capital verdict,” and (3) the point where the Governor can commute the sentence of a defendant scheduled for execution.<sup>75</sup>

The Court responded that “[t]he existence of these discretionary stages is not determinative” and “[n]othing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution.”<sup>76</sup> The Court ultimately concluded that a capital punishment system “guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant”<sup>77</sup> was not unconstitutional merely because, within those standards, the actors in the trial had “the [discretion] to decline to impose the death penalty even if [they] find[] that one or more statutory aggravating circumstances are present in the case.”<sup>78</sup>

Since *Gregg*, the Court has maintained its position that discretion in capital punishment cases in general, and in capital charging decisions in particular, does not necessarily create constitutional concerns. One of its strongest statements in support of this position comes from its decision in *McCleskey v. Kemp*,<sup>79</sup> a case of particular interest to the current topic because it involved the first highly publicized, in-depth statistical analysis of bias—albeit racial bias—in

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69. *See id.* at 365.

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

71. For the purposes of this Note, a death-eligible homicide event is one in which the statutory elements of a capital crime are clearly satisfied. Such clear facts do not always exist. The process by which a prosecutor determines whether to seek the death penalty (i.e., file a death notice) is, however, beyond the scope of this analysis.

72. 428 U.S. 153 (1976).

73. *Id.* at 199.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 203.

79. 481 U.S. 279 (1987).

the application of the Georgia capital punishment system.<sup>80</sup> The Court recognized that “decisions whether to prosecute and what to charge necessarily are individualized and involve infinite factual variations.”<sup>81</sup> The Court went on to hold that “the policy considerations behind a prosecutor’s traditionally ‘wide discretion’” applied to decisions whether to prosecute capital homicides.<sup>82</sup> The Court’s analysis was reiterated in *United States v. Armstrong*,<sup>83</sup> in which the Court expressed the belief that there exists a “presumption that a prosecutor has not violated equal protection [by exercising his or her prosecutorial discretion]” until a defendant has demonstrated “that the administration of a criminal law is ‘directed so exclusively against a particular class of persons’ [that] the system of prosecution amounts to ‘a practical denial’ of equal protection of the law.”<sup>84</sup>

It is not surprising that prosecutorial discretion plays a major role in the application of the capital punishment system, because many factors must be considered when determining whether it is appropriate to seek a death sentence.<sup>85</sup> For example, trying a death penalty case—which includes a series of appeals, some of which are mandatory—can be extremely costly.<sup>86</sup> Richard Dieter, the Executive Director of the Death Penalty Information Center, posits that “[d]eath penalty cases are clearly more expensive at every stage of the judicial process than similar non-death cases” because every aspect of a non-capital trial, including expert witnesses, preparation time, voir dire for jurors, and trial length, is magnified in a capital trial.<sup>87</sup> The ability of certain counties

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80. *Id.* In this case, the petitioner presented the results of an analysis conducted by David Baldus that demonstrated statistically significant variations in the likelihood of being sentenced to death depending on the race of the offender and the race of the victim. *Id.* at 286–88 (describing the methodology and results of the study, along with the district court’s reaction to its presentation at trial). For an in-depth presentation of the methodology and results of the study, see DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* (1990).

81. *McCleskey*, 481 U.S. at 295 n.15.

82. *Id.* at 296 (quoting *Wayte v. United States*, 470 U.S. 598, 607 (1985)). The Court notes that broad prosecutorial discretion exists because courts are “particularly ill-suited” to conduct judicial review of decisions. *See Wayte*, 470 U.S. at 607. That discretion, however, “is not ‘unfettered’” and “the decision to prosecute may not be ‘deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.’” *Id.* at 608 (internal citations omitted).

83. 517 U.S. 456 (1996).

84. *Id.* at 464–65 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886)).

85. Although there are myriad factors that contribute to the decision whether to charge a death-eligible offender with a capital crime, examples of factors commonly considered are the moral culpability of the offender, *see Atkins v. Virginia*, 536 U.S. 304, 306–07 (2002), and the desires of the victim’s family, *see, e.g., Jennifer McMenamin, Court Hears Killer’s Appeal; Lawyers Seek Access to Balto. County Files To Explore Racial Bias*, *BALT. SUN*, May 9, 2006, at 1B (“[C]ounty prosecutors seek a death sentence in every eligible murder case except when the victim’s family is not willing to endure the lengthy appeals process . . .”).

86. *See, e.g., JOHN G. MORGAN, COMPTROLLER OF THE TREASURY, TENNESSEE’S DEATH PENALTY: COSTS AND CONSEQUENCES* 16 (2004), <http://www.comptroller.state.tn.us/orea/reports/deathpenalty.pdf>.

87. *COSTS OF THE DEATH PENALTY AND RELATED ISSUES: TESTIMONY OF RICHARD C. DIETER, EXECUTIVE DIRECTOR, DEATH PENALTY INFORMATION CENTER* (2005), <http://www.deathpenaltyinfo.org/NY-RCD-Test.pdf> (reproducing testimony before the New York State Assembly Standing Committee on Codes, Judiciary and Correction).

within a state to prosecute capital crimes diminishes as the costs increase.<sup>88</sup> Therefore, the decisive factor in whether to seek a death sentence often becomes whether the county can afford to seek it.<sup>89</sup>

States can point to the Supreme Court's decision in *Gregg* as a justification for their current death penalty statutory schemes, and for the discretion arising out of those schemes. For example, after *Gregg*, Maryland enacted a death penalty statute with a level of discretion similar to that seen in the Georgia system.<sup>90</sup> The statute itself provides actors in the criminal justice system with a great deal of discretion during their decisionmaking processes, and Maryland courts have upheld the state's death penalty statute in the face of challenges to the discretion that it allows.<sup>91</sup> As a result, at every stage of a capital punishment proceeding where the statutory elements are satisfied, a Maryland State's Attorney has the discretion whether to continue pursuing the death penalty or to choose an alternative prosecutorial option.<sup>92</sup> But while discretion can be exercised at all stages throughout the process, as discussed earlier,<sup>93</sup> the first point at which that discretion is exercised is clearly the *most* important. While statistical

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88. See *id.* at 9 (“‘Rich’ counties that can afford the high costs of the death penalty may seek this punishment often, while poorer counties may never seek it at all . . . . Some counties have approached the brink of bankruptcy because of one death penalty case that has to be done over a second or third time.”); see also Julie Bykowicz, *Death Penalty Has Cost; Circumstances, Resources Guide Baltimore's Policy*, BALT. SUN, Sept. 3, 2006, at 1A (“[A] veteran [Baltimore] city homicide prosecutor says, ‘I don’t have a moral problem with the death penalty; I have a resource problem with it.’”). But see *Attorney General & State's Attorneys* § 53 in 3 MARYLAND LAW ENCYCLOPEDIA 387, 434 (West 2000 & Supp. 2006) (“A county must supply the State's Attorney with enough resources so that he or she retains prosecutorial discretion for all significant offenses. Where a county budget compels the State's Attorney to forgo investigations and prosecutions for significant offenses, it does not meet the legal requirement imposed on a county.”).

