ESSAY

SUPERVISING FEDERAL CAPITAL PUNISHMENT: WHY THE ATTORNEY GENERAL SHOULD DEFER WHEN U.S. ATTORNEYS RECOMMEND AGAINST THE DEATH PENALTY

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IN two and one-half years, Attorney General John Ashcroft has directed United States Attorneys to pursue the death penalty in thirty-three cases in which those U.S. Attorneys had specifically recommended against it.[1] This is a significant change from the Reno Justice Department, which overruled U.S. Attorneys in this way only twenty-six times during the first five years that the modern death penalty protocol was in effect.[2] Ten of the cases in which

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[*] United States District Judge, Eastern District of New York. This Essay is based on an address I gave at the Virginia Law Review Banquet in February 2003. I am very grateful to Carter Burwell for his help in preparing it for publication and Jamie Orenstein for his comments on an earlier draft.

[1] See Memorandum from the Federal Death Penalty Resource Counsel, Attorney General Ashcroft's Decisions Regarding the Federal Death Penalty 3 (July 17, 2003), available at http://www.capdefnet.org/pdf_library/81393.pdf (on file with the Virginia Law Review Association) [hereinafter FDPRC Memo]. The death penalty protocol implemented in 1995 requires United States Attorneys to submit a recommendation to the Attorney General regarding whether the government should pursue the death penalty for every defendant who might be eligible for the death penalty based on the charges against the defendant. The Attorney General reviews that recommendation and makes a final determination whether the U.S. Attorney will pursue a death penalty prosecution. See U.S. Dep't of Justice, The Federal Death Penalty System: A Statistical Survey (1988–2000), at 1–2 (2000), available at http://www.usdoj.gov/dag/pubdoc/_dp_survey_final.pdf (on file with the Virginia Law Review Association) [hereinafter 2000 DOJ Death Penalty Report].

[2] From 1995 to 2000, Attorney General Janet Reno reviewed a total of 588 recommendations by U.S. Attorneys and authorized seeking the death penalty for 159 defendants. 2000 DOJ Death Penalty Report, supra note 1, at 24. Attorney General Reno overruled a U.S. Attorney's recommendation *not* to seek death in only twenty-six out of 415 such cases, or six percent of the time. Those twenty-six cases represented only sixteen percent of the total number of death-penalty prosecutions authorized by the Justice Department during those five years. Id. at 40–41. During the two-and-one-half years that John Ashcroft has been Attorney General, he has reviewed a total of 335 recommendations by U.S. Attorneys and authorized seeking the death

Attorney General Ashcroft has ordered U.S. Attorneys to file death notices against their better judgment are in New York.[3] In one very recent case in my district, the Eastern District of New York, the defendant had already agreed to plead guilty and cooperate with the U.S. Attorney's prosecution of his co-defendants, an agreement that was scuttled by the Attorney General's decision.[4] Attorney General Ashcroft has nullified at least five plea agreements with death penalty-eligible defendants.[5] This is also a significant departure; in the Reno Justice Department, plea and cooperation agreements were not even reviewed by the Attorney General.[6]

The stated reason for the decisions to require U.S. Attorneys to seek the death penalty in cases where they do not want to do so is

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penalty for eighty-two defendants. See FDPRC Memo, supra note 1, at 1. Attorney General Ashcroft has overruled U.S. Attorneys' recommendations *not* to seek the death penalty in thirty-three out of 286 such cases—twelve percent of the time, twice the Reno figure—producing forty percent of the total number of death-penalty prosecutions he has authorized. Id. at 3–4.

Another interesting comparison between the two Attorneys General is that during the Reno years, the Attorney General overruled recommendations against the death penalty and in favor of it virtually the same number of times. From 1995 to 2000, Attorney General Reno overruled U.S. Attorneys a total of fifty-three times: twenty-six times when the U.S. Attorney had not sought the death penalty, and twenty-seven times when the U.S. Attorney had sought it. 2000 DOJ Death Penalty Report, supra note 1, at 40–41. In contrast, in his first two-and-one-half years in office, Attorney General Ashcroft overruled local prosecutors a total of forty times, thirty-three of which resulted in decisions to seek the death penalty. See FDPRC Memo, supra note 1, at 4, 6. This difference suggests that an agenda other than simple "uniformity" informs current policy.

[3] See Benjamin Weiser & William Glaberson, Ashcroft Pushes Executions in More Cases in New York, N.Y. Times, Feb. 6, 2003, at A1; FDPRC Memo, supra note 1, at 6.

[4] Leigh Jones, DOJ Is Quietly Rejecting Death Penalty Deals, N.Y.L.J., Feb. 7, 2003, at 1; see Transcript of Status Conference, United States v. Zapata, No. 01-CR-516 (E.D.N.Y. Jan 31, 2003) (on file with the Virginia Law Review Association) [hereinafter Status Conference]. The Assistant United States Attorney stated at the status conference that the Attorney General's decision "was a surprise to us all," and it rendered unenforceable a cooperation agreement that she, her supervisor, and Zapata had executed. Id. at 6–8.

[5] Karen Branch-Brioso, Ashcroft Takes Active Stance on Death Penalty; Critics Say It Undermines Local Judgment, St. Louis Post-Dispatch, Feb. 7, 2003, at A1, available at 2003 WL 3554501.

[6] See FDPRC Memo, supra note 1, at 3 (stating that under Attorney General Reno, U.S. Attorneys were free to resolve cases through plea and cooperation agreements, thereby removing those cases from the pool of cases considered by the Attorney General).

to achieve national uniformity in the imposition of the federal death penalty.[7] Although no formal statement of the standards used by the Attorney General is available,[8] statements attributed to Justice Department officials indicate the following guiding principles: (1) the Attorney General is obligated to enforce the death penalty because it is provided for by federal law;[9] (2) subjecting some defendants but not others to the death penalty is unfair;[10] and (3) the Attorney General, as the overseer of all federal prosecutors, is in the best position to make decisions about the death penalty and ensure its uniform application because he is able to survey all such cases throughout the country.[11]

This topic has many dimensions, most of which I will not address here. For example, there is the question of racial disparity among those who face the death penalty. Attorney General Reno found it troubling that only twenty percent of the defendants who face capital charges are white.[12] Attorney General Ashcroft has dismissed that concern, contending that the disproportionate numbers of

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[7] See, e.g., Racial and Geographic Disparities in the Federal Death Penalty System: Hearing Before the Subcomm. on the Constitution, Federalism, and Property Rights of the Senate Comm. on the Judiciary, 107th Cong. 11 (2001) [hereinafter Racial and Geographic Disparities] (statement of Larry Thompson, Deputy Attorney General) (announcing revised protocol, including the Attorney General's decision to begin reviewing plea agreements between U.S. Attorneys and death penalty-eligible defendants, to "increase uniformity"); William Glaberson, Capital Cases and Agendas, N.Y. Times, Feb. 8, 2003, at B1; Jones, supra note 4.

[8] Glaberson, supra note 7 ("Justice Department officials declined to discuss the standards the attorney general is using, saying only that the department's decisions are governed by a desire to see that the federal death penalty is applied uniformly around the country.").

[9] See Jones, supra note 4 (quoting written Justice Department statement noting that "[t]he death penalty is the law of the land, provided for as the ultimate punishment for heinous crimes").

[10] See Weiser & Glaberson, supra note 3 (quoting Justice Department spokeswoman Barbara Comstock as stating: "What we are trying to avoid . . . is one standard in Georgia and another in Vermont").

[11] See Jones, supra note 4 (quoting written statement by Justice Department as stating: "The people involved in the death penalty review process at Main Justice have the benefit of seeing the landscape of these cases nationwide, thereby ensuring consistency in the U.S. Attorney districts across the country").

[12] See Raymond Bonner & Marc Lacey, Pervasive Disparities Found in the Federal Death Penalty, N.Y. Times, Sept. 12, 2000, at A18; 2000 DOJ Death Penalty Report, supra note 1, at 6; Henry Weinstein, Lawyers for Federal Death Row Inmate Ask for Commutation, L.A. Times, Sept. 14, 2000, at A14.

black and Hispanic defendants who face capital charges are due not to bias, but rather to the overrepresentation of those groups in the pool of federal defendants who are accused of death-eligible crimes.[13] Another issue I will not address is purely a management issue, but a very important one: the demoralizing effect of decisions overruling U.S. Attorneys who feel that they know their cases far better than the Attorney General or his staff can know them.[14]

In this Essay, I will focus on two issues. The first is the goal of uniformity, and whether it is either achievable or desirable. Though the Attorney General must formulate and implement national law enforcement policies, there are nonetheless many reasons to defer to the decisions of the U.S. Attorneys in particular cases, even if doing so means that the federal death penalty is not sought in some districts like it is sought in others. The Attorney General should overrule U.S. Attorneys to require them to seek the death penalty only in exceptional circumstances, to vindicate specific and narrow federal interests that are not present in the garden-variety murder cases in which the Attorney General has recently acted.[15]

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[13] See Racial and Geographic Disparities, supra note 7, at 12 (statement of Larry Thompson, Deputy Attorney General) (noting that "statistical [racial] disparities . . . resulted from non-invidious factors rather than from racial or ethnic bias"); U.S. Dep't of Justice, The Federal Death Penalty System: Supplementary Data, Analysis and Revised Protocols for Capital Case Review 3, at http://www.capdefnet.org/pdf_library/Death_Penalty_Study.pdf (June 6, 2001) (on file with the Virginia Law Review Association) [hereinafter 2001 DOJ Revised Protocols]; see also William Glaberson & Benjamin Weiser, Decisions on Death Cases Raise Questions of Race, N.Y. Times, Feb. 14, 2003, at B2 (pointing out that Attorney General Ashcroft has referred to studies showing that prosecutors seek death less often for minorities than for white defendants).

