Pleading guilty for life: an exploration of plea bargaining in the face of death

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PLEADING GUILTY FOR LIFE:
AN EXPLORATION OF PLEA BARGAINING IN THE FACE OF DEATH

By
Susan Ehrhard

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Pleading Guilty for Life:
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Abstract

This dissertation explores decision making and the process of plea bargaining in aggravated murder cases. The study focuses on the extent to which, if any, the death penalty acts as a bargaining tool, inducing guilty pleas to sentences that would otherwise not be accepted, were the death penalty upon conviction at trial not a possibility. The role of the death penalty in this process is an important consideration and one that raises significant implications concerning the human and financial costs of capital punishment. Interviews with prosecutors and defense attorneys in a state where the maximum punishment for murder is death and a state where the maximum punishment for murder is life without parole are used to explore the role and importance of the death penalty in plea bargaining, as compared to the role and importance of a maximum sentence of life without parole.
Acknowledgements

This dissertation began with a question I asked my criminal justice professor as an undergraduate student. I wanted to know if the death penalty served as leverage in plea bargaining. Dr. Lofquist told me that he did not know and was unaware of any research that addressed the issue. He would later encourage me to pursue graduate work to answer that and my many other questions. Dr. Lofquist was the first to believe that I should and could pursue a PhD; it took me a little longer to believe it for myself. I applied to doctorate programs more to humor him than anything else, but soon after I arrived at Albany, the goal of pursuing a PhD became a very personal one, and one that I was determined to achieve.

Although the goal quickly became clear, the path towards achieving it was less black and white. I knew I had to take certain courses and pass particular milestones, but I did not know how difficult that would be, nor could I know the changes that would occur in my life throughout the journey. My determination and dedication have been tested, and I am happy to say that I have passed. However, I am not sure I could have passed so well and so confidently if not for the support of family and friends.

My mother has always been and continues to be my greatest cheerleader. My countless phone calls to her over the years expressing frustrations were inevitably followed up by a card in the mail a few days later, encouraging me to believe in myself and pursue my goal. She never knew what to expect when she picked up the phone, whining and venting, or excitement over progress and positive feedback. Although I think she may have screened her calls once in awhile, I am forever grateful for the many times she answered. Her love, support, and encouragement were an integral part of the completion of this dissertation and the achievement of the PhD. I know she is proud of me, and I am quite sure my father is proud of me as well. If he were here today, there is little doubt in my mind that he would be telling everyone about his daughter, “the doctor.”

Important as the support of my mother has been, it is my friends in the program who were most able to understand the ups and downs of the path towards a PhD. We listened to each other, empathized with each other, and encouraged each other throughout the journey. I am fortunate to have met such supportive people, and I value the friendships we have developed. They and the friends I have outside of academia made the bad times not so bad and the good times even better.

In spite of being of prime dating (and mating!) age, I never expected to meet my husband along this journey. It took me awhile to open myself up, and it took us awhile to forge a cemented commitment, but the support and love we have for each other were clear early on. Next to my mother, Scott has perhaps endured the most whining, but he always sat back and listened, often with a glass of wine in hand for me, and a bottle of beer in hand for himself. He encouraged me to pursue my goal, and he supported me in every way he knew how. Although I am thrilled that the dissertation is complete, I no longer have an excuse for not helping to clean out the garage or rake the yard on a Sunday afternoon!

While Dr. Lofquist planted the seed of graduate work in me, Dr. Acker, my chair, helped to grow it. His enthusiasm and support for my work have been a great source of strength for me. He and the other members of my committee showed genuine interest in
my research and in the contribution it would make to the field. Their feedback has been invaluable in enabling me to explore and discuss the process of plea bargaining in capital and non-capital murder cases with the attention, depth, and detail it deserves.

Of course, exploring this topic would not have been possible without the participation of the attorneys who were interviewed for this research. These individuals had little to gain in agreeing to speak with me, yet they made time out of their very busy schedules to discuss their experiences and perspectives. This dissertation would truly not have been possible without their help, and I am forever grateful for it. Speaking with them was one of the most enjoyable and fulfilling aspects of this research. I learned a great deal from the interviews, and I hope this dissertation conveys that knowledge to others and provides insight into a most interesting and still vastly unexplored area of study.
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Chapter 1: Introduction

Petitioner's argument that the prosecutor's decisions in plea bargaining [emphasis added] or in declining to charge capital murder are standardless and will result in the wanton or freakish imposition of the death penalty . . . is without merit, for the assumption cannot be made that prosecutors will be motivated in their charging decisions by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts (Justice White, concurring in the judgment in Gregg v. Georgia, 1976: 224).

But can the assumption be made that prosecutors will base their decisions solely on the strength of the case and the likelihood of a sentence of death?

This is a study about plea bargaining, a process of decision making that is closely intertwined with charging (Abrams, 1983). The focus of this research is plea bargains in aggravated murder¹ cases, which involve the highest stakes of punishment meted out by the American criminal justice system, life imprisonment and death. This study is guided by a number of research questions:

1. At the very core I explore whether the statutory availability of the death penalty for aggravated murder serves as an inducement in plea bargaining, exerting greater pressure on defendants to plead guilty, compared to circumstances where the maximum sentence authorized is life imprisonment or life without parole.
   a. I explore whether and under what circumstances prosecutors use the death penalty as leverage to induce a guilty plea.

¹ In jurisdictions with and without the death penalty, “aggravated murder” is sometimes called “first-degree murder.” However, the definition of first-degree murder often encompasses aggravating circumstances, such as murder committed in the perpetration of a robbery. Throughout this and subsequent chapters, the term “aggravated murder” will therefore be used when speaking about the highest level of murder in both death and non-death penalty jurisdictions generally.
b. Independent of whether prosecutors use the availability of the death penalty as leverage, I explore whether defense attorneys perceive it is used in this way.

2. I explore the influence of the availability of the death penalty on the process of plea bargaining, compared with the influence of a sentence of life or life without parole. Accordingly, I consider the following:

   a. Who initiates the possibility of a plea in aggravated murder cases, and at what point in the disposition process is the possibility of a plea first raised?

   b. Do plea discussions continue throughout the process, or are they confined to a specific point or points?

   c. Do discussions involve negotiation and bargaining, or do they entail offers of “take it or leave it?”

   d. What are the most important factors in the decision to pursue a plea bargain or a trial in aggravated murder cases?

   e. Compared with other factors, how important is the possibility of a death sentence or a sentence of life without parole in the decision to pursue a plea bargain or a trial?

These questions were explored through interviews with prosecutors and defense attorneys in two states, Ohio, where the death penalty is the maximum possible punishment for aggravated murder, and Michigan, where life imprisonment without the possibility of parole is the maximum possible punishment for aggravated murder.
This chapter will briefly discuss the importance of exploring the process of plea bargaining in aggravated murder cases, highlighting the issues and concerns surrounding guilty pleas and the death penalty and introducing the proposed study. In Chapter 2, the processing of capital cases will be reviewed, and a distinction between the weight of a possible death sentence as compared with the weight of a maximum sentence of life without parole in the prosecution’s ability to obtain guilty pleas and the defense’s decision to enter into them will be drawn. The constitutionality of guilty pleas, particularly those entered in the face of a possible death sentence, will be addressed through a review of the decisions of the United States Supreme Court. Additionally, this chapter will provide an extensive review of the literature on the factors that influence charging and plea bargaining decisions in aggravated murder cases as well as the costs and benefits of guilty pleas in the face of death, both for the prosecution and for the defense. In Chapter 3, the research methodology will be outlined, including a discussion of the study sites, sample selection procedures, characteristics of the sample, and data collection instruments.