89. For an expanded argument that cost is an arbitrary factor and that it is unconstitutional for it to serve as the decisive factor in applying the death penalty, see Ashley Rupp, Note, *Death Penalty Prosecutorial Charging Decisions and County Budgetary Restrictions: Is the Death Penalty Arbitrarily Applied Based on County Funding?*, 71 FORDHAM L. REV. 2735, 2777–78 (2003).

90. See MD. CODE ANN., CRIM. LAW § 2-303 (LexisNexis 2005 & Supp. 2006). The statute concerns the sentencing procedure of a capital punishment case, and enumerates ten specific aggravating circumstances, any one of which the jury must find present beyond a reasonable doubt in order to levy the death sentence. § 2-303(g)(1). If the jury finds any aggravating circumstances, it must also determine by a preponderance of the evidence whether any mitigating circumstances exist. § 2-303(h)(2). The jury is permitted to consider as a mitigating circumstance “any . . . fact that the court or jury specifically sets forth in writing as a mitigating circumstance in the case.” § 2-303(h)(2)(viii). After identifying aggravating and mitigating circumstances, the jury then determines by a preponderance of the evidence whether the aggravating circumstances outweigh any mitigating circumstances. § 2-303(i)(1).

91. See, e.g., *Calhoun v. Maryland*, 468 A.2d 45, 64 (Md. 1983) (“Absent any specific evidence of indiscretion by prosecutors resulting in an irrational, inconsistent, or discriminatory application of the death penalty statute, Calhoun's claim cannot stand. To the extent that there is a difference in the practice of the various State's attorneys around the State, our proportionality review [of sentences rendered] would be intended to assure that the death penalty is not imposed in a disproportionate manner.”).

92. For a description of the various points during the prosecutorial process where discretion is possible, see Paternoster et al., *supra* note 54, at 10.

93. See *supra* notes 49–56 and accompanying text.

evidence in Maryland demonstrates powerful county-by-county disparities in the likelihood that a capital defendant will receive a death sentence in a death-eligible case, that disparity is not attributable to variations in the frequencies with which prosecutors in different counties decide to continue pursuing the death penalty once a death notice is filed, nor is it attributable to county-by-county variations with which juries return death sentences.<sup>94</sup> Ultimately, what drives the disparities in the probability that a death sentence will result from the commission of a capital crime are the variations among prosecutors at the initial point when the decision to file a death notice is made. In the death penalty realm, this is troubling.

But given the support for prosecutorial discretion and considered in light of the previous discussion about the high standard required to establish an unconstitutional selective prosecution claim,<sup>95</sup> the likelihood that a capital defendant will be successful in challenging a decision by a prosecutor to seek the death penalty seems infinitesimally small. This Note proposes three new avenues through which to challenge prosecutorial discretion. The first links prosecutorial discretion to the Supreme Court's equal protection analysis in *Bush v. Gore*.<sup>96</sup> The second questions whether the role that geography plays in the charging decision raises concerns similar to those in *Furman*. The third avenue links prosecutorial discretion and the resultant geographic disparities in the application of capital punishment laws and considers the incentive that this creates for prosecutors to forum shop in the infrequent situation where a crime can be charged in multiple jurisdictions within the same state.

#### IV. CHALLENGES TO PROSECUTORIAL DISCRETION IN CAPITAL PUNISHMENT CASES

##### A. EQUAL PROTECTION AND A LACK OF STANDARDS

Even though the Supreme Court has set extremely broad limits on the exercise of prosecutorial discretion, the federal government and some (if not all) state governments have compiled standards to guide prosecutors as they determine whether to charge an alleged offender with a crime.<sup>97</sup> Additionally, in capital murder cases, prosecutors, judges, and juries are first required to find at least one aggravating factor among the set enumerated in the statute. If no factors exist

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94. See Paternoster et al., *supra* note 54, at 72 tbl.6F.

95. See *supra* notes 68–84 and accompanying text.

96. 531 U.S. 98 (2000) (per curiam).

97. For a discussion of federal prosecutorial guidelines, see *Jordan v. United States Dep't of Justice*, 591 F.2d 753, 757 (D.C. Cir. 1978), a case concerning a request made pursuant to the Freedom of Information Act for "access to the charging manuals, rules, and guidelines used by the Office of the United States Attorney for the District of Columbia . . ." The opinion indicates that "there are ten paragraphs in the Manual that contain specific guidelines and criteria which Assistant United States Attorneys are expected to consider in handling certain offenses." *Id.* For an example of state prosecutorial guidelines, see Joseph R. McCarthy, Note, *Implications of County Variance in New Jersey Capital Murder Cases: Arbitrary Decision-Making by County Prosecutors*, 19 N.Y.L. SCH. J. HUM. RTS. 969, 988–91 (2003) (discussing New Jersey's Prosecutors' Guidelines).

(or if the jury decides that the prosecutor failed to establish the existence of such factors), a death-eligible defendant cannot be convicted of a capital crime. If statutory aggravating factors are present, the jury must then determine whether any mitigating circumstances that might be present outweigh the severity of those aggravating factors.<sup>98</sup> Yet despite these prosecutorial guides and statutory requirements, the studies that have evaluated states' capital punishment systems clearly indicate that death penalty statutes have not been uniformly applied across different legal jurisdictions within a single state.<sup>99</sup>

Proponents of capital punishment suggest that such disparity is a by-product of validly exercised prosecutorial discretion. But discretion that is not guided by consistently applied and identifiable standards may amount to an equal protection violation, even if the defendant cannot establish “‘a practical denial’ of equal protection of the law,”<sup>100</sup> after the Supreme Court’s decision in *Bush v. Gore*.<sup>101</sup> In *Bush v. Gore*, the Court considered whether a vote recount in the 2000 presidential election amounted to a violation of the Fourteenth Amendment’s Equal Protection Clause.<sup>102</sup> The Court held that equal protection applies not only to the right to vote (which is deemed fundamental once granted to the people), but also to the processes put in place to allow citizens to exercise that right.<sup>103</sup> Once the right to vote was granted to all citizens in an equal manner, a

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98. This statutorily mandated balancing act was initiated in *Gregg v. Georgia*, 428 U.S. 153, 206–07 (1976) (establishing the need for aggravating factors) and *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) (requiring “particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death,” or, in other words, consideration of mitigating factors).

99. See *supra* notes 48–64 and accompanying text. This result holds even after controlling for characteristics of the crime, financial considerations, and other variables. See BALDUS, *supra* note 61, at 110.

100. *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886)).

101. 531 U.S. 98 (2000) (per curiam).