For an analysis of this continuing issue under Attorney General Ashcroft, see FDPRC Memo, supra note 1, at 1–3.

[14] See, e.g., Branch-Brioso, supra note 5.

[15] This is what the Attorney General said he would do. The 2001 revisions to the 2000 protocol state that "the Attorney General will, of course, retain legal authority as head of the Justice Department to determine in an *exceptional* case that the death penalty is an appropriate punishment, notwithstanding the United States Attorney's view that it should not be pursued." 2001 DOJ Revised Protocols, supra note 13, at 27 (emphasis added). When decisions overruling U.S Attorneys occur in forty percent of the federal capital cases, see FDPRC memo, supra note 1, at 3, it is difficult to characterize those cases as exceptional.

The second issue is the extraordinary, and insufficiently noted, adverse impact that the Attorney General's efforts to achieve uniformity in death penalty cases are likely to have on criminal investigations. Specifically, a collateral cost of overruling U.S. Attorney recommendations in cases where defendants have agreed to cooperate could well be that a large number of cases will never be brought. For the sake of seeking the death penalty in a few more federal cases, significant numbers of murderers and other criminals could elude investigation and prosecution, and thus remain at large, free to commit further crimes.

I. THE GOAL OF NATIONAL UNIFORMITY IN FEDERAL SENTENCING

On its face, the goal of uniformity seems laudable. Why should we not strive to have the federal criminal laws enforced evenly throughout the land? Why should the punishments imposed on similar people for similar crimes committed in similar ways be different simply because they happen to be prosecuted in different districts? And why should that idea not govern the most severe punishment available to prosecutors?

In fact, there are various reasons why there always have been, and likely always will be, significant differences around the country and even within particular districts in the way similar offenders are punished. The sources of those differences have not remained constant, however, and the identification of those sources is important in assessing the significance of the differences.

In the much larger realm of noncapital federal sentencing, one source of sentencing disparities—sentencing judges—provided the impetus for the sentencing reform movement that produced the Sentencing Reform Act of 1984, which established the United States Sentencing Commission.[16] The Sentencing Commission created the United States Sentencing Guidelines (the "Guidelines"), which replaced a world of unexplained, unreviewed, unguided, and wildly disparate sentencing—"a wasteland in the law"[17]—with the

[16] See Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered §§ of 18 U.S.C.).

[17] Marvin E. Frankel, Lawlessness in Sentencing, 41 U. Cin. L. Rev. 1, 54 (1972). Judge Frankel's *Criminal Sentences: Law Without Order* (1973) earned him the title of

highly structured Guidelines regime. Although an evaluation of the Guidelines is obviously beyond the scope of this Essay, they have indisputably accomplished several important goals. The lawless days of opaque, idiosyncratic sentencing are gone. Sentencing today is transparent, certain, and based on reasons that are explained and subject to appellate review. The Sentencing Commission collects, analyzes, and disseminates detailed and enormously valuable information about federal sentences.[18] The Guidelines and their accompanying grid are needlessly complex and burdensome, and the sentences they prescribe are frequently too harsh (and occasionally too lenient), but the Guidelines have cabined judicial discretion dramatically, and the extremely disparate sentencing practices that inspired the sentencing reform movement are gone. Many have contended, with justification, that Congress and the Sentencing Commission have gone too far in restricting judges' discretion to impose individualized sentences;[19] others claim they have not gone far enough.[20] But that debate does not alter the indisputable fact that

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"father of sentencing reform." Kate Stith & José A. Cabranes, Fear of Judging 35 (1998). Although Judge Frankel's call for a national sentencing commission was a driving force in the creation of the United States Sentencing Commission, the institution that resulted is quite different from the one Frankel proposed. For example, Frankel envisioned a commission that could, inter alia, "serve in a sense as a lobby within the Government for those sentenced and for those charged with their custody and treatment." Frankel, supra, at 51. Indeed, Frankel suggested that the membership of the commission include present or former prison inmates. Id.

[18] Much of the data referenced in this Essay was supplied by the Sentencing Commission. I am especially grateful to Lou Reedt, the Acting Director of the Commission's Office of Policy Analysis, for his able assistance over the years.

[19] See Judge John S. Martin, Jr., Let Judges Do Their Jobs, N.Y. Times, June 24, 2003, at A31 (announcing resignation of federal district judge because of his view that "Congress has tried to micromanage the work of the commission and has undermined its efforts to provide judges with some discretion in sentencing or to ameliorate excessively harsh terms").

[20] Recent events show a fervent desire of some members of Congress to further curtail judicial discretion in sentencing. This past spring, members of the House Judiciary Committee accused the chief judge of the U.S. District Court in Minnesota, a Republican appointee and former federal prosecutor, of impermissibly imposing sentences that were too lenient on drug offenders, and threatened to subpoena his sentencing records. See Jess Bravin & Gary Fields, House Panel to Probe U.S. Judge: Minnesota Jurist's Records Expected to be Subpoenaed in an Unusual Showdown, Wall St. J., Mar. 12, 2003, at A2. Shortly thereafter, Congress passed the PROTECT Act of 2003, Pub. L. No. 108-21, 117 Stat. 650, which included several provisions limiting judicial

there has been a sea change in the ability of federal judges to exercise discretion when imposing sentences.

The successful effort to restrain judicial discretion, however, has not produced a system in which similarly situated offenders are treated alike. Prosecutors have always been vested with ample discretion, and the Guidelines' diminution of the power of judges further enhanced the power of federal prosecutors.[21] Differences in the exercise of that discretion among U.S. Attorneys, and by individual U.S. Attorneys in specific cases, have resulted in the differential treatment of similar cases, and account for the lion's share of the remaining disparities in federal sentencing.

First, prosecutors have never been obligated to treat like cases alike. Absent an unconstitutional motive, they are permitted to prosecute one of two identically situated defendants to the full extent of the law and the other not at all.[22] Thus, all similar cases do not necessarily make it into federal court. U.S. Attorney's offices have intake guidelines—criteria that must be satisfied before a case is accepted for prosecution. When I was the Chief of the Criminal Division in the U.S. Attorney's office in the Eastern District of New York, we prosecuted persons caught trafficking in marijuana (absent special circumstances) only if more than a ton of marijuana was involved.[23] If a federal agent called and said she had just arrested three men in a Queens warehouse with 800 kilos of marijuana, we would refer her to the District Attorney. But take that same case and move it to a city with less drug trafficking, and those

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discretion in sentencing and changed the number of judges who could serve on the U.S. Sentencing Commission from a minimum of three to a maximum of three.

[21] See, e.g., Albert W. Alschuler, The Failure of the Sentencing Guidelines: A Plea for Less Aggregation, 58 U. Chi. L. Rev. 901, 926 (1991) ("The sentencing reform movement has not restricted sentencing discretion so much as it has transferred discretion from judges to prosecutors.").

[22] See, e.g., Wayte v. United States, 470 U.S. 598, 607–08 (1985).

[23] See Letter from Ralph A. Kistner & Philip C. Bigger, to Chief U.S. Probation Officer (Sept. 14, 1990), *in* 3 Fed. Sentencing Rep. 231, 231 (1991) (discussing effect of intake guidelines on Sentencing Guidelines for drug traffickers); cf. Final Report of the Eastern District of New York Advisory Group, 142 F.R.D. 185, 209, 213 (Aug. 1992) (noting various intake guidelines for the U.S. Attorney's Office for the Eastern District of New York).

offenders would not only be federal defendants, they would be big news.[24]

Differences in the exercise of prosecutorial discretion affect not only *whether* similarly situated defendants get prosecuted, but to what extent, and how severe their punishments will be. One method used by prosecutors to create disparate sentences is charge bargaining pursuant to Rule 11(c)(1)(A) of the Federal Rules of Criminal Procedure.[25] In exchange for guilty pleas, some U.S. Attorneys release some defendants from the mandatory minimum drug sentences prescribed by Title 21, United States Code, Sections 841 and 860 and the mandatory consecutive firearm offenses set forth in Title 18, United States Code, Section 924(c).[26] Others routinely refrain from filing prior felony informations, which significantly increase mandatory minimum and maximum sentences.[27] Some generously cap otherwise severe drug sentences at four years by allowing defendants to plead guilty to the "telephone count"

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[24] Compare Mohamad Bazzi, $2.4M Pot Bust in Brooklyn, Newsday (Queens, N.Y.), July 26, 1998, at A25, available at WESTLAW, NEWSDAY Database (state prosecution in Brooklyn following seizure of 1000 pounds of marijuana), and Robert E. Kessler, Drug Ring Bust Yields $11M, Newsday (Nassau, N.Y. and Suffolk, N.Y.), June 4, 2003, at A25 (federal prosecution in Brooklyn following seizure of two tons of marijuana and $11 million in cash), with Kane County Police, FBI Nab 6 in Marijuana Seizure, Chi. Trib., Feb. 15, 2001, § 2, at 5 (federal prosecution in Chicago following seizure—"one of the largest in the history of Kane County"—of roughly 1300 pounds of marijuana). There were exceptions to general intake rules, of course. If there were other charges besides marijuana trafficking, for example, we would not withhold provable marijuana charges.