The results of the study are presented in Chapters 4 through 6. Chapters 4 and 5 encompass a discussion of the findings from the interviews with prosecutors and defense attorneys in Ohio and in Michigan, respectively. Additionally, in Chapter 4, the plea bargaining process and the factors that influence decision making in capital cases will be compared and contrasted with that in non-capital cases for both prosecutors and defense attorneys. In Chapter 6, the findings from Ohio will be compared and contrasted with those from Michigan. In this chapter, an analysis of the perspectives and decisions of prosecutors compared with defense attorneys in capital cases in Ohio, non-capital cases
in Ohio, and murder cases in Michigan will also be presented. The dissertation will conclude with Chapter 7, in which the major findings are highlighted, and policy implications, limitations, and future directions for further research are discussed.

**Introduction**

I begin with the premise that “death is different”\(^2\) and explore whether the possibility of a death sentence upon conviction at trial has a unique effect on the plea bargaining process, influencing decision making in ways that a maximum sentence of life imprisonment or life without parole (LWOP) does not. The possibility of a death sentence is different in kind from lesser punishments, as it does not only involve the defendant’s loss of freedom but also the loss of his life. When faced with this possibility, the defense (defense attorneys and defendants) may be inclined to accept pleas to sentences that would otherwise be rejected, were the difference between a plea bargain and a trial conviction a matter of years and not a matter of life and death. Prosecutors may use this inclination to their benefit, charging cases as capital in order to induce a guilty plea, a guilty plea to a higher sentence than they might otherwise obtain if the death penalty were not a possibility.

The suggestion that prosecutors may use the death penalty as leverage to induce a guilty plea is not new (see Bedau, 1982; Gross, 1996; King, 2004; Slogan, 2000; Tabak, 1986; van den Haag, 2003; White, 1991). A systematic exploration of this possibility and of the process of plea bargaining in capital and non-capital cases, is. While there is a vast empirical literature addressing the dynamics of plea bargaining (see for example, Alschuler, 1975, 1968; Eisenstein & Jacob, 1977; Emmelman, 1996; Heumann, 1977; 1976).
Mather, 1979; Maynard, 1984), this literature has not specifically explored such dynamics in capital and potentially capital cases\(^3\) (White, 1991).\(^4\) This is a significant gap, as the possibility that the death penalty may act as a bargaining tool raises important ethical and legal concerns and carries significant policy implications pertaining to the human and financial costs of capital punishment.

*Costs and Benefits of Plea Bargaining*

The advantages and disadvantages of plea bargaining have been widely studied and debated (see for example, Alschuler, 1981; Church, 1979; Cole, 1975; Easterbrook, 1992; Schulhofer, 1984), with advocates highlighting the efficiency, cost effectiveness, and certainty of outcome that plea bargaining provides (Bibas, 2003). On the other hand, critics assert that the practice unfairly causes criminal defendants to waive their Fifth, Sixth, and Fourteentth Amendment rights (Halberstam, 1982). While defendants often reap the benefit of a lesser sentence through plea bargaining (Alschuler, 1981), criticisms of the practice counter that it nevertheless is coercive, arguing that defendants are induced to waive their trial rights out of fear of being punished with additional charges and a harsher sentence if they do not plead guilty (see Brunk, 1979; Langbein, 1978; Littrell, 1979).

\(^3\) A “potentially capital case,” also referred to as a “death-eligible case” in subsequent parts of this and other chapters, is a murder that may be charged capital according to the specifications of federal or state statute. Fagan, Zimring, and Geller (2006), for example, define death-eligible cases as murders that include any of the following circumstances: murder during the commission of robbery, burglary, rape or sexual assault, arson, kidnapping; murder of a child below the age of six; murders involving multiple victims; “gangland” murders involving organized crime or street gangs; murder committed by an offender while in prison or other government institution; sniper killings; and murder during the course of drug business. Fagan et al. use these elements to classify death-eligible cases because the elements are common in the statutes of death-eligible homicides across death penalty states.

\(^4\) A recent study by Kuziemko (2006) examined plea bargaining in potentially capital cases, but her study is a quantitative analysis of defendants’ propensity to plead guilty in such cases; it does not explore the dynamics of the plea bargaining process (see Chapter 2, pp. 48, 49).
These concerns are especially significant when the sentence involved is a death penalty, particularly when one considers the possibility that the death penalty may serve to induce guilty pleas by defendants in cases that typically do not result in a death sentence. In using the death penalty as leverage, there is a danger that prosecutors will bring capital charges merely to induce guilty pleas and avoid trials. Using the death penalty to induce a defendant to plead guilty enables the prosecutor to save the personnel and financial costs of a capital murder trial, let alone those of a non-capital murder trial. He/she also obtains a guilty plea to a higher sentence than the defense might otherwise agree to, were the death penalty not a possibility. In exchange, the defense obtains the assurance of a sentence less than death. For some defendants, including those in cases that ordinarily do not result in death sentences and also those who may be innocent of any crime, the possibility of a death sentence if convicted at trial may be a risk too great to take (Guidorizzi, 1998; Scott & Stuntz, 1992).

**The Research Study**

**Objectives**

The goal of the project was to systematically explore whether and (if so) how the availability of the death penalty influences the process of plea bargaining in aggravated murder cases. This research was designed to provide insight into a topic that has largely been neglected. Given the concerns noted above, it is important to ask whether the death penalty acts as a threat and also whether prosecutors use the availability of the death penalty as leverage to obtain a guilty plea and whether defense attorneys perceive they do. While defense attorneys and defendants may not ordinarily consider guilty pleas to a
sentence of life imprisonment or life without parole, they may do so when faced with the possibility of a death sentence.

*Findings from a Pilot Study*

This project builds on a pilot study I earlier completed (Ehrhard, 2008). Over a six-month period, I conducted in-depth interviews with fifteen defense attorneys and twelve prosecutors in a state in which a capital punishment law was in effect. Only those who either defended or prosecuted at least one death-eligible case and at least one non-death-eligible murder case were included in the sample. Participants were asked two sets of almost identical open-ended questions about the process of plea bargaining in murder cases where the maximum sentence was either life imprisonment or life imprisonment without parole, or death.

Findings from this study suggested that the death penalty is used as a plea bargaining tool. A majority of defense attorneys said it gives prosecutors great leverage and is a powerful tool at the prosecution’s disposal. Both defense attorneys and prosecutors felt that the option to file a death notice puts the prosecution in a unique position of strength and affects the defense’s decision regarding a plea in ways that a potential life or life without parole sentence does not. Prosecutors and defense attorneys generally agreed that without the threat of death, a case is unlikely to be resolved with a guilty plea to a sentence of life without parole. A majority of defense attorneys and prosecutors said that defendants plead guilty, even if that means a sentence of life without parole, in order to avoid the possibility of a death sentence upon a conviction at trial. These findings suggest that the death penalty is a powerful inducement in plea bargaining.
**Research Approach**

The findings from the pilot study indicate the need to further explore issues surrounding plea bargaining in death-eligible murder cases. The present research study expanded on this early work to include more respondents and to explore the role of the maximum punishment in plea bargaining in a state with a long history as a death penalty jurisdiction and a state with a long history as a non-death penalty jurisdiction. Doing so provided for a more refined understanding of the role and importance of the death penalty in the plea bargaining process, as compared to the role and importance of a maximum sentence of life or life without parole.