102. U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

103. *Bush v. Gore*, 531 U.S. at 104. It is unclear whether the Court’s equal protection analysis is applicable to anything beyond the facts presented by this specific case. The language of the opinion seemingly precludes the decision from serving as precedent when it notes that the Court’s “consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.” *Id.* at 109. The effect of this language has been debated by commentators. See, e.g., Richard L. Hasen, *Bush v. Gore and the Future of Equal Protection Law in Elections*, 29 FLA. ST. U. L. REV. 377, 386 (2001) (noting that the limiting language was “extraordinary” and concluding that “the Court appeared to dismiss any precedential value [*Bush v. Gore*] may have for future election law cases”); Samuel Issacharoff, *Political Judgments*, 68 U. CHI. L. REV. 637, 650 (2001) (“The difficulty in defining the scope of this new equal protection right is made all the worse by the Court’s disingenuous limiting instruction. . . . [W]ithout any principled distinction between recounts and any number of other procedures that might result in ‘arbitrary and disparate treatment’ of different parts of the electorate, the limiting instruction is either meaningless or reveals the new equal protection as a cynical vessel used to engage in result-oriented judging by decree.”). At least one federal court has held that *Bush v. Gore* does have precedential value, although the decision in that case was vacated and awaits rehearing en banc in the Sixth Circuit. See *Stewart v. Blackwell*, 444 F.3d 864, 874 n.22 (6th Cir. 2006), *vacated* No. 05-3044 (6th Cir. July 21, 2006) (stating explicitly that “the

state could not “value one person’s vote over that of another.”<sup>104</sup> The equal protection violation arose from the lack of uniform standards governing the recount; the Court noted that “the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another.”<sup>105</sup> Ultimately, the Court concluded that “[t]he recount process . . . is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter” and that “there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied” before the process could continue.<sup>106</sup>

The decision in *Bush v. Gore* has been widely criticized by commentators.<sup>107</sup> The decision is difficult to understand because the Court avoids the typical language it often employs when considering an equal protection challenge. It does indicate that it is dealing with a fundamental right, stating that “[w]hen the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter.”<sup>108</sup> However, the Court does not then engage in an analysis typical of its strict scrutiny equal protection jurisprudence. Despite these shortcomings, the decision can be applied to the situation in which a lack of uniform prosecutorial standards leads to disuniform application of the death penalty among counties within a state.

The lack of uniform standards guiding the exercise of prosecutorial discretion, like the lack of uniform standards guiding the exercise of vote-counter discretion, constitutes a violation of the Equal Protection Clause. The decision to seek the death penalty, and the potential resulting death sentence, implicate the unalienable right to life.<sup>109</sup> If the Equal Protection Clause is violated when the process of exercising the right to vote (a right only deemed fundamental after it has been granted by the state) is administered inequitably in the absence of uniform standards, surely it is violated when the process of extinguishing a

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Supreme Court does not issue non-precedential opinions”). For a concise discussion of *Bush v. Gore* and *Stewart*, see generally Chad Flanders, *Please Don't Cite this Case!: The Precedential Value of Bush v. Gore*, 116 YALE L.J. POCKET PART 141 (2006), <http://thepocketpart.org/2006/11/07/flanders.html>. While the validity of extending *Bush v. Gore* is clearly debatable, that debate is beyond the scope of this Note and its resolution is not necessary for the argument to proceed. The equal protection analysis in *Bush v. Gore* is used not to argue that it applies directly to the capital punishment setting, but rather is used as a first step in conceptualizing how to approach the death penalty debate in new ways.

104. *Bush v. Gore*, 531 U.S. at 104–05.

105. *Id.* at 106.

106. *Id.* at 109.

107. See, e.g., Markenzy Lapointe, *Bush v. Gore: Equal Protection Turned on its Head, Perhaps for a Good Though Unintended Reason*, 2 WYO. L. REV. 435, 479 (2002) (“The Court’s equal protection ruling in *Bush v. Gore* is fundamentally flawed for the reasons set forth. The result cannot be justified by any of the Court’s prior equal protection decisions.”); see generally David Cole, *The Liberal Legacy of Bush v. Gore*, 94 GEO. L.J. 1427, 1427, 1452–74 (2006).

108. See *Bush v. Gore*, 531 U.S. at 104.

109. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).



life is also administered inequitably in the absence of uniform standards. The lack of standards creates the same county-to-county disparity deemed important by the Court in *Bush v. Gore*.<sup>110</sup> The disuniformity among same-state counties regarding the decision to seek the death penalty creates concerns comparable to those created in the voter recount situation. Just as equal protection requires that each voter be treated with the same dignity, it should also require that each citizen's life be treated with the same dignity. The lack of uniform standards governing prosecutorial discretion in capital cases fails to provide this uniform dignity.

#### B. THE EIGHTH AMENDMENT AND INTRASTATE DISPARITY

Both Supreme Court jurisprudence and legislative action indicate that rampant disproportionality in sentencing violates the evolving standards of decency test used to gauge violations of the Eighth Amendment. Under the Eighth Amendment,<sup>111</sup> courts must evaluate punishments to determine whether they are cruel and unusual by reference to “the evolving standards of decency that mark the progress of a maturing society.”<sup>112</sup> In *Furman v. Georgia*, the Supreme Court applied that standard in holding that a system of capital punishment that “capriciously selected [a] random handful upon whom [to impose] the sentence of death” was unconstitutional because such death sentences were “wantonly and . . . freakishly imposed.”<sup>113</sup> Justice Douglas stated that “[t]he high service rendered by the ‘cruel and unusual’ punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary . . . .”<sup>114</sup>

The question then becomes whether the influential role that geography plays in the disproportionate prosecution of death-eligible homicides among different counties amounts to a violation of the Eighth Amendment. The empirical evaluations of state capital punishment systems indicate not only that geography plays a very important role in determining whether the capital punishment statute will be applied, but, at least in Maryland, it plays the most important role in predicting both the likelihood that an offender accused of committing a capital crime will be charged as a capital or non-capital offender and that such a charge will be carried all the way through to the sentencing stage.<sup>115</sup> The results of these evaluations demonstrate a practice of disproportionate charging and

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110. See *Bush v. Gore*, 531 U.S. at 106.

111. U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

112. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

113. 408 U.S. 238, 309–10 (1972) (per curiam) (Stewart, J., concurring). Justice Stewart noted that his “concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race. But racial discrimination has not been proved and I put it to one side.” *Id.* at 310 (citation omitted).

114. *Id.* at 256 (Douglas, J., concurring).

115. See *supra* notes 41–64 and accompanying text. For instance, in Maryland, the probability that a death sentence will arise out of a death-eligible offense is “twenty-three times higher in Baltimore

sentencing based on the county in which the crime was committed. Disproportionality based on arbitrary decisionmaking in capital punishment cases has concerned the Supreme Court since it upheld Georgia's death penalty statute in *Gregg v. Georgia*. In that case, the Court found that, while there was potential for arbitrary sentencing decisions, the mandatory review procedures contained in the Georgia capital punishment statute provided assurances that punishments for similar crimes would not be disproportionate.<sup>116</sup> The Court recognized that an "aberrant jury" could at some point impose a death sentence in a case when no other similar crimes had ever received such a punishment but concluded that the review procedures protected against such disproportionality.<sup>117</sup>