[25] See Fed. R. Crim. P. 11(c)(1)(A).

[26] Frank O. Bowman III & Michael Heise, Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences, 86 Iowa L. Rev. 1043, 1119–21 (2001) [hereinafter Bowman & Heise, Quiet Rebellion?]; Frank O. Bowman III & Michael Heise, Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level, 87 Iowa L. Rev. 477, 523 (2002); Patti B. Saris, Below the Radar Screens: Have the Sentencing Guidelines Eliminated Disparity? One Judge's Perspective, 30 Suffolk U. L. Rev. 1027, 1054 (1997); Stephen J. Schulhofer & Ilene H. Nagel, Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and its Dynamics in the Post-*Mistretta* Period, 91 Nw. U. L. Rev. 1284, 1290 (1997).

[27] Bowman & Heise, Quiet Rebellion?, supra note 26, at 1120. Pursuant to 21 U.S.C. § 851, these informations, which state the defendants' prior convictions, must be filed in order to trigger the enhanced sentences.

charge in Title 21, United States Code, Section 843.[28] To deal with the crushing caseload of immigration offenders, U.S. Attorneys in the southwest border districts have implemented "early disposition" or "fast track" charge bargaining policies that allow a criminal alien to avoid prosecution under a statute that carries a twenty-year maximum sentence if he promptly pleads guilty to a lesser offense, stipulates to a two-year sentence, waives any appeal, and agrees to an expedited removal following his prison term.[29] Prosecutors also enter into sentence bargains pursuant to Rule 11(c)(1)(C).[30] Whereas a charge bargain results in the dismissal of (or an agreement not to bring) other charges, a sentence bargain results in an agreed-upon sentence (or sentencing range) that is lower than the otherwise applicable sentence, provided the court approves the bargain.

Another way prosecutors produce disparities in sentencing is what has been termed "guideline factor bargaining."[31] The elaborately detailed Guidelines provide for numerous possible adjustments to a defendant's offense level, depending on the facts of his or her case. When guideline factor bargaining, the Assistant U.S. Attorney agrees not to seek an upward adjustment in the sentencing calculation or not to oppose a downward adjustment. Some guideline factor bargaining is systemic and produces interdistrict disparities. For example, drug couriers are abundant in both the Eastern District of New York and the Southern District of Florida. These offenders, who are generally from impoverished, drug-

[28] Bowman & Heise, Quiet Rebellion?, supra note 26, at 1121. Since the statutory maximum authorized by Congress limits the permissible length of the sentence, prosecutors can limit judges to a maximum sentence of four years by permitting the defendant to plead guilty to a superseding charge of using a telephone to facilitate a drug transaction.

[29] See Alan D. Bersin & Judith S. Feigin, The Rule of Law at the Border: Reinventing Prosecution Policy in the Southern District of California, 12 Geo. Immigr. L.J. 285, 301 (1998). The availability of these "volume-discount" charge bargains in the border districts has led to departure applications by immigration offenders in other districts. For interesting discussions of these efforts to eliminate sentencing disparities via departures (which were ultimately rejected), see United States v. Banuelos-Rodriguez, 215 F.3d 969 (9th Cir. 2000) (en banc) and United States v. Bonnett-Grulon, 212 F.3d 692 (2d Cir. 2000).

[30] See Fed. R. Crim. P. 11(c)(1)(C).

[31] Schulhofer & Nagel, supra note 26, at 1285.

exporting countries, get paid a small amount of money to smuggle drugs into this country, often by swallowing balloons packed with heroin or cocaine before boarding an airplane. The number of couriers prosecuted in our Brooklyn courthouse seems to be limited only by the number of law enforcement officials on duty to greet the daily incoming flights from Bogota, Lagos, and other source-country cities. Pursuant to an agreement between the Federal Defender and the U.S. Attorney, and with the approval of the district's judges, these couriers generally get the largest available "role reduction" in their sentence—four levels off their base offense level—for having a "minimal" role in their crime.[32] But couriers who fly into the Southern District of Florida virtually never get such an adjustment.[33] The difference to the offenders is dramatic. For example, a courier who promptly pleads guilty in Brooklyn to smuggling 850 grams of heroin generally faces a sentencing range of thirty-seven to forty-six months. When an identical courier who pleads guilty in Miami gets no role adjustment, she faces a range of fifty-seven to seventy-one months.[34]

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[32] U.S. Sentencing Guidelines Manual § 3B1.2(a) (2001) [hereinafter Guidelines Manual]; see Tony Garoppolo, Treatment of Narcotics Couriers in the Eastern District of New York, 5 Fed. Sentencing Rep. 317, 317 (1993) (reporting that the Eastern District of New York "is the only judicial district that is a major port of entry into the United States providing a routine reduction for couriers by classifying them as minimal participants").

[33] Letter from Kathleen M. Williams, Federal Public Defender for Southern District of Florida, to Judge John Gleeson (July 23, 2003) (on file with the Virginia Law Review Association) (noting that of the eighty-four "airport" couriers the Federal Defender represented in 2003, only one received a minimal-role adjustment). The Sentencing Commission's drug study sample of sentences imposed on drug "mules" and couriers in fiscal year 2000 revealed that 3.8% of such offenders received minimal-role adjustments in the Southern District of Florida, as compared to 91.4% in Brooklyn. See U.S. Sentencing Comm'n, FY2000 Data Files USSCFY00 and DSS2000 (on file with the Virginia Law Review Association) [hereinafter Drug Study Sample]; see also Ilene H. Nagel & Stephen J. Schulhofer, A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines, 66 S. Cal. L. Rev. 501, 539 (1992) (noting sentencing differences for drug couriers and the effect of intake guidelines on their analysis); Stephen Schulhofer, 5 Fed. Sentencing Rep. 225, 227 (1993) (discussing different sentencing strategies for drug couriers among high volume border districts).

[34] Both couriers begin with a base offense level of thirty. Guidelines Manual, supra note 32, § 2D1.1(c)(5). The typical Brooklyn courier receives downward adjustments of four levels for a minimal role under § 3B1.2(a), two levels under the "safety valve" provision in § 2D1.1(b)(6), and three levels for acceptance of responsibility. Id.

The adjustment for the defendant's role in the offense is one of hundreds of calibrations in a sentencing system that was erected for the express purpose of restricting judicial discretion. Professors Stephen Schulhofer and Ilene Nagel documented early in the Guidelines' era what all of us in the trenches have known since the inception of the Guidelines in 1987: Federal prosecutors use guideline factors as chips in plea bargaining. Professors Schulhofer and Nagel estimated that such bargaining results in a compromise of the otherwise applicable guideline range in twenty to thirty-five percent of federal cases.[35] The disparities produced by guideline factor bargaining are intradistrict as well. For a variety of reasons, prosecutors will seek or acquiesce in adjustments that produce sentencing ranges that are more lenient than the ones that a rigid application of the Guidelines would produce.[36]

Another source of disparate sentencing is the departure power—the power of the sentencing court to sentence below the prescribed range based on circumstances of a kind, or to a degree, not adequately considered by the Sentencing Commission, or based on the defendant's cooperation with the government.[37] Many departures in the former category are the direct result of prosecutors' policies. For example, when the U.S. Attorneys in the southwest border districts do not charge bargain to expedite their huge caseloads, they stipulate to specified downward departures.[38] These agreed-upon

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§ 3E1.1. The total offense level is twenty-one, with a corresponding sentencing range of thirty-seven to forty-six months. Id. ch. 5, pt. A. The Miami courier who gets no role reduction has a total offense level of twenty-five, with a range of fifty-seven to seventy-one months. Id. Although Miami couriers virtually never get the four-level downward adjustment for a mitigating role, data supplied by the Sentencing Commission reveals that 44.9% of the "mules" and couriers in fiscal year 2000 received a two-level adjustment for a minor role. See id. § 3B1.2(b); Drug Study Sample, supra note 33. Those defendants' sentencing range, given the above facts, would be forty-six to fifty-seven months. Guidelines Manual, supra note 32, at ch. 5, pt. A.

[35] Schulhofer & Nagel, Plea Negotiations, supra note 26, at 1290.

[36] United States v. Gonzalez-Bello, 10 F. Supp. 2d 232, 237 n.3 (E.D.N.Y. 1998) (describing three such cases in the Eastern District of New York).

[37] 18 U.S.C. § 3553(b), (e); Guidelines Manual, supra note 32, §§ 5K2.0, 5K1.1.

[38] Nora M. Demleitner and Jon M. Sands, Non-Citizen Offenders and Immigration Crimes: New Challenges in the Federal System, 14 Fed. Sentencing Rep. 247, 248 (2002) (noting Arizona's 94.6% departure rate in illegal re-entry cases in fiscal year 2000); Linda Drazga Maxfield, Immigration Offenses Involving Unlawful Entry: Is Federal Practice Comparable Across Districts?, 14 Fed. Sentencing Rep. 260, 262

downward departures are the substantial equivalent of sentence bargains under Rule 11(c)(1)(C). A defendant who pleads guilty to an immigration offense in one of those districts will get a significant break in his sentencing range. Indeed, drug couriers may be better off in Brooklyn, but immigration offenders most certainly are not—as a general matter, they do more than twice as much prison time if prosecuted in Brooklyn than if prosecuted in the Southern District of California.[39]

Departures based on a defendant's assistance to the government are another source of sentencing disparity, not merely because they release almost twenty percent of all defendants from their Guideline range,[40] but also because such departures require a government motion, and practices governing when such a motion will be made vary widely. Some prosecutors rarely make them, whereas others make them very frequently.[41] One study revealed that nearly one-half of the U.S. Attorneys around the country consider it "substantial assistance" to the government when the only crimes the cooperating defendant discloses are his own.[42] And the Eastern District of Pennsylvania, a perennial league leader in substantial assistance motions, acknowledges that it uses the motions—which spare the

(2002) (noting that Arizona had a 97.3% departure rate in fiscal year 1997, and 92% of the departures were awarded in exchange for the defendant's promise to accept voluntary deportation).