The project involved interviews of prosecutors and defense attorneys in Ohio (with a death penalty) and Michigan (without a death penalty). These states were chosen because they are located in the same part of the country, are similar in respect to demographic factors, and include a large number of counties, thereby enabling an exploration of plea bargaining in different jurisdictions within these states. Importantly, Ohio has a relatively large death row (a reflection that being sentenced to death is a real possibility) and an active execution chamber (a reflection that being put to death is a real possibility). (See Chapter 3 for a more detailed discussion of the study sites and sample selection procedures.)

The interviews were composed of questions addressing the use of the maximum sentence (particularly a death sentence) as leverage in plea bargaining but also involved questions about the nature of the plea bargaining process itself. Prosecutors and defense attorneys were asked to discuss how the possibility of a death sentence affects the nature of plea discussions, including such elements as the initiation and duration of discussions.
and the extent to which any discussions involve actual negotiation and bargaining. These questions were also explored regarding the influence of a maximum sentence of life without parole in murder cases where the death penalty is not an option, providing insight into the role of the maximum sentence on the process and outcomes of plea bargaining in murder cases where the death penalty is available and those where it is not. Additionally, prosecutors were asked about the factors that influence their decision to charge a case capitally. Inquiring about these factors provided insight into the relationship between charging and bargaining decisions in death-eligible cases (see Chapter 2, pp. 17-21). The questions were explored extensively, with participants being asked to discuss the reasons for their decisions.

I also explored the role of the maximum sentence from the defendants’ perspective. Asking participants about the influence of a possible death sentence on defendants’ desires to plead guilty or pursue a trial provided an understanding of how defendants view a possible death sentence, compared with how they view a maximum sentence of life or life without parole. Based on their more frequent and personal contact with defendants, defense attorneys were in a better position to discuss this. However, it was important to ask prosecutors to speculate on this influence as well, as their perception of the power of a death sentence in defendants’ desires to plead guilty or pursue a trial provided an understanding of the use of capital punishment as a plea bargaining tool.

It must be emphasized that this study was exploratory. It was not meant to test a particular theory but to provide insight into an issue that has thus far largely been neglected by research. The role of the death penalty in plea bargaining carries significant
policy implications regarding the human and financial costs of capital punishment as well as ethical and legal implications regarding the propriety of using the death penalty as an inducement to encourage defendants to forfeit their trial rights and plead guilty out of fear of possibly being executed.
Chapter 2: Literature Review

Introduction

Being sentenced to death for a murder is a rare phenomenon. Between 1977 and 1999, about 2% of all murders resulted in death sentences (Death Penalty Information Center, 2007);\textsuperscript{5} between 2000 and 2005, the number was just 1%.\textsuperscript{6} However, these figures reflect the universe of all murders, and many murders do not qualify for the death penalty (Fagan, Zimring, & Geller, 2006) either because they do not meet the statutory requirements or because they are committed in jurisdictions without capital punishment.

Fagan et al. (2006) determined that between 1978 and 2003, about 25% of all reported murders qualified as death-eligible (p. 1811).\textsuperscript{7} Their dataset indicates that the death sentence rate among death-eligible cases for the period 2000-2005 is about 7%.\textsuperscript{8} Fagan et al. based their determination of a death-eligible murder solely on the elements specified in capital statutes. In the real world application of these statutes however, the determination of whether a particular murder meets the requirements is not entirely black and white; not all statutory requirements are clear, and considerable discretion is exercised in interpreting and applying the law. This discretion is partially responsible for why so few murders end in death sentences.

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\textsuperscript{5} This figure was calculated by dividing the number of murders during this period into the number of death sentences during this same period (see Death Penalty Information Center, 2007).

\textsuperscript{6} This figure was calculated by dividing the number of murders during this period (see United States Department of Justice, Uniform Crime Reporting Program, 2005) into the number of death sentences during this same period (see Death Penalty Information Center, 2007).

\textsuperscript{7} They defined “death-eligible” murders as those that included any of the following elements common to capital statutes across the states: killings during the commission of robbery, burglary, rape or sexual assault, arson, and kidnapping; killings of children below six; multiple victim killings; “gangland” killings involving organized crime or street gangs; “institution” killings where the offender was confined in a correctional or other governmental institution; sniper killings; and killings in the course of drug business.

\textsuperscript{8} This figure was calculated by dividing the number of death-eligible homicides during this period (from Fagan et al.’s data) into the number of death sentences during this same period (see Death Penalty Information Center, 2007).
A number of studies have sought to track the processing of cases to determine the points at which cases are not or are no longer pursued capitaly. In their study of North Carolina homicides between 1977 and 1978, Nakell and Hardy (1987: 108-109) found that of 444 homicide defendants (including both those whose crimes did and not meet the statutory requirements for first-degree murder), 331 (75%) were indicted on charges of first-degree murder (a capital crime in North Carolina); of these 331, 12 cases were dismissed after indictment. Of the remaining 319 cases, 213 (67%) involved guilty pleas to a charge less than first-degree murder and 46 (14%) were tried on a charge of less than first-degree murder. In only 8 of the 60 cases that were tried capitaly was the defendant sentenced to death; this represents 2.4% of the cases originally indicted on charges of first-degree murder.

Similarly, Bienen, Weiner, Denno, Allison, and Mills (1988:164) tracked the processing of potentially capital cases through five stages. They estimated that 57% (404/703) of all homicides in New Jersey between 1982 and 1986 met the statutory requirements of a capital murder. Prosecutors served a notice of intent to seek the death penalty in 34% of these capital eligible cases. Seventy two percent of these cases progressed to a capital trial; 73% subsequently progressed to the penalty phase of the trial, and 36% resulted in death sentences, representing about 6% of all death-eligible cases.

More recently, Paternoster, Brame, Bacon, and Ditchfield (2004) tracked the processing of cases in Maryland from 1978-1999. Out of a universe of approximately 6,000 homicides, they identified 1,311 death-eligible cases. Notices of intent to seek the death penalty were filed in 353 of these cases (27%), but in 140, the notices were
subsequently withdrawn, most often in exchange for a plea. One hundred and eighty of the remaining 213 cases advanced to the penalty phase of a capital trial; 76 of them (6% of the original pool of death-eligible homicides) resulted in a sentence of death (p. 20).\(^9\)

These studies reveal the points at which death sentences in capital-eligible cases are no longer pursued. They also highlight the role of prosecutorial discretion in the processing of such cases.\(^10\) Whether or not a homicide meets the requirements of a capital crime is a decision most often made initially by the prosecutor (Bright, 1995) and one that may involve considerable discretion (Pokorak, 1998). Of those homicides that are determined to be death-eligible, prosecutors then decide whether or not to file capital charges. This is a crucial point of attrition in cases; for example, Paternoster et al. (2004) and Bienen et al. (1988) both found that prosecutors seek death sentences in only about one-third of all death-eligible cases.