If disproportionate sentencing decisions violate evolving standards of decency (so much so that the Court recognized the need for review procedures to ensure consistency in sentencing), the same may be said of disproportionate charging decisions. Furthermore, sentencing review procedures do not address the problem of disproportionate charging decisions because they compare the sentences of offenders convicted of death-eligible offenses with the sentences of other offenders convicted of death-eligible offenses. Sentencing review fails to capture the first step in the process, the charging decision, and thus fails to evaluate whether similarly situated death-eligible *offenders* (not convicts) are being charged in a systematically disproportionate manner depending upon the locus of the crime. The problem with this argument, however, is that the Supreme Court has held subsequent to *Gregg* that proportionality review of sentences is not required as part of a constitutional capital punishment system.<sup>118</sup>

But although *Gregg's* proportionality review may no longer be good law, the reasoning that underlies the *Furman* decision still applies when the application of a state's capital punishment statute depends not on the nature of the crime but rather on where the crime was committed. The elements of a capital punishment statute define the types of crimes to which that statute applies. Reliance on the crime's location in the charging calculus seems as arbitrary a factor as race. There is no valid reason why geography should play such a vital role in the statewide death penalty system. This is especially true when one considers the possibility that the same crime might or might not be charged under a state's death penalty statute depending on whether the crime was committed one foot

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County than it is in Baltimore City, *even after considering case characteristics.*" Paternoster et al., *supra* note 54, at 33–34 (emphasis added).

116. *Gregg v. Georgia*, 428 U.S. 153, 204–07 (1976) ("The provision for appellate review in the Georgia capital-sentencing system serves as a check against the random or arbitrary imposition of the death penalty.").

117. *Id.* at 206 ("If a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death.").

118. *See, e.g., Pulley v. Harris*, 465 U.S. 37, 53–54 (1984) (holding that "without any requirement or practice of comparative proportionality review, [the California capital punishment system] cannot be successfully challenged under *Furman* and our subsequent cases").

to the east or to the west of a county line. State capital punishment systems that give rise to these geographic disparities are unconstitutional because, just as in *Furman*, they lead to the “wanton and freakish” imposition of death sentences. This analysis applies not just to capital murders that occur in counties with prosecutors who seek the death penalty with greater frequencies. The charging decision in capital cases statewide has no consistency; the application of the punishment is completely arbitrary. What drives the charging outcome is geography; the existence of a statewide system that depends in large part on the location of the crime in determining the severity of the punishment calls into question the legitimacy of the entire system because such systems offend evolving standards of decency.

Judicial opinions are not the only metric by which evolving standards of decency can be measured. Recent state legislative action provides a strong indication that disproportionate sentencing decisions in capital cases violate the evolving standards of decency test by which the Eighth Amendment is evaluated. State legislatures, speaking as representatives of the people, have undertaken new movements within their respective jurisdictions to institute statewide reviews of prosecutorial charging decisions in cases involving death-eligible offenses, in part to ensure that similar offenses are charged in similar manners, regardless of the location of the crime.<sup>119</sup> These local movements, focused directly on the disparate geographical effects arising out of prosecutorial decision-making, provide a much stronger indication that proportionate charging decisions are the mark of a maturing society, and that disproportionate intrastate geographic application of the death penalty offends evolving standards of decency.<sup>120</sup>

### C. INTRASTATE FORUM SHOPPING

A third approach by which to challenge the exercise of prosecutorial discretion and the resultant disparate geographic application of the death penalty is through an argument against the temptation such discretion presents for intrastate forum shopping. This approach does not amount to a constitutional

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119. See, e.g., ILLINOIS REPORT, *supra* note 58, at 84–85 (discussing a recommendation to institute statewide review of county prosecutors’ decisions to seek the death penalty in individual cases).

120. Part of what might also be driving recent legislative action in this area is the recognition that when prosecutors in different counties apply a state’s capital punishment statute with widely disparate frequencies, the law being enforced loses its statewide application and acquires a county-specific quality. This results in the situation that exists in states such as Maryland and Illinois. While this approach may not amount to a constitutional Eighth Amendment violation, it certainly warrants consideration. When states differ with respect to their individual approaches to the death penalty, observers can point to the differing moral consensus within each individual state and argue that sovereign rights permit those states to express their moral views on the death penalty differently. When counties within the same state apply one capital punishment statute with drastically different frequencies—frequencies explained most strongly by geography rather than by homicide characteristics—that one law takes on the appearance of multiple statutes governing different counties. This disparity cannot be justified by appeals to state sovereignty.

challenge directly, but intertwines concerns raised by both the Eighth and Fourteenth Amendments and applies them in a new way to question the legitimacy of the capital punishment system. The intrastate forum shopping approach questions the appropriateness of a system that creates disparities among different counties within the same state such that prosecutors have the incentive, in the infrequent scenario in which law enforcement cannot accurately identify the exact location of the commission of a capital murder, to shop for the forum (within the state) most likely to lead to the application of the death penalty. This is not a theoretical approach disconnected from reality, as the story of Kevin Johns indicates.

The story of Kevin G. Johns, Jr. is a fairly unsympathetic one. Johns was arrested at the age of nineteen for the February 2002 murder of his uncle.<sup>121</sup> He was sentenced to thirty-five years in prison under the supervision of the Maryland Division of Corrections.<sup>122</sup> Johns was initially assigned to the Patuxent Institution, a prison generally reserved for the State's most mentally ill inmates, but he was soon transferred to the Maryland Correctional Training Center in Hagerstown.<sup>123</sup> In January 2004, while still housed there, Johns was placed in a cell with Armad Cloude, a sixteen year-old serving a sentence for second-degree murder.<sup>124</sup> One night, while braiding Cloude's hair, Johns strangled him to death.<sup>125</sup> After Johns confessed to the murder and received a life sentence, the State held a hearing to consider Johns's mental status and to determine where Johns should be housed; several inmates who had been housed with Johns at various times and who knew about his mental status traveled to Hagerstown from the Maryland Correctional Adjustment Center ("Supermax") in Baltimore to testify on his behalf.<sup>126</sup> Philip Parker, one of the inmates who had served time with Johns, testified that the Division of Corrections would not be able to provide Johns with the mental services that he needed unless he was housed in a particular facility in Jessup, Maryland. Despite this testimony, Johns was ordered transferred to Supermax that same day to begin serving his life sentence.<sup>127</sup>

Johns joined the inmates from Baltimore on the seventy-five mile bus ride

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121. Stephanie Desmon, *Parallel Lives, Tragic Ending*, BALT. SUN, Feb. 13, 2005, at 1A. Johns killed his uncle in a dispute over money. The details of the murder were particularly gruesome. Johns told police that he "took off his belt and started to strangle his uncle" and when the belt snapped, "put [his uncle] into a choke hold." *Id.* Because he thought that he had not killed his uncle by strangling him, he used an old saw and a box cutter on his uncle's throat to "finish the job." *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* This murder was committed in a similarly gruesome nature. "To be sure [Cloude] was dead, Johns tried to cut him in the neck, too. The body was found around 3:30 a.m., while prisoners were being released for breakfast. Half of Cloude's hair was [braided]; the other half wasn't." *Id.*

126. Stephanie Desmon & Gus G. Sentementes, *Prisoner Strangled on Bus, Parents Allege*, BALT. SUN, Feb. 4, 2005, at 1B; see Greg Garland, *Broken Light in Prison Bus Hid Strangling, Officer Says*, BALT. SUN, Feb. 11, 2005, at 1A.