[39] The average sentence for an immigration offense in the Eastern District of New York in fiscal year 2001 was almost three years; in the Southern District of California it was less than sixteen months. See U.S. Sentencing Comm'n, Federal Sentencing Statistics by State, District & Circuit: Eastern New York 14 tbl.9, at http://www.ussc.gov/judpack/2001/nye01.pdf (2001) (on file with the Virginia Law Review Association); U.S. Sentencing Comm'n, Federal Sentencing Statistics by State, District & Circuit: Southern California 14 tbl.9, at http://www.ussc.gov/judpack/2001/fls01.pdf (2001) (on file with the Virginia Law Review Association). The national average was over twenty-six months. See U.S. Sentencing Comm'n, 2001 Sourcebook of Federal Sentencing Statistics 29 tbl.13 (2001), available at http://www.ussc.gov/ANNRPT/2001/SBTOC01.htm (on file with the Virginia Law Review Association) [hereinafter 2001 Sourcebook].

[40] 2001 Sourcebook, supra note 39, at 53 tbl.26.

[41] See, e.g., Daniel W. Stiller, Section 5K1.1 Requires the Commission's Substantial Assistance, 12 Fed. Sentencing Rep. 107, 107 (1999).

[42] Linda Drazga Maxfield & John H. Kramer, Two Sentencing Commission Staff Reports on Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice, 11 Fed. Sentencing Rep. 6, 9 (1998) (noting that § 5K1.1 motions based solely on self-incriminating cooperation may be "illegal").

defendants the rigors of a Guidelines sentence—as an alternative to charge bargaining.[43]

Not all departures are instigated by prosecutors. Many departures based on circumstances of a kind or to a degree not considered by the U.S. Sentencing Commission are not the result of U.S. Attorneys' policies. Here as well, disparities abound. Some courts depart a lot; others hardly at all. The rate of departure in the Second Circuit is four times higher than the rate in the Fourth Circuit; the rate in the Ninth Circuit is more than seven times higher than the rate in the Fourth Circuit.[44] Indeed, the courier who flies into the Eastern District of New York is not only likely to have a significantly lower guideline range than an identical courier who flies into the Southern District of Florida, she is also more likely to get a downward departure in her sentence; in fiscal year 2000 the New York courier had a 25.9% chance for a downward departure, while the Miami courier had only a 3.8% chance.[45] Indeed, in 2000, the aggregate result of the disparities between the two districts in the application of the Guidelines and in the availability of departures was that the courier's average sentence in the Southern District of Florida was almost twice as long as the average sentence in the Eastern District of New York.[46]

To be sure, the immediate cause of the disparities produced by this latter category of departures is judicial, not executive, action, and indeed this is the last bastion of judicial discretion in sentencing. But the executive's acquiescence in these departures could hardly be clearer. Often it is explicit—that is, the prosecutor affirmatively states at sentencing that she does not oppose a particular departure application. Whether expressed or not, the proof is in the numbers: There were more than 10,000 downward departures

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[43] Daniel C. Richman, The Challenges of Investigating Section 5K1.1 in Practice, 11 Fed. Sentencing Rep. 75, 75 (1998).

[44] See 2001 Sourcebook, supra note 39, at 53 tbl.26. The Ninth Circuit's departure rate is no doubt affected by the "fast track" departure policies in the southwest border districts.

[45] Drug Study Sample, supra note 33. The departures referenced here are for reasons other than cooperation. Substantial-assistance departures were granted in 10.3% of the Southern District of Florida cases and in 24.1% of the cases in the Eastern District of New York. Id.

[46] Id.

for reasons other than cooperation in fiscal year 2001, and the government sought appellate review of only nineteen of them.[47]

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[47] See 2001 Sourcebook, supra note 39, at 53 tbl.26, 109 tbl.58. While the number of § 5K2.0 departures has risen over the past five years, the government has never appealed more than 0.5% of those departures. See id.; U.S. Sentencing Comm'n, 2000 Sourcebook of Federal Sentencing Statistics 53 tbl.26, 109 tbl.58 (2000); U.S. Sentencing Comm'n, 1999 Sourcebook of Federal Sentencing Statistics 53 tbl.26, 109 tbl.58 (1999); U.S. Sentencing Comm'n, 1998 Sourcebook of Federal Sentencing Statistics 53 tbl.26, 107 tbl.56 (1998); U.S. Sentencing Comm'n, 1997 Sourcebook of Federal Sentencing Statistics 53 tbl.26, 107 tbl.56 (1997); U.S. Sentencing Comm'n, 1996 Sourcebook of Federal Sentencing Statistics 41 tbl.26, 79 tbl.51 (1996); see also Emily Bazelon, With No Sentencing Leeway, What's Left to Judge?, Wash. Post, May 4, 2003, at B4 (noting that from 1991 to 2002 prosecutors appealed only 282 cases in which judges gave sentences lighter than those recommended by the Sentencing Guidelines, or less than 0.1% of the time).

I recognize that there are other factors that discourage government appeals of downward departures under § 5K2.0. Provided the ground for the departure is permissible, the decision whether to depart is reviewed under the deferential abuse of discretion standard. See Koon v. United States, 518 U.S. 81, 96–97 (1996). Moreover, the government might understandably refrain from appealing even a departure that meets that stringent standard if the degree of departure is relatively slight. Nonetheless, these impediments do not, in my opinion, explain the virtual non-existence of government appeals of these downward departures. The better explanation is that "the greatest supporters of the judicial departure power seem to be the prosecutors who do not challenge it." Ian Weinstein, Fifteen Years After the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing, 40 Am. Crim. L. Rev. 87, 124 (2003).

In response to the PROTECT Act § 401(l), on July 28, 2003, the Attorney General issued a memorandum setting forth new Department of Justice ("DOJ") policies concerning sentencing recommendations and sentencing appeals. Memorandum from John Ashcroft, Attorney General, to All Federal Prosecutors 1 (July 28, 2003) (on file with the Virginia Law Review Association) [hereinafter John Ashcroft Memorandum]. Those policies, in conjunction with simultaneous amendments to § 9-2.170(B) of the U.S. Attorneys' Manual, will require U.S. Attorneys to report to Main Justice nine categories of departures made over the objection of the government. Id. at 4, A-1. It is too early to tell how many departures will be captured in those categories, and whether the reporting requirement will have an effect on the incidence of departures or of appeals from departures.

Also in response to the PROTECT Act, the Attorney General issued a memorandum on September 22, 2003, regarding charging and plea bargaining practices. Memorandum from John Ashcroft, Attorney General, to All Federal Prosecutors 1 (Sept. 22, 2003) (on file with the Virginia Law Review Association). The public disclosure of the memorandum produced reports of dire consequences for federal prosecutorial discretion, see e.g. Adam Liptak and Eric Lichtblau, New Plea Bargain Limits Could Swamp Courts, Experts Say, N.Y. Times, Sept. 24, 2003, at A23, but the text of the memorandum in fact preserves significant areas of local flexibility. As with respect to the memorandum regarding departures, the effect of the memorandum gov-

In one respect, the Sentencing Commission has itself acquiesced in the disparities that result from executive branch discretion, or at least acted in a way that allows them to persist. In 2001, the Sentencing Commisssion amended the commentary to the guideline governing role in the offense to make it clear that the minimal-role adjustment couriers receive in the Eastern District of New York is permissible.[48] By doing so, and by further emphasizing that the role adjustment is heavily dependent upon the facts of the case, and thus deserving of the most deferential type of appellate review,[49] the Sentencing Commission has wisely facilitated the interdistrict disparity described above.

In other respects, however, the Sentencing Commission has tried gamely to eliminate sentencing disparities resulting from prosecutorial discretion. For example, one stated purpose of the Guidelines' modified "real offense" system—by which sentencing ranges are determined based on the offender's actual conduct, rather than on the particular charge of which he was found guilty—was to prevent prosecutors from influencing sentences by charge bargaining.[50] An amendment in 2000 added a policy statement that encourages upward departures to compensate for charge bargains,[51] and Section 6B1.2 of the Guidelines attempts to fend off plea bargains that circumvent a faithful application of the Guidelines by requiring judges to reject the bargains.[52] These

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erning charging and plea bargaining on the disparities described here remains to be seen.

[48] Guidelines Manual, supra note 32, § 3B1.2 cmt. 3(A), app. C. The amendment effectively overruled *United States v. Burnett*, 66 F.3d 137, 140 (7th Cir. 1995), which held that when a defendant is sentenced only for the amount of drugs he or she handled—which is true for the typical courier—a downward role adjustment is unwarranted. The Sentencing Commission adopted the Eleventh Circuit's approach in *United States v. DeVaron*, 175 F.3d 930 (11th Cir. 1999), which held that such circumstances do not automatically preclude a mitigating role adjustment. See Guidelines Manual, supra note 32, at app. C.