Prosecutors also exercise a great deal of discretion in the decision to plea bargain or pursue a trial. “The decision by the prosecutor to offer a plea, then to engage in plea negotiations, and finally to accept a plea of guilty, marks a key point where cases drop out of the capital case processing system” (Bienen et al., 1988:192). As noted earlier, Nakell and Hardy (1987) found that over two-thirds of death-eligible cases were resolved by guilty pleas prior to trial, a figure also found by a study of capital cases in Colorado (unpublished manuscript cited in Baldus, Woodworth, & Pulaski, 1990: 234). In their study of capital cases in Georgia, Baldus, Woodworth, and Pulaski (1990: 233) found that just under half of all death-eligible cases ended in guilty pleas. Paternoster et al. (2004)

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\(^9\) See Paternoster et al. (2004) for the conditional and unconditional probabilities that a case will advance through each step of the process.

\(^10\) For discussions of the exercise of discretion, see generally, Abrams (1983), Cox (1976), Davis (1969), Galligan (1986), and Reiss (1974).
highlight the frequency of plea bargaining as well, though their data do not reveal the percentage of death-eligible or death noticed cases that are disposed of with guilty pleas.

**The Leverage of Death**

*The Difference Between Death and Life*

Charging decisions and plea bargaining winnow the number of cases that are brought before a judge and jury. As the studies discussed above show, the course of death-eligible cases is substantially influenced by the decisions of prosecutors; they determine what charges to bring and whether or not to engage in plea bargaining. The importance of these decisions should not be underestimated.

Defendants facing a death sentence may be more inclined to plead guilty than those for whom the difference between a plea bargain and a trial conviction is a matter of years and not a matter of life and death. Prosecutors may use this inclination to their advantage, filing capital charges in order to induce a defendant to plead guilty, thus avoiding the cost and uncertainty of a murder trial.

It is important to recognize, however, that for some defendants the possibility of a death sentence may not be an inducement to plead guilty. Defendants may “volunteer” to be executed, having decided that death is preferred to a life behind bars. Defendants may refuse to plead guilty, refuse to aid their attorneys in their own defense during the guilt and/or punishment phases of their trial, and/or may waive their rights to appeal (see Blume, 2005; Dieter, 1990; White, 1987). However, such defendants comprise only a minority of those charged with capital crimes (Blume, 2005); for most, a death sentence is something to be avoided.
Just as a death sentence may represent little or no threat to some capital defendants, a sentence of life without parole may be a great threat to some non-capital defendants. Although the difference between life without parole and an open life sentence does not involve the possibility of an execution, it may involve the possibility of release. For most defendants charged with aggravated murder there may be little difference between an open life sentence and life without parole, either because the minimum number of years to be served exceeds their life expectancy and/or the chances of being released prior to the expiration of their sentences is extremely remote. However, for some defendants, particularly those who are young, the possibility of a life beyond prison walls may be very real. For them, the difference between life and life without parole is significant. Thus, while death is different, and the threat of death is theoretically a greater inducement for a defendant to plead compared with the threat of life without parole, it is important to recognize that the significance of these differences may not be the same for all defendants.

*Charging for Death*

Prosecutors exercise virtually unlimited discretion in the decision to “decline to charge, offer a plea bargain, or decline to seek a death sentence in any particular case” (*McCleskey v. Kemp*, 1987: 312; Pokorak, 1998). They have the authority to charge a case capitaly if they deem it appropriate to do so, whether for purposes of pursuing a death sentence or inducing a plea bargain, and in most death penalty jurisdictions there are no statewide standards to govern decision making in aggravated murder cases; local district attorneys typically set their own policies (Bright, 1995).
While the present research is primarily concerned with plea bargaining, it is thus important to call attention to prosecutors’ charging decisions, as such decisions are closely intertwined with bargaining; “the charge is the asking price in plea bargaining, and the drafting of accusations is therefore an integral part of the negotiating process” (Alschuler, 1968: 85). Indeed, prosecutors’ charging decisions are the key to their control over plea bargaining (Utz, 1978; Vorenberg, 1981). In this vein, the death penalty is an important tool in giving prosecutors the upper hand; as Nakell and Hardy (1987) point out, “indicting for first-degree murder enhances the prosecutor’s plea bargaining posture with the defendant” (p. 130).

Mather (1979: 113) found that prosecutors filed almost all homicide cases at the highest charge of first-degree murder, retaining the right to pursue the cases capitaly. Prosecutors said they did this because evidence might later be uncovered to warrant the most serious charge. Defense attorneys, however, argued that by filing such charges even in cases where the death penalty was not likely to be imposed, prosecutors improved their position in plea bargaining. In cases where the death penalty is not an option, defendants have less to lose by pursuing a trial and risking a conviction. Mather found that in very serious cases (including, but not exclusively homicide cases) where the offender had a long criminal record, plea offers from the prosecution were not worth accepting. In such cases, the defendant faced a stiff sentence whether he pled guilty or was convicted at trial, so there was little incentive for him to forgo his right to trial and the possibility of an acquittal.

Similarly, in her study of plea bargaining in homicide cases, Ehrhard (2008) found that in cases where the defendant was facing a maximum punishment of life
imprisonment without parole or an open life sentence, the offers from the prosecution were unlikely to involve a sentence of a determinate number of years. The defense attorneys she interviewed largely agreed that there was little incentive to accept a plea to an indeterminate life sentence (even if it involved a lower minimum sentence than the defendant would receive if convicted at trial\textsuperscript{11}), because they believed parole boards are averse to releasing offenders before the expiration of their sentences.\textsuperscript{12} Her research indicated that even where the prosecution had a very strong case and a conviction was likely, the defense was unlikely to accept a plea bargain, as a trial forced the prosecution to present its case and left the door open for prosecutorial or judicial errors that could be grounds for appeal. Additionally, while an acquittal may be unlikely, prosecutors and defense attorneys agreed that there are always uncertainties about what a jury might do.

This research indicates that prosecutors’ leverage in plea bargaining only goes so far, ceasing at the point where the defendant has little to lose by going to trial. Defendants facing a severe punishment whether they plead guilty or pursue a trial may be inclined to do the latter, even when life imprisonment without parole is at stake. Unfortunately, research addressing the role of this sentence on plea bargaining in murder cases is lacking.\textsuperscript{13} In discussing this sanction, Cheatwood (1988) and Wright (1990) suggest that life without parole changes the negotiations between the prosecution and the defense (as

\textsuperscript{11} The defense attorneys cited small differences in the minimum sentences offered by prosecutors compared with those faced upon trial conviction.

\textsuperscript{12} The role of the parole board in ultimately determining the length of sentence to be served was noted by Mather (1979) as well in her discussion of the lack of incentives for the defense to plead guilty in serious cases.