127. Desmon & Sentementes, *supra* note 126.

back to Supermax.<sup>128</sup> The events that transpired on that bus ride are unclear, except for one thing: Philip Parker was alive when the bus left Hagerstown and dead when the bus arrived in Baltimore. Initial news reports focused on the failure of corrections officers on the bus to take the appropriate steps necessary to ensure the safety of the inmates on board.<sup>129</sup> The media also focused attention on the fact that nobody knew where the murder took place.<sup>130</sup> Johns quickly became the focus of police investigations; because of the possibility that police would question him, and because of the ambiguity surrounding the location of the murder, Johns's attorney contacted the state's attorneys in all four of the counties through which the bus passed on the way from Hagerstown to Baltimore to ensure that, amidst all the confusion, no police from any of those jurisdictions questioned Johns.<sup>131</sup> Ultimately, prosecutors announced that the case would be tried in Baltimore County.<sup>132</sup> Prison investigators determined that Kevin Johns had "likely killed" Philip Parker while the bus traversed the four-mile stretch of road that passed through Baltimore County, and the State's Attorney's Office in Baltimore County announced that it would seek the death penalty in the case.<sup>133</sup>

One of the more difficult and controversial aspects of this case is the nature of the crime scene: a moving bus. Nobody is quite sure how to determine exactly where this murder took place. Many states have codified the procedure

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128. Desmon, *supra* note 121.

129. Desmon & Sentementes, *supra* note 126 (noting that the victim's father, himself once a prisoner in the Maryland correctional system, stated that "guards often slept on the long, dark bus ride through the night"); see also Greg Garland, *Former Inmates Describe Bus, Cage; Md. Officials Won't Give Location of Key Prisoner During Fatal Trip to City*, BALT. SUN, Feb. 5, 2005, at 1B ("[F]ormer inmates said correctional officers might not have noticed a struggle because of loud music regularly played on the buses during the trips."); Greg Garland & Gus G. Sentementes, *Seating Killer in Bus with Other Inmates Violated Md. Policy; Passengers Posing Special Risks Are To Be Separated, Procedures Say*, BALT. SUN, Feb. 23, 2005, at 1A.

130. See Garland, *supra* note 129 ("Corrections officials have said there were five staff members on the bus when Parker was killed but that no one noticed anything amiss until he was found dead when the bus stopped in Baltimore.").

131. See Eric Rich & Allison Klein, *Lawyer Prohibits Inmate's Questioning; Convict, Victim Were on Md. Prison Bus*, WASH. POST, Feb. 8, 2005, at B3.

132. See Garland, *supra* note 126, at 1A. The details surrounding the determination were vague. Assistant State's Attorney "S. Ann Brobst [indicated] that Baltimore County prosecutors will be handling the case. She said she could not reveal how authorities determined that Parker was killed within the county . . ." *Id.*

133. See Gus G. Sentementes, *Death Sentence To Be Sought for Killing Aboard Prison Bus; Murderer Said To Strangle Fellow Inmate with Chains*, BALT. SUN, Mar. 8, 2005, at 9A; see also Allison Klein, *Inmate Indicted in Strangulation on Md. Prison Bus; Prosecutors Plan To Seek Death Penalty Against Murderer Serving Life Sentence*, WASH. POST, Mar. 8, 2005, at B3. The state's attorney sought the death penalty because "the county's policy is to seek the death penalty in every case that is eligible." *Id.* Johns was eligible for the death penalty because he allegedly committed a murder while serving a life sentence. This is one of the statutory aggravating circumstances that serve to elevate a homicide to a death-eligible offense. See MD. CODE ANN., CRIM. LAW § 2-303(g)(1) (West 2005). The Maryland Code lists ten aggravating factors, at least one of which a jury must find to exist beyond a reasonable doubt for a death sentence to be levied. Johns is alleged to meet factor "(viii) the defendant committed the murder while under a sentence of death or imprisonment for life." *Id.*

to determine where to charge such a crime, particularly when that crime is committed close enough to a jurisdictional border as to raise doubt as to the actual location of commission.<sup>134</sup> Maryland does not have such a statute currently on the books, but the Maryland Court of Special Appeals ruled in *Smith v. State*<sup>135</sup> that “the State may prove venue by demonstrating, by a preponderance of the evidence, that the crime occurred so near to the boundary line as to render the precise location doubtful.”<sup>136</sup> At first glance, then, the Johns case does not present a unique set of circumstances. Crimes must occur near county and other jurisdictional lines with enough frequency that state legislatures feel the need to codify the procedures to be followed when such instances arise.

But while Johns’s story might not be unique, it is worth examining in part because the murder could have taken place in any of the four counties through which the prison bus traveled that night. Johns’s lawyers have presented evidence that the murder could also have taken place in Howard, Washington, or Frederick counties.<sup>137</sup> Prosecutors will not discuss the evidence that led to the decision to charge the crime in Baltimore County, indicating without specifics that the evidence was “ample.”<sup>138</sup> The controversial aspect of this decision was the possibility that prosecutors had an ulterior motive in choosing Baltimore County as the prosecuting jurisdiction—“Baltimore County prosecutors seek the death penalty more frequently than their counterparts in other Maryland jurisdictions.”<sup>139</sup>

The presence of significant disparities in the frequency of application of the death penalty among different counties within the same state creates an incentive for that state’s prosecutors, in situations where a murder could have happened in any of a number of distinct legal jurisdictions, to seek the most favorable legal jurisdiction within that state in which to prosecute the crime. Maryland law enforcement officials were faced with four potential jurisdictions in which they could prosecute the crime. One of those jurisdictions, Baltimore

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134. See, e.g., ALA. CODE § 15-2-7 (2005) (“When an offense is committed on the boundary of two or more counties or within a quarter of a mile thereof or when it is committed so near the boundary of two counties as to render it doubtful in which the offense was committed, venue is in either county.”). This section of the Alabama Code uses the terms “jurisdiction” and “venue” interchangeably. See *Agee v. State*, 465 So. 2d 1196 (Ala. Crim. App. 1984). This statute is similar to other “county-line buffer statutes.” For a comprehensive list of all states with county-line buffer statutes, see Brian C. Kalt, *Cross Eight Mile: Juries of the Vicinage and County-Line Criminal Buffer Statutes*, 80 WASH. L. REV. 271, 277–79 & nn.23–24 (2005) (presenting a list of all nineteen states that have county-line buffer statutes, along with the specific wording of those statutes).

135. 695 A.2d 575 (Md. Ct. Spec. App. 1997).

136. *Id.* at 586.

137. See Lisa Goldberg, *Lawyers See Trial’s Location as a Life-or-Death Issue*, BALT. SUN, Sept. 7, 2005, at 1B (referencing court papers filed by Johns’s attorneys containing statements from inmates that were on the bus indicating the different possible locations for the homicide).

138. *Id.* (quoting Baltimore County Assistant State’s Attorney S. Ann Brobst).