[49] Guidelines Manual, supra note 32, § 3B1.2 cmt. 3(C).

[50] See id. at ch. 1 pt. A, 5–6; Bowman & Heise, Quiet Rebellion?, supra note 26, at 1057; Stephen Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 Hofstra L. Rev. 1, 9–13 (1988).

[51] Guidelines Manual, supra note 32, § 5K2.21.

[52] Charge bargains are supposed to be rejected unless the sentencing court "determines, for reasons stated on the record, that the remaining charges adequately reflect the seriousness of the actual offense behavior and that accepting the agreement will

efforts have failed.[53] Although a few cases address Section 6B1.2,[54] it is mainly ignored by sentencing judges, as evidenced in part by the fact that plea agreements are listed by sentencing judges as the basis for downward departures more than any other specific reason.[55]

In any event, the Sentencing Commission should not concern itself with prosecutorial discretion. The unwarranted disparities that the Sentencing Reform Act of 1984 was enacted to eradicate have always been thought to be the product of *judicial*, not prosecutorial, discretion. Thus, the differences produced by the practices described above do not mean that the Guidelines have failed to achieve their essential goal. In any case, the Sentencing Commission already has plenty to do in fulfilling its assigned tasks of reining in judges and formulating sound sentencing policy.

Nor should the Attorney General be concerned, except perhaps at the margins, with the actions of U.S. Attorneys that result in moderate sentencing disparities. Those disparities (both inter- and intra-district) are understandable and, in the main, entirely unobjectionable. In fact, there are many good reasons for them. One is

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not undermine the statutory purposes of sentencing or the sentencing guidelines." Id. § 6B1.2(a). Sentence bargains may be accepted only if the agreed-upon sentence is already within the applicable range (in which case the agreement was not necessary to begin with) or departs from that range for "justifiable reasons." Id. § 6B1.2(c). A 1989 amendment to the commentary, ostensibly promulgated only to "clarify" it, in fact limited "justifiable reasons" significantly, to reasons that would warrant a departure even in the absence of the plea agreement under 18 U.S.C. § 3553(b) (2000). See Guidelines Manual, supra note 32, at app. C.

[53] See Schulhofer & Nagel, supra note 26, at 1304–05. Schulhofer and Nagel criticize judges for not using the power that § 6B1.2 provides them, but their criticism is misplaced. The provision directs judges to *reject* plea bargains that produce a sentence the Sentencing Commission might regard as too lenient. See Guidelines Manual, supra note 32, § 6B1.2. District judges, meanwhile, seek the discretion to impose, in appropriate situations, sentences below the applicable Guidelines range. Those situations include cases in which the prosecutor has agreed to compromise the applicable Guidelines range.

[54] Compare United States v. Goodall, 236 F.3d 700 (D.C. Cir. 2001) (indicating that § 6B1.2 does not prohibit sentence bargains even when the resulting sentence cannot be reached via a departure), with United States v. Rose, 176 F. Supp. 2d 661 (N.D. Tex. 2001) (indicating that § 6B1.2 precludes acceptance of such bargains).

[55] The most-cited reason given by sentencing courts for downward departures is "general mitigating circumstances" (19.9% of departures); next is "pursuant to plea agreement" (17.6%). 2001 Sourcebook, supra note 39, at 52 tbl.25.

the weight of the evidence. Defendants *A* and *B* may have similar roles in the same crime, but the evidence against *A* may be a lock while the evidence against *B* is shaky. If those defendants are both convicted, the Guidelines will treat them as similarly situated, but until the convictions occur they are plenty dissimilar. The prosecutor may want to avoid the risk that *B* will be acquitted at trial by offering an agreed-upon sentence under Rule 11(c)(1)(C) that lowers the applicable guideline range a couple of levels, or by capping the maximum sentence with a charge bargain. That a prosecutor compromises the Guidelines by allowing more lenient sentences than they otherwise prescribe hardly suggests, as many believe, that the prosecutor is less aggressive, or "softer" on criminals, than another prosecutor who does not. Indeed, the least aggressive prosecutors may obtain the most severe sentences; if the only cases they bring are the ones they cannot lose, there is little need to plea bargain.

Similarly, in her desire to avoid a trial of *B*, the prosecutor might canvass the often messy facts and reach the good faith conclusion that possession of a weapon (or a heightened loss amount, or the existence of more than fifty victims, etc.) cannot be proved by a preponderance of the evidence, and therefore an upward adjustment is not warranted. She might then bargain with those guideline factors, agreeing not to pursue them if *B* pleads guilty, notwithstanding her steadfast intention to seek the same adjustments against the co-defendant, against whom the evidence is strong. If the prosecutor and Defendant *B* want to hedge against losing the trial by agreeing in any of these ways to a compromise sentence that reflects the strength of the evidence, there is no good reason to prevent them.[56]

Regional differences in the exercise of prosecutorial discretion in the Guidelines era are unavoidable. One need only review the history of the death penalty in the United States to realize that there are significant differences around the country in the way crimes are perceived, prosecuted, and punished. Those differences

[56] This discussion is borrowed from John Gleeson, Sentence Bargaining Under the Guidelines, 8 Fed. Sentencing Rep. 314, 315 (1996), which calls on the Sentencing Commission to amend § 6B1.2 to explicitly authorize reasonable sentence bargains. Id. at 317.

extend to noncapital crimes as well. So when the Sentencing Commission determined the sentencing ranges on the Guidelines grid by averaging the sentences imposed in the pre-Guidelines era (and then by upwardly adjusting them in certain categories of cases, including drug cases),[57] it was inevitable that the Guidelines' sentences for particular categories of offenders would be viewed in some places as more severe than the sentences that had traditionally been regarded as fair for those offenders. This was certainly true in New York for nonviolent drug trafficking offenders.[58] A U.S. Attorney is naturally more likely to rationalize a more lenient approach to a sentence by one of the methods described above if she believes it will produce a more just sentence. As long as that is the motivation, an attempt by the Attorney General (or Congress or the Sentencing Commission) to forbid such an approach is neither wise nor likely to succeed.

Also in the mix are administrative concerns. It makes sense, for example, to treat similarly situated immigration offenders more leniently in the Southern District of California than in New York because the former district is overrun by such cases, and the volume discount, "fast track" departures enable the U.S. Attorney to move the cases more efficiently. Similarly, if the U.S. Attorney and federal law enforcement agencies determine that law enforcement needs in the district require the diversion of resources to particular cases or investigations, offering favorable plea bargains to avoid time-consuming trials of unrelated cases is an entirely acceptable means of doing so.

Numerous other factors influence prosecutors' discretion,[59] but the central point is that the U.S. Attorneys are in the best position to evaluate most of them. As the Attorney General himself recently put it, "[f]ew things that the Department does are more important than the hard work tirelessly performed by its prosecu-

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[57] Michael Tonry, Sentencing Matters 96–98 (1996); Breyer, supra note 50, at 17–18.

[58] See Joseph B. Treaster, 2 Judges Decline Drug Cases, Protesting Sentencing Rules, N.Y. Times, Apr. 17, 1993, at A1 (reporting announcement by U.S. District Judges Jack B. Weinstein of Brooklyn and Whitman Knapp of Manhattan that they would no longer preside over drug cases as a protest against the Guidelines and mandatory minimum drug sentences).

[59] See Gleeson, supra note 56, at 314–15.

tors."[60] With their feet on the ground in their districts, U.S. Attorneys know the strengths and weaknesses of their cases, the likelihood that juries will convict, the particular resource allocation issues in their districts, and how the communities they serve and protect perceive crimes and evaluate punishments. Absent special circumstances, the judgments made by U.S. Attorneys deserve the Attorney General's deference, even if, in the aggregate, they fail to produce nationally uniform sentences.[61]

But all of that relates to noncapital sentencing, and death is different, right?[62] I agree that death is different, but the difference makes the case against overruling recommendations not to seek the death penalty even stronger. If uniformity in this context means that offenders who commit murders in different districts but with similar combinations of aggravating and mitigating circumstances will be charged similarly—that is, both either will or will not be targeted for execution—consider first how hard achieving such uniformity will be. All courts, federal and state, have traditionally punished drug traffickers, bank robbers, and fraudsters to some degree. Trying to get prosecutors to seek (and judges to impose) similar sentences in those cases is merely a matter of making adjustments to everyone's existing sentencing practices, which, as set forth above, has not happened. The death penalty, on the other hand, is not a matter of degree: You either get it or you do not. Federal prosecutors in forty federal districts in thirty-two states (as well as the federal districts in Guam, the U.S. Virgin Islands, and

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[60] See Memorandum from John Ashcroft Memorandum, supra note 47, at 2.

[61] I need not attempt here to catalogue what those special circumstances would be, but I do not suggest that U.S. Attorneys' tireless work should insulate them from oversight. For example, national law enforcement programs, such as Project Triggerlock and the Triggerlock II program, by which the most violent and dangerous offenders who commit federal firearm offenses were prosecuted federally, would plainly justify overruling a U.S. Attorney's conflicting intake guidelines. Similarly, the notion that a U.S. Attorney would consider a defendant's disclosure of only her own crime to be "substantial assistance" within the meaning of § 5K1.1, see Maxfield & Kramer, supra note 42, at 7, is absurd, and should obviously not be permitted. If, for the legitimate reasons set forth above and elsewhere, see Gleeson, supra note 56, at 315, a reasonable compromise of the applicable guideline range is appropriate, it ought to be implemented openly and forthrightly, and § 6B1.2 ought to permit it. See id. at 317.