\textsuperscript{13} The literature examining the impact of three strikes laws pertains to the role of the maximum sentence in plea bargaining, but this research does not focus on the offense of murder nor does it necessarily address the role of life imprisonment without parole. Much of the research on three strikes laws centers on California, which has one of the harshest such laws in the country. However, the provisions of California’s law carry a maximum sentence of twenty-five years to life (not life without parole) for a third strike conviction (typical of most three strike state statutes) and severely restrict plea bargaining in three strikes cases (see Harris & Jesilow, 2000; Marvell & Moody, 2001; Olson, 2000; Ziegler & del Carmen, 1996).
compared with lesser punishments), but they do not discuss how it changes negotiations nor do they provide evidence of its impact on plea bargaining. Wright’s discussion in particular is focused on life without parole as an alternative to the death penalty; he points out that the sanction provides prosecutors with an additional tool in prosecuting murder. However, he does not provide empirical evidence for its influence on the disposition of aggravated murder cases either in states where it is the maximum punishment or in states where the death penalty is an option.

When defendants are charged with a capital crime they may be inclined to plead guilty to avoid a possible sentence of death; the charging practices of the prosecutors in Mather’s research would seem to reflect prosecutors’ perception that defendants are inclined to plead guilty (to a reduced sentence and/or charge) in capital-eligible cases, given the high risks of a trial on an aggravated murder charge. Ehrhard’s (2008) research indicates that the death penalty exerts greater leverage on defendants to plead guilty, compared to the leverage of life without parole. She found that defendants facing a maximum sentence of life imprisonment without parole were not necessarily inclined to plead guilty, but in capital-eligible cases, the threat of death was a powerful incentive to forgo the risk of a trial. The prosecutors and defense attorneys she interviewed reported that the leverage of a possible death sentence is an important plea bargaining tool at the prosecution’s disposal (pp. 14, 19). Similarly, Kuziemko’s (2006: 128) examination of plea bargaining in murder cases before and after New York’s reinstatement of its capital punishment law in 1995 found that the death penalty increased the bargaining position of prosecutors.

In his concurring opinion in *Furman v. Georgia* (1972), Justice Marshall said that
the elimination of capital punishment,

would do little to impair the State's bargaining position in criminal cases, since life imprisonment remains a severe sanction which can be used as leverage for bargaining for pleas . . . in exchange either for charges of lesser offenses or recommendations of leniency (p. 356).

The research discussed above suggests that Justice Marshall may be taking the leverage of life without parole, as compared with the leverage of the death penalty, for granted. Both of these punishments may be powerful plea bargaining tools in the prosecution’s arsenal, but the possibility of a death sentence seems to exert a more significant threat.

**The Supreme Court Addresses Plea Bargaining**

Legal and ethical concerns about prosecutors’ use of more severe sanctions as inducements to encourage defendants to plead guilty and waive their trial rights have been expressed by scholars and those in the legal community.14 However, the Supreme Court has legitimated prosecutors’ use of charging and sentencing leverage as aspects of plea bargaining.

In *Bordenkircher v. Hayes* (1978) the Court addressed the constitutionality of threats made by prosecutors. The prosecutor in the case offered the defendant, a two-time felon, a plea bargain to a sentence of five years but threatened to indict him as a multiple offender, which would subject him to a mandatory life sentence, if he pursued a trial. The defendant refused to plead guilty and was subsequently re-indicted, convicted and sentenced to life. In affirming the conviction, Justice Stewart, expressing the majority opinion, wrote:

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14 See discussion on pp. 27-28
While confronting a defendant in plea bargaining with the risk of more severe punishment may have a discouraging effect on the defendant’s assertion of his trial rights, the imposition of these difficult choices is a permissible attribute of any legitimate system which tolerates and encourages the negotiation of pleas; the simple reality that the prosecutor’s interest at the bargaining table is to persuade the defendant to forego his right to plead not guilty is constitutionally legitimate (Bordenkircher v. Hayes, 1978: 364).

Thus, the Court accepted the prosecutor’s use of his/her power as leverage to try to obtain a guilty plea from the defendant. While acknowledging that “for an agent of the state to pursue a course of action whose objective is to penalize a person’s reliance on his legal rights is patently unconstitutional,” the Court nevertheless concluded, “in the give-and-take of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution’s offer” (Bordenkircher v. Hayes, 1978: 363).

In Corbitt v. New Jersey (1978) the Court affirmed its approval of plea bargaining in Bordenkircher and upheld a statutory scheme that authorized the imposition of a harsher penalty on a defendant convicted at trial than on a defendant who entered a guilty plea. Under the New Jersey statute, a defendant found guilty of first-degree murder by a jury received a mandatory life sentence but upon a plea of guilty, may be sentenced to either life imprisonment or imprisonment for no more than thirty years. In its ruling, the

15 In Boykin v. Alabama (1969) the Supreme Court expressed concern over defendants’ understanding of their waiver of several fundamental trial rights in pleading guilty. The case involved a defendant who entered a guilty plea and, after a trial by jury to determine the punishment, was sentenced to death. The Court reversed the conviction, finding that the record failed to show that the defendant voluntarily and knowingly entered his plea. The Court said that, “A plea of guilty is more than an admission of conduct; it is a conviction. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality,” the trial judge erred in accepting the defendant’s guilty plea “without an affirmative showing that it was intelligent and voluntary” (p. 242). For a defendant’s plea to be valid, the record must demonstrate that the defendant understands his/her constitutional rights and is knowingly, intelligently, and voluntarily, relinquishing those rights (Boykin v. Alabama, 1969).
Court reiterated that a State may encourage a guilty plea by offering considerable benefits in exchange for that plea.

*Guilty Pleas and the Death Penalty*

Concerns surrounding threats in plea bargaining are particularly significant when the charges involved carry a possible death sentence. It has been suggested that the weight of a possible death sentence for a capital defendant adversely affects the voluntary nature of his plea and impedes his choice to exercise his constitutional rights (Slogan, 2000). In such situations, the defendant may, quite literally, be pleading guilty to save his life out of fear of being sentenced to death. The Court addressed this issue in *Brady v. United States* (1970), *Parker v. North Carolina* (1970), and *North Carolina v. Alford* (1970).

The defendant in *Brady* pled guilty and was sentenced to fifty years in prison for kidnapping, an offense that was punishable by death only after trial and upon recommendation by a jury. The defendant contended that his guilty plea had not been entered voluntarily but was coerced by the possibility of a death sentence if he pursued a trial. The Court affirmed the conviction, holding that “a plea of guilty is not invalid merely because entered to avoid the possibility of a death penalty” (*Brady v. United States*, 1970: 755). While a defendant’s guilty plea may be partially motivated by fear of the death penalty, it does not follow that his guilty plea is invalid. Writing for the majority, Justice White stated,

[There was no] evidence that the defendant was so gripped by fear of the death penalty or hope of leniency that he did not or could not, with the help of counsel, rationally weigh the advantages of going to trial against the advantages of pleading guilty (p. 750).
Thus, a guilty plea entered to avoid the possibility of a death sentence is not invalid so long as the record demonstrates that the plea was knowingly, intelligently, and voluntarily made.