139. Jennifer McMenamin, *Inmate Heavily Bound at Hearing; Lawyers Agree To Limit Information Given Suspect in Killing on Prisoner Bus*, BALT. SUN, May 17, 2005, at 1B.

County, was most likely to provide for a favorable outcome for prosecutors if the state decided to seek the death penalty. The striking disparity created by Baltimore County's prosecutorial policy concerning capital cases created an incentive for prosecutors to figure out a way to choose that county as the venue in which to prosecute the crime. This phenomenon, referred to in this Note as "intrastate forum shopping," leads to the inequitable administration of a state's death penalty system—an inequitable administration that raises constitutional concerns.

The Supreme Court has addressed the issue of disparate application of a law within the same state.<sup>140</sup> But the cases of Kevin Johns and others similarly situated<sup>141</sup> present a different issue than that presented to the Court in *Missouri v. Lewis*, *Hayes v. Missouri*,<sup>142</sup> and *Reinman v. City of Little Rock*. In those cases, the disparate application of the laws did not create an incentive for the state to shop for a forum in which it had a greater likelihood of receiving a more favorable outcome.<sup>143</sup> Therefore, the Supreme Court's forum-shopping jurisprudence provides a better line of cases with which to consider intrastate geographic disparities in the application of the death penalty.

The first step in the analogy requires a brief overview of the Supreme Court's forum-shopping jurisprudence. The Court laid the foundation for this line of cases in *Erie Railroad Co. v. Tompkins*,<sup>144</sup> a case involving an individual, Harry Tompkins, who suffered injuries he claimed resulted from the negligence of the Erie Railroad Company.<sup>145</sup> The outcome of the case depended in large part on what law would govern it; although the accident occurred in Pennsylvania and Tompkins was a resident of that state, he sued in federal court in the Southern District of New York because Erie Railroad was incorporated in that state, and because the standard for establishing negligence under federal law was lower than under Pennsylvania state law.<sup>146</sup> The lower courts applied federal law and ruled in favor of Tompkins. The Supreme Court reversed the lower courts and

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140. See *supra* notes 30–35 and accompanying text.

141. See Willing & Fields, *supra* note 62 (describing the case of Raymond Patterson, a man sentenced to death in South Carolina for the murder of an elderly man during a robbery). The murder occurred within feet of the line dividing Lexington and Richland counties. *Id.* Patterson committed the murder in Lexington County, which had more death sentences levied than Richland County (although the time period of comparison is unclear). *Id.*

142. 120 U.S. 68 (1887).

143. In *Reinman*, for example, the challenged law concerned a prohibition against the presence of livery stables within certain parts of Little Rock on the grounds that the stables created health risks, among other detrimental effects. 237 U.S. 171, 172 (1915).

144. 304 U.S. 64 (1938).

145. *Id.* at 69.

146. *Id.* at 69–70. If the case had been governed by Pennsylvania law, Tompkins would have been considered a trespasser on the railroad's property; the railroad was "not liable for injuries to undiscovered trespassers resulting from its negligence, unless it be wanton or willful." *Id.* at 70. Under federal law, the railroad would have been held to a much more stringent standard. "Where the public has made open and notorious use of a railroad right of way for a long period of time and without objection, the company owes to persons on such permissive pathway a duty of care in the operation of its trains" such that "a jury may find that negligence exists toward a pedestrian using a permissive path on the

overruled *Swift v. Tyson*,<sup>147</sup> the case upon which the lower courts had relied.<sup>148</sup> The Court was comfortable in doing so, reasoning that the decision in *Swift* had “introduced grave discrimination by noncitizens against citizens,”<sup>149</sup> and that the exploitable arbitrage that it created “rendered impossible equal protection of the laws.”<sup>150</sup>

The *Erie* Court did not use the term “forum shopping.”<sup>151</sup> The Court used it later, however, when it reframed its understanding of the *Erie* doctrine in *Hanna v. Plumer*,<sup>152</sup> a case involving a conflict between state law and the Federal Rules of Civil Procedure with respect to the requirements of service of process.<sup>153</sup> The Court believed that in order to resolve the issue, it could not merely look at the decisions of *Erie* and its progeny; instead it had to refer back to the policies underlying the decision in *Erie*.<sup>154</sup> The *Erie* decision had the “twin aims” of “discouragement of forum shopping and avoidance of inequitable administration of the laws.”<sup>155</sup> The *Hanna* Court’s reframing of *Erie* was affirmed in *Semtek International Corp. v. Lockheed Martin Corp.*,<sup>156</sup> a case involving claim preclusion and statute of limitations issues.<sup>157</sup> In holding that a federal court, sitting in diversity, should apply the claim preclusion law of the state in which it sits, the Court said that “any other rule would produce the sort of ‘forum-shopping . . . and . . . inequitable administration of the laws’ that *Erie* seeks to avoid. . . .”<sup>158</sup>

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railroad right of way if he is hit by some object projecting from the side of the train.” *Id.* (quoting the opinion of the Circuit Court affirming the District Court’s decision).

147. 41 U.S. 1 (1842).

148. See *Tompkins v. Erie R.R. Co.*, 90 F.2d 603, 604 (2d Cir. 1937) (relying on “general law” as permitted by *Swift*, 41 U.S. 1, but not citing the case).

149. *Erie*, 304 U.S. at 74.

150. *Id.* at 75.

151. The concept of “forum shopping” appears in *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 521 (1953) (Jackson, J., dissenting). Justice Jackson criticized the majority opinion, writing that its “decision, in contrast with our position, would enable shopping for favorable forums.” *Id.* Justice Jackson went on to say that “shopping for a favorable law via the forum non conveniens route opens up possibilities of conflict, confusion and injustice greater than anything *Swift v. Tyson* . . . ever held.” *Id.* at 522.

152. 380 U.S. 460 (1965).

153. *Id.* at 461, 467.

154. *Id.* at 467.

155. *Id.* at 468. Reframing *Erie* with reference to these twin aims was not accepted by all members of the Court. “*Erie* was something more than an opinion which worried about ‘forum-shopping and avoidance of inequitable administration of the laws.’” *Id.* at 474 (Black, J., dissenting). “I have always regarded that decision as one of the modern cornerstones of our federalism, expressing policies that profoundly touch the allocation of judicial power between the state and federal systems.” *Id.*

156. 531 U.S. 497 (2001).

157. *Id.* at 499.