[62] See, e.g., Gregg v. Georgia, 428 U.S. 153, 188 (1976) (plurality opinion).

the Northern Mariana Islands) have *never* asked for permission to seek the death penalty since it was reinstated federally in 1988.[63] Forcing those prosecutors to seek death as readily as it is sought in, say, Texas or Virginia, is going to be a far more difficult task than trying to achieve uniformity in noncapital cases.

Moreover, the compulsion at issue is different in kind from efforts to coerce uniformity in noncapital cases. It is one thing to compel a prosecutor to seek a thirty-six-month sentence when she thinks an eighteen-month sentence is just, but quite another to require her to seek a death warrant for a defendant she believes should not face a capital charge. The federal interests that justify placing a U.S. Attorney in that position should be compelling indeed.

Also, thirteen of the federal districts in which the death penalty has never been sought are in jurisdictions that have no death penalty under local law.[64] Through their constitutions or laws, the people in twelve states (as well as the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Guam, and the Northern Mariana Islands) have chosen not to punish any state crimes with death.[65] In a federal system that rightly accords great deference to states' prerogatives, the federalization of the death penalty should be limited to cases in which there is a heightened and demonstrable federal interest, one that justifies the imposition of a capital prosecution on communities that refuse to permit them in their own courts.

In addition, the Justice Department's effort to create uniformity in seeking the death penalty presupposes a measure of uniformity in the sample of cases it reviews. But, as noted above, federal prosecutorial discretion includes the option to decline prosecution

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[63] See 2000 DOJ Death Penalty Report, supra note 1, at 12 & n.13, T-14–T-17 tbl.5A, T-18–T-21 tbl.5B. The year 2000 is the last year for which the DOJ has made statistics available.

[64] Death Penalty Info. Ctr., State by State Death Penalty Information, at http://www.deathpenaltyinfo.org/article.php?did=121&scid=11 (last visited Aug. 13, 2003) (on file with the Virginia Law Review Association); 2000 DOJ Death Penalty Report, supra note 1, at 12, T-14–T-17 tbl.5A, T-18–T-21 tbl.5B.

[65] These states are Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. See Death Penalty Info. Ctr., supra note 64.

in favor of allowing the case to be prosecuted in state court. As Professor Rory Little has noted,

> when the local cultural milieu opposes capital punishment and has undergone no (or little) local implementation of the death penalty in a U.S. Attorney's professional lifetime, then decisions not to charge potential death cases federally, or to prosecute them without death penalty exposure, may more easily and frequently be made, in complete good faith.[66]

Indeed, the disuniformity in the administration of the death penalty among the states has been reflected, albeit not as starkly, in U.S. Attorney recommendations.[67] Even rigorous uniformity at Main Justice, therefore, will not address significant sources of disparity in the field.[68]

Even if all potential death penalty cases were prosecuted federally, practical considerations could readily produce disparate death penalty recommendations by U.S. Attorneys. Unlike noncapital cases, in which federal juries are isolated from the issue of punishment, juries play the central role in the imposition of the death penalty. Among the many significant consequences of that fact is the prosecutor's need to assess the likelihood that a jury will impose the death penalty if asked to do so. On similar facts, that assessment will differ depending on where you are in the country. California juries have imposed over 600 death sentences since capital punishment was reinstated in the mid-1970s; New York juries have imposed only six since 1995, when the state's new death penalty statute was enacted, and not one New York defendant—federal or state—has been executed in forty years.[69] Just as local realities regarding jury awards in civil cases would necessarily inform a national policy for the settlement of such cases, real differences among districts' jury pools—and the likelihood that a jury

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[66] Rory K. Little, The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role, 26 Fordham Urb. L.J. 347, 469 (1999).

[67] Id. at 453.

[68] Id.

[69] See Tracy L. Snell & Laura M. Maruschak, U.S. Dep't of Justice, Bureau of Justice Statistics Bulletin: Capital Punishment 2001, 14 app. tbl.2 (2002), available at http://www.ojp.gov/bjs/pub/pdf/cp01.pdf; Death Penalty Info. Ctr., supra note 64.

will actually impose the death penalty—cannot properly be ignored in determining whether to seek a death sentence.

The differences are not limited to differences among states or among regions of our country. Within New York State, where the district attorneys are elected, some district attorneys, particularly in New York City, rarely or never seek the death penalty despite numerous death-eligible cases. Some district attorneys in upstate counties seek it often. It is a small sample, but for the forty-four death notices that have been filed throughout the state from 1995 to 2001, sixty-one percent of them have been filed in upstate counties, where only nineteen percent of all homicides occur.[70] Similarly, a recent study in Maryland found that a death sentence is twenty-three times as likely to be imposed by a jury sitting in Baltimore County as it is by a jury in Baltimore City, and fourteen times as likely as in Montgomery County.[71]

There is no secret as to what is going on within these states. It is a smaller scale of what is happening in the country as a whole: some communities feel much more strongly about seeking and imposing the death penalty than others. On the same set of facts, the District Attorney in Monroe County in upstate New York will be far more confident that the death penalty is appropriate—and that the jury will impose it—than the District Attorney in the Bronx, who has never sought the death penalty and has publicly stated that he never will.[72] To the extent that the U.S. Attorneys' deci-

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[70] See N.Y. Capital Defender Office, Capital Punishment in New York State: Statistics from Six Years of Representation, at http://www.nycdo.org/6yr.html (last visited Aug. 14, 2003) (on file with the Virginia Law Review Association). Recently, two New York City district attorneys decided to seek the death penalty in high-profile killings, but there have still only been fourteen death penalty prosecutions in the city since the death penalty was reinstated in New York in 1995. Shaila K. Dewan, Death Penalty to Be Sought In the Killing of 2 Detectives, N.Y. Times, July 30, 2003, at B2; William Glaberson, District Attorney to Seek Death Penalty, N.Y. Times, July 29, 2003, at B4.

[71] See Raymond Paternoster et al., An Empirical Analysis of Maryland's Death Penalty Sentencing System with Respect to the Influence of Race and Legal Jurisdiction tbl.1F, at http://www.urhome.umd.edu/newsdesk/pdf/exec.pdf (last visited Sept. 2, 2003) (on file with the Virginia Law Review Association).

[72] See Christopher Dunn, The Death Penalty Skips Across County Lines, Newsday (Queens, N.Y.), Feb. 25, 2003, at A36; Rick Hampson, Murder Puts DA's Ideology to the Test, Times Union (Albany, N.Y.), Mar. 19, 1996, at B2. Governor George Pataki actually removed Bronx County District Attorney Robert Johnson from a high-

sions that the Attorney General has overruled reflect assessments of how juries will react to the particular cases, those decisions deserve respect. The federal death penalty is already so difficult to obtain—sixteen of the last seventeen federal juries asked to sentence someone to death have refused to do so[73] that it scarcely makes sense to seek it if the prosecutor handling the case believes the evidence will not bear the weight of a capital case.

Does it matter that a jury is not likely to impose a death penalty? Those seeking uniformity might say that we should present all cases meeting specified requirements to capital juries—the worst that can happen is the jury will decline to impose the death penalty. But many prosecutors who actually try murder cases believe that the failure to get the death penalty is not the only ill effect of an incorrect decision to seek it. They believe that, now more than ever, jurors in capital cases hold the prosecution to a higher standard than proof beyond a reasonable doubt. And jurors also know that one way to avoid sitting through gut-wrenching victim impact testimony and having to decide whether a defendant lives or dies is to acquit on the capital charge. So forcing U.S. Attorneys to seek the death penalty against their better judgment may jeopardize their ability to get a conviction on the murder count—or maybe every count.[74]

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profile murder prosecution when he refused to seek the death penalty. Johnson challenged his removal, but Pataki's decision was upheld by New York's highest court, see Johnson v. Pataki, 691 N.E.2d 1002 (N.Y. 1997), before the defendant made the issue moot by committing suicide before trial.

[73] See Abby Goodnough, Acquittal in Puerto Rico Averts Fight Over Government's Right to Seek Death Penalty, N.Y. Times, Aug. 1, 2003, at A12; Adam Liptak, Juries Reject Death Penalty in Nearly All Federal Trials, N.Y. Times, June 15, 2003, at A12; see also Summerlin v. Stewart, No. 98-99002, slip op. 12783 (9th Cir. Sept. 2, 2003) (Reinhardt, J., concurring) ("Since General Ashcroft has launched his expanded federal death penalty campaign, sometimes over the objections of local federal prosecutors, juries have returned 21 verdicts. In 20 of them they have voted for life rather than death.").

[74] Alan Vinegrad, the former U.S. Attorney in Brooklyn, has stated that New York jurors might be so averse to the death penalty that they may require proof to a certainty that the defendant is guilty: "'Although it is laudable in the abstract to impose the death penalty consistently . . . the danger is that may not be taking sufficient account of the resistance in a particular locale toward the death penalty or the specific facts that might weigh against the death penalty in a particular case.'" Glaberson, supra note 7 (quoting Alan Vinegard). Similarly, Jamie Orenstein, a former federal prosecutor who was both a member of the Timothy McVeigh prosecution team and of

This is especially true because the Attorney General's capital case review, like the Sentencing Guidelines themselves, does not take into account the strength of the case, but rather assumes the defendant's guilt and looks to the nature of the crime charged and the presence or absence of mitigating or aggravating circumstances.[75] As in the noncapital context, there is no persuasive reason why differences between the weight of the evidence against otherwise similarly situated defendants cannot be reflected in different charging decisions, including the decision to seek death, and in different plea bargains.