Decided the same year as Brady, at issue in Parker v. North Carolina (1970) was a North Carolina statute that provided for a penalty of death upon conviction at trial unless a jury recommended life imprisonment, whereas a plea of guilty provided for a mandatory sentence of life imprisonment. Finding nothing to distinguish the case from Brady, the Court upheld the conviction, ruling that “an otherwise valid guilty plea is not involuntary because induced by the defendant’s desire to limit the possible maximum penalty to less than that authorized if there is a jury trial” (Parker v. North Carolina, 1970: 795).

In North Carolina v. Alford (1970), the Court was again faced with a situation in which the defendant argued that his guilty plea was induced by fear of the death penalty. Upon entering his guilty plea, the defendant in Alford stated, “I just pleaded guilty because they said if I didn’t they would gas me for it” (North Carolina v. Alford, 1970: 29). Following its decisions in Brady and Parker, the Court upheld the plea, ruling that a guilty plea entered to avoid the death penalty does not violate the Fifth Amendment if it represents “a voluntary and intelligent choice among the alternative courses of action open to the defendant” (North Carolina v. Alford, 1970: 29). Alford presented an additional issue, however, the defendant’s disavowal of guilt.

In entering his plea, not only did the defendant, Alford, cite his fear of the death penalty but also he maintained that he was pleading guilty in spite of his innocence, “I’m not guilty but I plead guilty” (North Carolina v. Alford, 1970: 29). The case thus
confronted the Court with the possibility that innocent defendants may plead guilty. Addressing Alford’s claim, the Court stated that there is no constitutional violation in accepting a guilty plea by a defendant who maintains his innocence, provided there is strong evidence before the court of his factual guilt.

In denying Alford’s claim that his plea was invalid because it was motivated by fear of the death penalty, the Court closely followed its ruling in Brady. The Court’s rulings in Brady, Parker, and Alford reflect an acceptance of plea bargaining in the face of death. However, the Court has never truly reconciled its decisions in these cases with its decision in a case that preceded them, United States v. Jackson (1968).

At issue in Jackson was the Federal Kidnapping Statute (the same statute under which Brady had been charged), which authorized a jury, and only a jury, to impose a sentence of death upon a capital defendant. Under the sentencing scheme, a judge could not impose a sentence of death after a bench trial, and a defendant could not plead guilty to a sentence of death. Thus, defendants who asserted their right to a trial by jury faced a possible execution, while those who waived this right, did not. The Supreme Court held the sentencing scheme unconstitutional (United States v. Jackson, 1968).

Writing for the majority, Justice Stewart said that the effect of the statute was to “needlessly chill the exercise of basic constitutional rights” and “needlessly encourage” guilty pleas and jury waivers (United States v. Jackson, 1968: 582-583). He drew a distinction between necessary coercion and needless encouragement (Littrell, 1979):

the evil in the federal statute is not that it necessarily coerces guilty pleas and jury waivers but simply that it needlessly encourages them. A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right (United States v. Jackson, 1968: 583).
Justice Stewart’s opinion seems to reflect a concern that the death penalty facilitates plea bargaining and affects the voluntary nature of guilty pleas by capital defendants (Slogan, 2000). This concern was largely dismissed in Brady and subsequent cases. The apparent contradiction between these cases and Jackson may be understood as the distinction between the constitutionality of a statute and the constitutionality of a process. In Jackson, the Court held that a statute that needlessly encourages guilty pleas in the face of death is invalid, whereas in Brady, the Court held that a process that encourages defendants to plead guilty in the face of death is constitutionally permissible, provided the record demonstrates the plea was entered knowingly and voluntarily. The statutory scheme at issue in Corbitt was similar to that in Jackson, but, as the Court pointed out in its ruling, did not involve the death penalty and therefore “the pressures to forgo trial and to plead to the charge in this case are not what they were in Jackson” (Corbitt v. New Jersey, 1978: 217).

While the cases since Jackson would seem to have put the issue of plea bargaining and the death penalty to rest, thirty years after Jackson was decided, at least one state court identified a Jackson problem with respect to plea bargaining in the face of a potential death sentence. In Hynes v. Tomei (1998) the New York Court of Appeals, the state’s highest court, ruled the provision of New York’s death penalty statute that allowed defendants to ensure a maximum sentence of less than death by pleading guilty after a death notice had been filed, unconstitutional. The statute provided for the imposition of the death penalty only upon a jury verdict, and therefore only those defendants who did not plead guilty and who exercised their Fifth and Sixth Amendment rights and pursued a trial were subject to a sentence of death. The Court held that, “the New York provisions
are unconstitutional for the same reason as the Federal Kidnaping Act [the statute at issue in *Jackson*]: by statutory mandate, the death penalty hangs over only those who exercise their constitutional rights to maintain innocence and demand a jury trial” (*Hynes v. Tomei*, 1998: 626). \(^{16, 17}\) This case indicates that questions concerning the use of the death penalty as an inducement in plea bargaining may yet remain.

**The Costs and Benefits of Plea Bargaining in Death-Eligible Cases**

As mentioned earlier, concerns about prosecutors’ use of more severe sanctions as threats to encourage defendants to plead guilty have been expressed by those in the legal and research communities. Critics of the practice assert that any offer that allows a defendant to avoid the threat of more severe prosecution induces or coerces his choice to plead guilty (see Guidorizzi, 1998; Langbein, 1978). Indeed, critics argue that the very offer of consideration in return for a guilty plea is itself an inducement that places a burden on the right to trial by undermining the defendant’s choice to invoke it (Littrell, 1979).

Littrell (1979) suggests that the choice to enter a guilty plea is really not a choice at all, and the element of coercion is implicit in the plea bargain itself. Quoting the *Harvard Law Review* (Note, 1970: 1397), he writes, “A guilty plea induced by a bargain occurs because the state has structured the outcome so that the defendants will choose not to go to trial.” “By structuring alternatives in this way,” the meaning of “choice” is transformed “to include ‘forced choices,’ which is coercion poorly disguised” (Littrell, 1979).

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\(^{16}\) The Court ruled that a defendant may not plead guilty to first-degree murder while a notice of intent to seek the death penalty is pending. The ruling did not however, prohibit guilty pleas to lesser degrees of murder while a notice is pending nor did it prohibit guilty pleas to first or lesser degrees of murder when no notice of intent to seek the death penalty is pending because “defendants in that situation face the same maximum sentence regardless of how they are convicted” (*Hynes v. Tomei*, 1988: 629).

\(^{17}\) The New York death penalty statute was declared unconstitutional in 2004 (see *People v. LaValle*).
The concern with coercion is not only that it is implicit in the plea bargaining process but also that prosecutors may inappropriately use their discretion to threaten defendants with additional charges and a more severe sentence if they do not plead guilty. The process of plea bargaining itself has further been criticized as a vehicle for determining defendants’ guilt and punishment without full investigation, without testimony and the presentation of evidence, and without the involvement of an impartial judge of the facts and of the processes through which evidence was obtained (Scott & Stuntz, 1992). Accordingly, in pleading guilty, defendants relinquish their constitutional rights to due process, to a speedy and public trial by an impartial jury, their right to be confronted with the witnesses against them, their right to compulsory processes for obtaining witnesses in their favor, and their right not to incriminate themselves (see United States Constitutional Amendments V, VI, and XIV).