158. *Id.* at 508–09 (quoting *Hanna*, 380 U.S. at 468). The *Semtek* Court was ultimately concerned with the need to protect the ideals of federalism. For example, the Court in *Semtek* said that “[s]ince state, rather than federal, substantive law is at issue there is no need for a uniform federal rule. And indeed, nationwide uniformity in the substance of the matter is better served by having the same claim-preclusive rule (the state rule) apply whether the dismissal has been ordered by a state or a federal court.” *Id.* at 508. State law does not always trump federal law, particularly given the



When some commentators address the issue of forum shopping, they raise the argument that “our governmental structure tends to create choice, both between (or among) states and between state courts and federal courts.”<sup>159</sup> States independently create their own laws, and the distinct laws resulting from these independent processes “help[ ] states differ from one another” in meaningful ways.<sup>160</sup> Given the freedoms granted to each state to develop its own legislation, the inevitable result is the possibility that one state might present a forum with a more favorable potential outcome than another state.<sup>161</sup> Forum shopping at the interstate level can occur in both criminal as well as civil cases, something that was seen during the determination of forum in the criminal trials of John Allen Muhammad and John Lee Malvo, the two men responsible for the sniper shootings in the District of Columbia metropolitan area.<sup>162</sup> Interstate forum shopping is supported in part by the notion that states are permitted to develop legal systems that vary from other states.<sup>163</sup>

However, when we examine intrastate disparity in the application of laws, we are faced with the potential for a type of forum shopping unsupported by traditional notions of federalism. Despite the technical differences between the *Erie* line of cases and intrastate forum shopping, the twin policy goals underlying the decision in *Erie*—avoidance of forum shopping and the “inequitable

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Supremacy Clause, *see* U.S. CONST. art. VI, cl. 2, a fact recognized by the Court in its statement that “federal reference to state law will not obtain, of course, in situations in which the state law is incompatible with federal interests.” *Semtek*, 531 U.S. at 509.

Some commentators believe that this federalism concern limits the reach of the forum-shopping jurisprudence. *See* Debra L. Bassett, *The Forum Game*, 84 N.C. L. REV. 333, 369 (2006) (“[T]he Supreme Court has repeatedly recognized the existence and the value of forum shopping, and its jurisprudence shows an inclination to curtail forum shopping only when mandated by federalism concerns.”). Courts also have recognized that in certain situations procedural structures permit selection of a forum from amongst multiple options. For example, the Fourth Circuit identified diversity jurisdiction and venue statutes as “certainly implicit, if not explicit, approval of alternate forums for plaintiffs,” and concluded that “[t]here is nothing inherently evil about forum-shopping.” *Goad v. Celotex Corp.*, 831 F.2d 508, 512 n.12 (4th Cir. 1987).

159. Bassett, *supra* note 158, at 339.

160. *See id.* Indeed, “[b]enefits or unfairness to one side or the other [in litigation] do not warrant placing limits on forum shopping. Substantive law differences among states [are] a fact of life and [are] properly treated as such by the Supreme Court.” *Id.* at 369.

161. *See id.* at 370; *see also* Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 569 (1989) (comparing the judicial system in the United States to judicial systems in Europe and concluding that both “federalism” and “quasi-federal structure[s] invite intrasystem forum shopping”).

162. *See* Matthew Mosk, *Dissent in Sheinbein Case Has Md. Lawyers Talking; Sending Son to Israel Backed as ‘Forum Shopping,’* WASH. POST, Dec. 28, 2002, at B1 (referring to the decision to try the sniper suspects in Virginia, a state with traditionally strong support for the death penalty, “a defense lawyer and past president of the Montgomery County Bar Association . . . said he has seen prosecutors in the region forum-shop for years, mostly to exploit the notoriously stern sensibilities of Virginia jurors and judges”).

163. *See, e.g.,* Bassett, *supra* note 158, at 389 (“When laws vary from state to state, results may differ depending on the forum.”).

administration of the laws”<sup>164</sup>—still apply. This is true even considering the Supreme Court’s decisions in *Missouri v. Lewis* and its progeny<sup>165</sup> because of the belief that the death penalty holds unique jurisprudential status.

The belief that “[t]hroughout our history, arbitrary geographical boundary lines have made tremendous differences”<sup>166</sup> gains special significance when considered in light of Kevin Johns and his story. Baltimore County prosecutors argue that they have ample evidence to demonstrate that Kevin Johns killed Philip Parker while the prison bus transporting them traversed the four miles of road (out of seventy-five total miles) in Baltimore County. Defense counsel challenged the selection of Baltimore County as the appropriate venue, arguing instead that the murder occurred in Howard County, but the judge presiding over the case rejected the argument.<sup>167</sup> The argument that the murder occurred elsewhere was not a new one, as newspaper accounts indicated that different witnesses could present different evidence indicating that the murder occurred in any of three of the four jurisdictions through which the rolling crime scene passed. But all of this evidence is irrelevant to the analysis. Maryland law enforcement officials had a tremendous incentive to seek out evidence linking the crime to Baltimore County, for if the case is charged and maintained in Baltimore County, Johns will be much more likely to get the death penalty.<sup>168</sup>

This incentive to forum shop within a state erodes the legitimacy of that state’s capital punishment system. A death sentence is the most severe penalty available, and as such, it should be applied only to the worst of the worst within a state. Maryland cannot reasonably argue that it subscribes to this belief. Maryland has one capital punishment statute within its criminal code, yet Maryland cannot say that it has only one capital punishment system. Instead, it has twenty-four variations of that capital punishment system. When faced with a situation such as that presented by the Kevin Johns case, these variations permit the state to pick the legal jurisdiction that presents the state with the greatest likelihood of obtaining the most severe punishment. Had the prison bus crossed state lines, the forum-shopping debate would be moot. But that is not the set of facts with which we are presented.

As demonstrated previously, Maryland is not unique in its failure to apply its own capital punishment laws in a uniform fashion within the state. Illinois was faced with a similar showing of disparity, and this disparity was one of the factors considered by Governor George Ryan when he cleared the state’s death

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164. *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508–09 (2001) (quoting *Hanna v. Plumer*, 380 U.S. 460, 468 (1965)).

165. *See supra* notes 30–35 and accompanying text.

166. Gerald L. Neuman, *Territorial Discrimination, Equal Protection, and Self-Determination*, 135 U. PA. L. REV. 261, 262 (1987). While Neuman was referencing the difference that these imaginary boundaries made to the lives of innocent people, the argument still holds when an imaginary line is what might make the difference between life and death.

167. *Crime & Justice*, WASH. POST, Jan. 5, 2006, at B2.

168. The case is currently pending in the Baltimore County court system.

row in 2003. In explaining his actions, Ryan said,

The death penalty in Illinois is not imposed fairly or uniformly because of the absence of standards for the 102 Illinois State Attorneys, who must decide whether to request the death sentence. Should geography be a factor in determining who gets the death sentence? I don't think so but in Illinois it makes a difference. You are 5 times more likely to get a death sentence for first degree murder in the rural area of Illinois than you are in Cook County. Where is the justice and fairness in that—where is the proportionality?<sup>169</sup>

Ryan reiterated this point later in his speech when he stated that “if you look at the cases, . . . a killing with the same circumstances might get 40 years in one county and death in another county.”<sup>170</sup> Ultimately, he concluded that “the Illinois capital punishment system is broken.”<sup>171</sup>

A recommendation for fixing geographical disparity was contained in a report issued by the Governor's office in response to calls to evaluate the Illinois capital punishment system.<sup>172</sup> This recommendation was specifically created in an effort to “promote uniformity throughout the state with respect to standards for deciding whether or not the death penalty should be sought in a first degree murder case.”<sup>173</sup> Such an approach would work in other states right now. Currently, state's attorneys have tremendous discretion to pursue the death penalty in cases that meet the statutory requirements. Wide disparities arise out of the exercise of that discretion. The problem is amplified when one of the leading factors in the prediction of whether the death penalty will be pursued, irrespective of the characteristics of the crime, is the legal jurisdiction in which that crime took place. The problem becomes intolerable when law enforcement is given the opportunity, in the infrequent situation where the situs of the crime is ambiguous, to shop for the forum which leads to the greatest likelihood of a death sentence.