Even if a conviction is obtained, and the defendant is sentenced to life without parole, an imprudent decision to seek the death penalty is hardly cost-free. Capital cases are notoriously protracted and expensive, and they constitute a significant drain on the resources of a prosecutor's office. Indeed, one reason death penalty cases have declined significantly in New York state courts in recent

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Attorney General Reno's Capital Review Committee, has stated: "'It's a dangerous game the Department of Justice is playing here. . . . We've got to assume . . . that if some juries are balking at death in overcharged cases, others are balking at conviction.'" Liptak, supra note 73 (quoting Jamie Orenstein).

A recent, highly publicized case may be a prime example of this problem. Puerto Rico, which has not executed a defendant since 1927, outlawed the practice in 1929, and in 1952 included in its Bill of Rights the statement: "The death penalty shall not exist." P.R. Const. art. II, § 7; Adam Liptak, Puerto Ricans Angry That U.S. Overrode Death Penalty Ban, N.Y. Times, July 17, 2003, at A1. Nevertheless, the local U.S. Attorney sought—and Attorney General Reno authorized—a death penalty prosecution of two defendants accused of kidnapping and brutally murdering a grocery store owner after they were not paid a million-dollar ransom. See Goodnough, supra note 73. The decision to pursue the death penalty evoked strong protests from the local community, and the trial judge initially assigned to the case rejected the death penalty prosecution entirely, holding that the federal death penalty could not be applied against Puerto Ricans. United States v. Acosta Martinez, 106 F. Supp. 2d 311 (D.P.R. 2000). The First Circuit reversed, United States v. Acosta Martinez, 252 F.3d 13 (1st Cir. 2001), and the death penalty prosecution went forward under continued protest before a different district judge. In August 2003, the jury acquitted the defendants on all counts, including charges of extortion and obstruction of justice. See Goodnough, supra note 73.

[75] U.S. Dep't of Justice, U.S. Attorneys' Manual § 9-10.080 (2001) [hereinafter U.S. Attorneys' Manual] (providing "Standards for Determination" of whether the Attorney General should seek the death penalty).

years[76] is because they consume so much of the prosecutor's time that other violent felonies do not get the proper attention.[77]

Uniformity in the imposition of federal death penalties is indeed a virtue, and a virtue worth pursuing, but there are a limited number of factors that warrant seeking the death penalty in federal court notwithstanding the U.S. Attorney's contrary recommendation. Examples of such factors include large numbers of victims, the murder of law enforcement officers or witnesses, and acts of terrorism. Such cases, most people would agree, cry out for the death penalty.[78] Cases that leap to mind are the Oklahoma City bombing case, the bombing of U.S. embassies in Africa, and obviously the terrorist attacks on September 11, 2001. I do not suggest that to be an exclusive list of factors, and others could be debated,[79] but they would exclude garden-variety murders that have traditionally been prosecuted in state court and lie at the heart of the recent disagreements between the Attorney General and the U.S. Attorneys in New York. Granted, that approach may also result in fewer federal death penalties, but federal death penalties are minuscule in number already, accounting for only 0.53% of all death row inmates.[80]

Finally, where the local U.S. Attorney has determined that a federal capital charge is inappropriate in the everyday murder case, leaving the decision whether to seek capital punishment in the hands of state prosecutors is consistent with our history. Murder is, and always has been, "an oft and competently prosecuted state

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[76] See N.Y. Capital Defender Office, supra note 70. The filing of notices of intent to seek the death penalty peaked at fourteen in 1998, and declined from an average of eleven during the period from 1996–98, to an average of three per year beginning in 1999.

[77] William Glaberson, Prosecutors Seek Fewer Executions, Signaling New Wariness, N.Y. Times, Sept. 21, 2003, at 41.

[78] See, e.g., David Baldus, When Symbols Clash: Reflections on the Future of the Comparative Proportionality Review of Death Sentences, 26 Seton Hall L. Rev. 1582, 1605 (1996).

[79] Rectifying racial inequities in the decision to seek the death penalty, for example, might be a sufficiently weighty interest, although it weighs far more heavily in favor of overruling recommendations in favor of the death penalty than recommendations against it.

[80] See Snell & Maruschak, supra note 69, at 6 tbl.5 (listing 3581 prisoners under sentence of death as of December 31, 2001, nineteen of which were federal).

crime,"[81] and the decision to federalize it is modern, controversial even among conservatives, and expensive.[82] As a general rule, U.S. Attorneys who choose to leave the prosecution and punishment of murderers to the states do not offend any legitimate federal interest.

II. THE IMPACT ON CRIMINAL INVESTIGATIONS

One of Attorney General Ashcroft's recent decisions overruling a U.S. Attorney occurred in the case of *United States v. Jairo Zapata*.[83] Zapata is charged in an indictment with participating in a continuing criminal narcotics enterprise. The charges include a murder related to the drug business; Zapata and others are charged with killing another drug dealer who stole drugs from them. Zapata reached an agreement with the U.S. Attorney, in which he agreed to plead guilty to a noncapital murder charge and to cooperate with the government.[84] Only the government and Zapata know what his testimony might accomplish, but it is reasonable to infer that it would either strengthen the murder case against his co-defendants, or help make other cases, including murder cases, or both. The U.S. Attorney obviously recommended that the government should not pursue the death penalty against Zapata in light of his agreement to cooperate.

In the Reno Justice Department, a case resolved by such an agreement would not have been reviewed by the Attorney General. That has changed,[85] and in Zapata's case the Attorney General has directed the U.S. Attorney to file a death notice, which she has done. At least for now—Zapata's counsel are reportedly filing a motion for specific performance of a cooperation agreement that counsel claim was not conditioned on the Attorney General's ap-

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[81] Rory K. Little, Myths and Principles of Federalization, 46 Hastings L.J. 1029, 1072 (1995).

[82] Rory K. Little, The Future of the Federal Death Penalty, 26 Ohio N.U. L. Rev. 529, 533 (2000) (noting that former Attorney General Edwin Meese was a prominent advocate of the "anti-federalization cause").

[83] No. 01-CR-516 (E.D.N.Y. filed May 16, 2001). The case is assigned to the Honorable Joanna Seybert.

[84] See Status Conference, supra note 4, at 7; Jones, supra note 4.

[85] See U.S. Attorneys' Manual, supra note 75, §§ 9-10.040, 9-10.100.

proval—Zapata's plea and cooperation with the government are off the table.

There are several ways in which federal prosecutors build murder cases, but a popular misconception outside law enforcement is that most are founded on forensic evidence, or electronic surveillance, or some other type of conclusive proof. The truth is that the real world looks nothing like *CSI: Miami.* Murder investigations depend heavily on confidential informants, and murder prosecutions depend just as heavily on the testimony of accomplice witnesses. This is especially so in the paradigm federal murder investigations—investigations of drug cartels and other criminal enterprises—where the upper echelon targets do not commit the killings themselves. Rather, they commit their crimes by talking to people. To make murder cases against them, prosecutors frequently start by building a case against one of the people to whom they talk. Using the considerable leverage supplied by the Guidelines, prosecutors procure that person's information and testimony. Then they use all of their investigative resources to corroborate him—to make him believable to a jury.[86] If a prosecutor does a good enough job, and gets lucky with the people she indicts, those individuals may plead guilty and cooperate as well. A prosecutor can get on a roll doing this, sending a lot of murderers—those who pull the trigger and those who order them to—to prison. That obviously punishes them for their crimes, but it also—and prosecutors are acutely aware of this—incapacitates them from committing more crimes.

These investigations and prosecutions are not a pleasant business. The people who cooperate are usually not attractive in any respect. In fact, they are usually murderers themselves, which is how they gained the knowledge that makes them useful. They generally consider cooperation only when they are in deep trouble themselves. Since they have the right to withhold their information, they demand something in return for it: They want a break in their own case (or cases) in exchange for cooperation. The provi-

[86] See John C. Jeffries, Jr. & John Gleeson, The Federalization of Organized Crime: Advantages of Federal Prosecution, 46 Hastings L.J. 1095, 1104–08 (1995).

sion authorizing downward departures for substantial assistance to the government is designed to provide that break to them.

This crime control strategy—procuring the cooperation of accomplice witnesses to increase the number of federal murder cases—is an effective one. It is fraught with difficult issues, such as how much leniency accomplice witnesses should receive in return for their testimony, and how to deal with the ever-present risks that they will (1) fabricate testimony in order to obtain the leniency; and (2) recidivate after an early release from prison.[87] But despite these and other difficulties, the enlistment of cooperating witnesses is a proven method of getting murderers off the streets and into prisons.[88]

Overruling recommendations against the death penalty in cases where the defendants have agreed to cooperate inevitably jeopardizes the ability of U.S. Attorneys to conduct such investigations. After *Zapata*, well-counseled defendants are unlikely to consider cooperation.[89] Understanding why that is true requires some background about how a defendant becomes an accomplice witness.

Cooperation with federal prosecutors, in New York and in many other places as well, begins with substantive meetings called prof-

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[87] See, e.g., Editorial, The Return of Sammy the Bull, N.Y. Times, June 26, 2001, at A18 (arguing that, in bargaining for cooperation, "[p]rosecutors and judges alike are enmeshed in an inevitably risky enterprise," but "[i]f the government were unwilling to take such risks, the result would be less law enforcement and more crime").