It is important to note however, that in exchange for giving up these rights, defendants are sometimes rewarded with more lenient sentences than they would receive had they pursued a trial and been found guilty (Alschuler, 1981). Thus, while the certain conviction resulting from a guilty plea is not, in and of itself, a benefit to the defense, the certainty of a sentence less than the maximum possible if convicted at trial, is. Yet one of the primary criticisms of plea bargaining remains, that the threat of a harsher sentence upon conviction at trial unfairly encourages defendants to forgo their trial rights (Scott & Stuntz, 1992); this concern is paramount when that threat involves a death sentence.

**Guilty Pleas By Non-Deathworthy Defendants**

The influence of the death penalty on plea bargaining is of particular concern as it pertains to the possibility that the death penalty may serve to induce pleas by
defendants who, though guilty of capital murder, are not representative of cases for which the death penalty is typically imposed. In *Gregg v. Georgia* (1976), the Supreme Court expressed concern that the death penalty may be applied in cases where it is “excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant” (p. 167). Thus, while a particular case may meet the statutory requirements for death eligibility, the circumstances and mitigating factors involved may differentiate it from those cases where death sentences are commonly imposed; in such a case, the death penalty might be considered excessive. Using the threat of the penalty to induce a guilty plea in a case where a death sentence is not typically imposed, one that is not deathworthy, is arguably inappropriate.

In their study of capital sentencing in Georgia, Baldus et al. (1990) examined life and death sentenced cases involving jury trial convictions for capital murder. On the basis of the presence of statutory and non-statutory aggravating and mitigating factors they developed a “culpability index” with levels ranging from “least culpable” to “most culpable.” They then examined the proportion of cases in each level that resulted in death and life sentences. They classified death sentences as excessive if the frequency with which death sentences were imposed in other cases identified as similar (those within the same culpability level) was less than .35; death sentences were considered proportional (or at least not excessive) if the death sentencing rate among similar cases exceeded .80 (p. 60).

They found that the death sentencing rate was greatest for cases at the highest culpability levels. However, they also found that nearly one half of all death sentences fell within groups of similar cases in which the death penalty was not frequently imposed.
These are cases where a death sentence could be considered excessive, or at least where its appropriateness could be questioned.

More specific analyses of armed-robbery murder cases revealed that the lowest and highest culpability levels corresponded with the lowest and highest rates of death sentences (.07 and .85 respectively). However, about 25% of the death sentences were imposed in cases where the death sentencing rate among similar cases was less than .35, and about 60% of the death sentences were imposed in cases where the rate was more than .35 but less than .80. In only the most extreme cases (those at the highest culpability level) did the sentencing rate exceed .80. Baldus et al. also found that there was not a steady increase in the proportion of death sentences within the middle range culpability levels; the death sentence rates varied in a non-linear pattern.

More recent research by McCord (2005) produced similar findings. McCord looked at all death-eligible cases across the United States with a sentence outcome in 2004. On the basis of statutory and non-statutory aggravating factors listed in news reports, he created a “depravity point calculator” to categorize the aggravation level of each case. He then looked at the death sentencing rate among cases in each level. He found that although the rate did increase as depravity level increased, the relationship was not a strictly linear pattern, with cases at lower levels sometimes having greater death sentencing rates than cases at higher levels (p. 847).

Importantly, Baldus et al. (1990) point out that their analyses are limited to defendants convicted of capital murder at trial; their findings “do not reflect the impact of pretrial prosecutorial charging and plea bargaining decisions that may have enabled highly culpable offenders to avoid the risk of a death sentence” (p. 98). Accordingly,
McCord’s (2005) research found cases in the highest depravity levels where prosecutors elected not to pursue death sentences (see p. 53 for a discussion of the prosecutors’ reasons for their decisions). Conversely, charging and plea bargaining decisions may result in death sentences for the least culpable offenders. If the death penalty acts as leverage to induce a plea of guilty and is used for such a purpose, there is a risk that those offenders who are not deathworthy will nevertheless be sentenced to death if they refuse to plead guilty and are then convicted at trial. Baldus et al. (1990) and McCord (2005) both found death sentences being imposed in cases having the lowest culpability/depravity levels.

Arguably, death sentences in such cases might subsequently be reviewed on appeal and found to be disproportionate to sentences imposed in similar cases. This is the core of comparative proportionality review, which the Supreme Court endorsed in *Gregg v. Georgia* (1976). Conducted by a state appellate court, usually the state court of last resort, it is a process involving the comparison of a death sentence in a particular case with sentences imposed in factually similar cases in order to determine whether the sentence is fair or proportionate. If other defendants in similar cases are not sentenced to death, the sentence is disproportionate; the case is not deathworthy (Bienen, 1996; Latzer, 2001). Importantly, while the Court has endorsed this process, it has refrained from setting standards to guide it and has also refrained from requiring it of the states (or the federal government) (see *Pulley v. Harris*, 1984). As a result, not all state courts conduct proportionality review, and those that do, tend to conduct only minimal proportionality review; in her analysis of the process, Bienen (1996) argues that the courts have become “factories for affirmances” (p. 154).
The absence of standards governing the process, particularly the identification of potentially “similar” cases for comparison, means that state courts conducting proportionality review adopt their own criteria for identifying comparison groups of similar cases, and, as one might expect, these criteria vary from one state to another. In Georgia for example, factually similar cases are drawn from cases in which death sentences, and sometimes life sentences, were imposed (Bienen, 1996; Latzer, 2001). On the other hand, in Ohio, the subject of the proposed study, the universe of cases for comparison is limited to those in which a death sentence was imposed (Bienen, 1996). Both of these procedures exclude from comparison those cases that may have been indicted capitally but were not and those that were indicted capitally but were not pursued to trial, including cases that were plea bargained (Latzer, 2001). By excluding from review factually similar death-eligible cases that were plea bargained, there is no review of prosecutors’ indictment decisions and decisions to pursue capital charges to trial compared with their indictment decisions and decisions to pursue a plea bargain. This is of particular concern if cases that are being plea bargained, based in part, on the threat that a capital sentence will be sought, disproportionately fall in the mid and lower levels of culpability.

When prosecutors initially charge a case capitally in order to improve their position in plea bargaining, the defendant may be bargaining down from a charge that is excessive or inappropriate. As previously noted, Mather (1979) identified such charging practices in her study of the plea bargaining process. Similarly, Bowers, Pierce, and McDevitt (1984) pointed to prosecutors’ use of their discretion to upgrade criminal homicide charges by alleging an aggravating felony circumstance or charging the
defendant with an additional, accompanying felony so that the crime qualified as a death-eligible offense. Such cases may involve offenders who, though death-eligible, are not deathworthy. Radelet and Pierce (1985) found evidence of such charging practices in their study of prosecutorial discretion in homicide cases. Their analysis revealed that, in order to induce plea bargains, prosecutors upgraded evidence in homicide cases so that the crimes met the requirements of death eligibility (p. 611). Such a practice could induce defendants who are not truly deathworthy to plead guilty to avoid being sentenced to death if convicted at trial.

Bedau (1982) points to an additional concern of plea bargaining in capital cases, that of guilty pleas by defendants who not only are unworthy of capital sentences but who are not guilty of capital murder, let alone any murder:

The possibility of plea bargaining places the defendant who believes he is innocent, or at least innocent of first-degree murder, in an acute dilemma. If he pleads not guilty to all charges, as he has a right to do, then he runs the greatest risk of the death sentence; if he pleads guilty to a lesser charge, he guarantees himself a prison sentence whether he deserves it or not (Bedau, 1982: 190).