Forum shopping and inequitable administration of the laws—the twin concerns driving the Supreme Court's forum-shopping jurisprudence—intertwine with both the Eighth and Fourteenth Amendments in the capital punishment context. The state-commissioned studies evaluating capital punishment schemes<sup>174</sup> demonstrate that states apply their death penalty laws with different frequencies depending on the county where the crime occurred. The question becomes whether this disparate application amounts to “inequitable administration of the laws,” and it is best answered by reference to the statistical

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169. George Ryan, Governor of Ill., I Must Act, Speech Before Northwestern University College of Law (Jan. 11, 2003), in AUSTIN SARAT, *MERCY ON TRIAL* 165–66 (2005).

170. *Id.* at 172.

171. *Id.* at 180.

172. ILLINOIS REPORT, *supra* note 58, at 84. Recommendation 30 of the report indicates the need for statewide review of death-eligibility in potential capital cases.

173. *Id.* at 85.

174. *See supra* Part II.

significance of the differences in frequency of application. Prosecutors undoubtedly have the authority to exercise discretion with respect to their charging decisions. But when different prosecutors in two geographically distinct legal jurisdictions exercise their discretion in vastly disparate ways, such as the prosecutors do in the geographically contiguous jurisdictions of Baltimore County and Baltimore City,<sup>175</sup> that disparity amounts to inequitable administration of the capital punishment law.

Capital punishment statutes are clearly applied differently depending on the legal jurisdiction in which the crime is charged. But does this inequitable administration amount to an equal protection violation? Capital murderers are not a suspect class that would cause the Court to raise scrutiny above rational basis review. Thus, the question is whether there is any rational basis for a state to treat a murderer differently depending on where he commits that murder, and whether that basis furthers a legitimate state interest. States are not charging capital murderers differently in different legal jurisdictions within that state primarily because of cost concerns, severity of the crimes, or prosecutorial experience. States are prosecuting different capital offenders differently under the same capital punishment statute because the crimes occur in different places. A successful challenge under the Fourteenth Amendment might therefore argue that there is no rational basis for a state death penalty law, passed by the state legislature to apply uniformly to all of the state's counties, to differ in meaning based solely on where it is being applied.<sup>176</sup> It is doubtful that a court would agree with such an argument. Nevertheless, in light of *Bush v. Gore* and the Court's approach to rational basis review in *Romer v. Evans*,<sup>177</sup> a court might be inclined to conduct an equal protection analysis that considers the geographically disparate application of a state's capital punishment statute under heightened rational basis review to find the statute's application at least problematic, if not unconstitutional, in the same manner that led to the federalism-based decision in *Erie*.

Even if that approach fails, courts might still consider the intersection of

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175. See Paternoster et al., *supra* note 54, at 33–34 (asserting that a death-eligible offense is twenty-three times more likely to be charged as such in Baltimore County than in Baltimore City).

176. An objection to this analysis is that the state has also set up its law enforcement system in such a manner as to permit elected state's attorneys the discretion to determine how to apply the law in their particular jurisdiction. Perhaps such an argument applies to most laws, but again, "death is different." There is also the possibility of raising an Equal Protection claim on behalf of citizens of the counties that prosecute death penalty cases the least. For instance, Baltimore City residents could argue that the city's failure to prosecute the death penalty in a meaningful fashion offers those citizens less protection from capital murderers than offered to citizens of Baltimore County. This is an interesting perspective, but might fail a standing analysis.

177. 517 U.S. 620, 624, 635–36 (1996) (holding that a Colorado state constitutional amendment prohibiting state protection of persons based on their homosexual status failed rational basis review and therefore violated the Equal Protection Clause of the Fourteenth Amendment). The standard of review applied in *Romer* has been described as a "rational basis test with teeth." See Jay Weiser, *Foreward: The Next Normal—Developments Since Marriage Rights for Same-Sex Couples in New York*, 13 COLUM. J. GENDER & L. 48, 55 (2004).

forum shopping and the Eighth Amendment to challenge the disparate application of a state's capital punishment statute. The Court in *Furman* created the "wanton and freakish" standard to judge the imposition of capital sentences. One could argue that the disparate application of the death penalty among counties within a state, and the forum-shopping incentive it creates in the infrequent scenario where the location of the crime is uncertain, leads to a "wanton and freakish" application of the capital punishment system. It is this process of forum shopping that exposes the power of geography. A death sentence imposed merely because law enforcement was able to try a crime (of unknown location) in the county most likely to seek the death penalty, when that *same* crime had little or no possibility of leading to a capital murder charge in another county, is undoubtedly the type of "wanton and freakish" result that Justice Stewart found so compelling in overturning the Georgia capital punishment system in *Furman*.

#### CONCLUSION

There is no doubt that prosecutors need the ability and freedom to exercise their discretion in ways that cannot be guided by a decisionmaking manual. But the same justification for prosecutorial discretion in non-death-eligible offenses does not necessarily apply to capital cases because of the simple proposition that "death is a uniquely and unusually severe punishment."<sup>178</sup> The evidence presented in several states provides a strong indication that in death penalty cases, where you commit the offense is at least as important (if not *much more* important) as the characteristics of the crime. The lack of uniform prosecutorial standards leading to this result creates three challenges to a state's capital punishment statute. First, the Court's decision in *Bush v. Gore* raises the possibility that a capital punishment system in which prosecutors are not guided by clear standards violates the Fourteenth Amendment's Equal Protection Clause. Dignity of life is at least as important as voting rights, and thus the absence of standards guiding decisions about the potential extinguishment of a life should also amount to a violation of equal protection. Second, the important role that geography plays in the charging decisions of prosecutors might be the type of arbitrary factor that the Court said in *Furman* led to the imposition of "wanton and freakish" death sentences that violated the Eighth Amendment.

Finally, the geographic disparity in the application of the death penalty creates concerns similar to those the Court attempted to address in its forum-shopping jurisprudence. In the infrequent situation in which law enforcement does not know where the capital crime was committed, law enforcement has the incentive to forum shop, to fit the evidence to the legal jurisdiction that is most likely to produce death notification by the prosecutors, and more importantly, most likely to produce a death sentence. The story of Kevin Johns is one such

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178. *Furman v. Georgia*, 408 U.S. 238, 305 (1972) (per curiam) (Douglas, J., concurring).

example. Baltimore County prosecutors have charged Johns in that county, but the legitimacy of that charging decision is tainted by the overwhelming evidence that Johns would most likely face a death notification in that county. Even if the notions of forum shopping and inequitable administration of the capital punishment statute among different counties within the same state do not amount to a constitutional violation, it is at least arguable that such an approach, intertwined with challenges brought under the Eighth and Fourteenth Amendments, is worthy of consideration.