[88] See Transcript of Criminal Cause for Sentencing at 45, United States v. Gravano, No. 90-CR-1051 (E.D.N.Y. Sept. 26, 1994) (noting that at the time of sentencing, Gravano's cooperation had produced "37 convictions [and] nine people awaiting trials"); see also Garofalo v. Gravano, 23 F. Supp. 2d 279, 281–83 (E.D.N.Y. 1998) (same). Twenty of the people Gravano cooperated against were convicted of murder or conspiracy to murder (or both). The government informed Gravano's sentencing judge as follows: "[W]e believe that if the criminal pasts of the defendants [convicted based on Gravano's cooperation] were laid bare, as Gravano's has [been], many would have criminal histories equally as serious as Gravano's." The Government's Sentencing Memorandum at 29, United States v. Gravano, No. 90-CR-1051 (E.D.N.Y. Aug. 15, 1994). Gravano, whose codefendant was John Gotti, had pled guilty to participation in nineteen murders. I was the government's lead prosecutor in the prosecution of Gotti and Gravano.

[89] See Aitan Goelman, Let The Prosecutor Decide, Nat'l L.J., June 2, 2003, at 38 (stating that after the Attorney General's decision in *Zapata*, the pool of potential cooperators in violent crimes case has "all but evaporated" because "few defense attorneys will now recommend that their clients cooperate when they may face execution nonetheless").

fers. The purpose of the proffer is to elicit from the prospective witness, who in this context is almost always an indicted defendant, all of the information necessary to determine whether a plea bargain that includes cooperation is appropriate. The prosecutor needs to know several things before she can make that assessment. Some relate to the crime or crimes currently under investigation, such as the defendant's version of the crime, including his own role and the roles of others. The prosecutor also needs to know about other crimes the defendant committed or knows about, including murder, in part to determine the benefits of the prospective cooperation, but also to assess the baggage he will bring to the witness stand at trial. Because future cross-examinations of the witness will not be limited to the crimes under investigation, the prosecutor needs to know about all of the criminal activity in the witness's past, whether or not the government is already aware of it.[90] "Prior crimes that are disclosed during the proffer session will be covered by any resulting plea agreement, so the terms of the government's offer (and, indeed, whether there will be an offer at all) depend in part on the other criminal activity disclosed" by the defendant during the proffer.[91]

Proffers occur pursuant to a separate, preliminary agreement called a "proffer agreement." The typical proffer agreement provides only limited protection to the prospective witness if no cooperation agreement results from the sessions. Most significantly, it does *not* prohibit the use of the defendant's statements as leads to pursue further investigation, and evidence derived from such investigation may be used against the defendant.[92] Thus, a defendant who proffers necessarily runs the risk that no cooperation agreement will result and he will have helped the government strengthen

[90] See John Gleeson, Supervising Criminal Investigations: The Proper Scope of the Supervisory Power of Federal Judges, 5 J.L. & Pol'y 423, 447–50 (1997) (describing proffer sessions).

[91] Id. at 449.

[92] Comm. on Second Circuit Courts, Fed. Bar Council, Proffer, Plea and Cooperation Agreements in the Second Circuit 5 (2003). The proffer agreement in the Eastern District of New York ensures the defendant that his statements during the proffer will not be used by the U.S. Attorney in determining whether to recommend the death penalty to the Attorney General. Leads from those statements, however, may be used for that purpose. Id. at app. B-4.

its existing case against him, perhaps enough to add new charges. In the death penalty setting, the proffer could result in the government developing evidence that will enhance its chances not only of getting a conviction, but of establishing the aggravating circumstances that could result in the defendant's execution.[93]

Despite that risk, death-eligible defendants have nevertheless made proffers, and based on their proffers, reached agreements with the government. The risk is taken because the defense attorneys and the U.S. Attorneys, repeat players in the market for cooperation in their legal communities, develop understandings about a number of factors, including the kinds of conduct that will render a defendant ineligible for cooperation under any circumstances, the kind of investigative assistance that the government will insist upon before conferring the benefits of a cooperation agreement on a defendant, and the kinds of baggage that will scuttle a prospective deal. A seasoned defense attorney will not subject her client to the risks inherent in a proffer without a high level of confidence, based on conversations with both the client and the prosecutor, that a cooperation agreement will result. In *Zapata*, the defense counsel apparently navigated this treacherous territory successfully. The defendant proffered, the U.S. Attorney concluded that the benefits to be gained from his cooperation were worth the costs of obtaining it,[94] and the Attorney General was told

[93] Proffer agreements conceivably could offer greater protection to the defendants who make proffers. Transactional immunity, for example, would insulate a defendant from prosecution for any crime about which he is questioned. Use and derivative use immunity, like that conferred by the federal immunity statute, would protect the defendant not only from the direct use of his proffer against him, but also from any evidence derived, directly or indirectly, from the proffer. See 18 U.S.C. § 6002 (2000); Kastigar v. United States, 406 U.S. 441, 443, 460–61 (1972).

Federal prosecutors wisely do not offer even the latter, more limited form of immunity to a proffering defendant. If they did, future prosecutions of the defendant for any crimes disclosed at the proffer would be permissible only if the government could overcome the taint of the immunized statements by proving, clearly and convincingly, an independent source for all of its evidence. Id. at 460. That burden is always difficult to carry, but it is especially difficult when the defendant has divulged crimes of which the government was previously unaware.

[94] See Wade v. United States, 504 U.S. 181, 187 (1992) (holding that the government motion requirement in § 5K1.1 vests discretion in prosecutors to make a "rational assessment of the cost and benefit that would flow from moving" for such a departure).

that Zapata should not be subjected to the risk of execution in exchange for his cooperation.

By rejecting that recommendation, the Attorney General has given every defense lawyer an excellent reason never to bring a death-eligible defendant in for a proffer. Imagine how Jairo Zapata's lawyers feel now. Based on the U.S. Attorney's interest in pursuing Zapata's cooperation, they presumably advised Zapata to proffer and, by doing so, secured an agreement from the government that would spare Zapata's life—that is, he would plead guilty and cooperate in exchange for a noncapital charge and a substantial assistance motion. However, now that the Attorney General has rejected that course, Zapata's lawyers know that Zapata has provided information to the government that may be used, lawfully, to assist the government both to prove Zapata's guilt and to persuade the jury that he should be executed. Moreover, because simply trying to cooperate is enough to get a defendant killed, a defendant in Zapata's position faces the prospect of being moved for his own protection to an isolation unit in jail, making it all the more difficult for him to assist in his defense.[95]

When defense counsel fear that an agreement that is satisfactory to the U.S. Attorney may nonetheless be rejected by the Attorney General, one has to wonder why a death-eligible defendant would ever be advised to offer his cooperation. The risk that the client may be helping the government put him to death is too great to bear. As a result, there will be fewer proffers, fewer investigations based on accomplice witnesses, and fewer prosecutions. How many fewer will be difficult, if not impossible, to quantify, but prosecutors and defense lawyers who do this work on a regular basis will say it is a lot.[96] The Attorney General needs to consider carefully

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[95] See Status Conference, supra note 4, at 13–14.

[96] Goelman, supra note 89 (claiming that the Attorney General's decision in *Zapata* "has had an immediate and profound impact on the ability of federal prosecutors to investigate and prosecute violent crimes"); see also Alan Vinegrad, Letter to the Editor, N.Y. Times, Feb. 21, 2003, at A26 ("As a result of Mr. Ashcroft's decision [requiring local prosecutors to seek the death penalty], prosecutors will now be forced to pursue execution of the source, thereby depriving the government of his testimony, weakening its ability to convict other dangerous criminals and jeopardizing the lives of their future victims.").

whether that is a cost worth bearing just so he can try to put a few more people on federal death row.

CONCLUSION

We live in a big, diverse country. There will always be regional differences in how we, as a society, perceive and react to crime. U.S. Attorneys, as a general rule, are products of the legal communities they serve. In many ways, they personify the values of those communities, which enables them to serve well. I suspect that when it comes to the values that influence law enforcement practices, it will be a long time before Georgia becomes just like Vermont, or New York City just like Houston.

The Attorney General's supervision of the federal death penalty should not strive to iron out those differences. There is no obvious federal interest in trying to obtain capital punishment for drug-related homicides in federal court in Massachusetts as readily as it is obtained in federal court in Virginia. Moreover, law enforcement policy must account for the fact that, in the vineyards, capital punishment is implemented through particular cases. Wholly apart from differences by region, numerous case-specific (and district-specific) factors influence U.S. Attorneys' decisions not to seek the death penalty in federal cases. Institutionally, the Attorney General is not well equipped to review those decisions, and unless they appear to be unreasonable, there is no good reason to try.

The Attorney General's attempt to achieve uniformity by compelling U.S. Attorneys to seek the death penalty is a bad idea. It is unlikely to produce more executions. It fails to account for the many factors that produce good faith decisions by able U.S. Attorneys that the death penalty should not be sought, and then requires those prosecutors to tell juries in those same cases that the only appropriate punishment is death. When the strategy upsets cooperation agreements, as in *Zapata*, it has the added effect of undermining the investigation and prosecution of violent crimes. The better way to achieve uniformity in this context is to tighten the standards, not loosen them—to narrowly and specifically identify the truly exceptional circumstances that will require that the death penalty be sought in federal court.