While there is little evidence that innocent defendants plead guilty to avoid more severe prison sentences (see Bagaric & Brebner, 2002; Gross, 1996), innocent defendants occasionally plead guilty to avoid death (Gross, 1996). In their research on wrongful convictions between 1900-1991, Radelet, Bedau, and Putnam (1992) documented sixteen cases where capital defendants pled guilty in spite of their innocence; most defendants indicated fear of execution as the reason for their plea (see Gross, 1996; Radelet et al., 1992).  

18 This is not to imply that innocent defendants (distinguished from defendants claiming to be innocent) do not plead guilty but merely to note that there has been little empirical research done to conclusively determine that this occurs and to establish the frequency with which it does.
The Conservation of Resources

Whether innocent or not, defendants most certainly have incentives to plead guilty. Indeed, in *Brady*, the Supreme Court recognized this, pointing out that plea bargaining enables defendants to limit the possible penalty and eliminate the practical burdens of a trial. The possibility of a sentence less than the maximum is an important consideration of defendants in deciding whether to plead guilty or pursue a trial (Baldwin & McConville, 1977; Casper, 1972). This consideration is particularly important in aggravated murder cases where punishments may involve sentences as great as life without parole and is especially significant in capital murder cases, where the certainty of a sentence less than death is a difficult choice to refuse, even for the defendant who is not deathworthy and/or who is innocent of murder.

A guilty plea in a capital case may be a difficult choice for the State to refuse as well. Whether or not a prosecutor charges a crime as capital with the intention of inducing a guilty plea, over time, he/she may come to realize the benefits of a plea bargain versus a trial. In *Brady*, the Court also pointed out the benefits of plea bargaining to the State, noting that plea bargaining allows for the conservation of scarce judicial and prosecutorial resources. Indeed, plea bargains are a cost effective and efficient means of case disposition (Cole, 1975; Rhodes, 1979). While murder trials are expensive and time consuming, capital murder trials are particularly costly. The drain of the death penalty on the resources of the judicial system is well understood and well documented (see Bohm, 2003 and Dieter, 2005 for reviews of cost studies); plea bargains in such cases relieve the State of substantial costs that would otherwise be incurred if a capital trial were pursued.

19 Beyond the defendant’s fear of being sentenced to death in spite of his/her innocence, these cases share few similarities in terms of geography, race, or other factors. They occurred both pre and post *Furman*, and in many, the defendant was pardoned when evidence of the real culprit was obtained (Radelet et al., 1992).
Death penalty cases are more expensive at every stage of the judicial process, from increased investigation costs, to longer and more intensive trial proceedings, to appellate review. The need for expert witnesses for both the trial and mitigation phases; the jury selection process, which has been estimated to take up to 5.3 times longer in capital than in non-capital cases (Brooks & Erickson, 1996; Garey, 1985: 1257); and the increased numbers of motions filed (Garey, 1985) are just a few examples of the many ways in which capital cases place an administrative and financial strain on the judicial system.

Additionally, it is important to note that many of the costs associated with the death penalty are accumulated up front, especially at trial and for the early appeals, while the costs of imprisoning someone for life are spread out over a few decades (Dieter, 2005). Thus, as Dieter points out, “A million dollars spent today is a lot more costly to the state than a million dollars that can be paid gradually over 40 years” (Dieter, 2005: 3). These costs especially burden local governments, which often bear the brunt of the expenses (Dieter, 1994; Douglas & Stockstill 2008). Some counties have been pushed to near bankruptcy (Deiter, 1994), and many are forced to raise taxes and decrease spending on police protections (Baicker, 2004) in order to cope with the financial impact of a capital case.

While the research clearly demonstrates that capital cases are more expensive than non-capital murder cases, in estimating cost comparisons, the studies fail to take into account the effect of plea bargaining on reducing costs. There is a potential cost savings in using the death penalty as a threat to elicit a guilty plea and avoid a trial. In similar cases where the death penalty is not a threat, defendants may be less inclined to plead
guilty. Research cited earlier indicates that while defendants may not be willing to go to
trial and risk their lives for the chance of being acquitted, they may very well be willing
to risk a long (perhaps life) sentence of imprisonment.

At best, some of the literature on cost recognizes the possibility that the death
penalty may elicit a savings in cost (Bohm, 2003; Dieter, 2005). However, this possibility
is largely rejected without evidence one way or the other. For example, Brooks and
Erickson (1996) say that the death penalty may give the prosecutor leverage with which
to obtain a guilty plea but that it is not often used this way. They cite no evidence in
support of this conclusion, merely pointing to a study in Maryland that showed that out of
104 defendants charged with first-degree murder, only two pled guilty to the charge. We
do not know how many defendants avoided trial by pleading guilty to a lesser charge
(The Report on the Governor’s Commission on the Death Penalty, An Analysis of Capital

In their study of the cost of capital cases in North Carolina, Cook and Slawson
(1993) provide evidence for the occurrence of guilty pleas in capital cases, but they do
not take this cost savings into account in any of their analyses.20 Similarly, a study
estimating the cost of capital punishment in Kansas (State of Kansas, 2003) notes that
there may be savings from trials avoided because capital (or potentially capital)
defendants plead guilty to a lesser charge, but the study does not take this potential cost
savings into account in its analysis.

In reviewing the literature on the financial expense of the death penalty and
dismissing the cost savings argument, Dieter (2005) points to the research in North

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20 Cook and Slawson may not have considered cost savings because at the time of their study, the Supreme
Court of North Carolina limited sentence bargaining in capital murder cases, though as the authors note,
this does not mean that no plea bargaining in the face of death occurred.
Carolina and Kansas, saying these studies considered the cost savings factor to be speculative and notes that “if this was the avowed purpose of the death penalty, it is doubtful that the courts would uphold the constitutionality of such an intentional interference with the right to trial” (p. 4). However, based on the discussion of Bordenkircher, Brady, and Alford presented earlier, it would seem that the Supreme Court would accept the constitutionality of the death penalty being used as leverage, acknowledging in Bordenkircher the use of prosecutorial threat, recognizing in Brady the cost effectiveness of plea bargaining, and ruling in Alford that fear of the death penalty does not necessarily invalidate a plea.

A Plea Solution to an Economic-Political-Social Conundrum. Resource concerns are not only economic in nature but can be political and social as well (Rhodes, 1979). The plea bargaining process is shaped by the environment in which the attorneys and their organizations function (see generally Eisenstein & Jacob, 1977; Nardulli, 1978; Nardulli, Eisenstein, & Flemming, 1988). The district attorney is typically an elected official, and the most tangible measure of his/her success and that of his/her office is the conviction rate (Alschuler, 1968). Additionally, while the public pays little attention to the processing of most criminal cases (Nardulli, Eisenstein, & Flemming, 1988), those that are unusual and/or rare occurrences are likely to generate publicity. In such cases, the expectations of local politicians and community members regarding conviction and sentence may be of particular influence (Nardulli, 1978).21, 22

21 For a more recent discussion of the influence of the social and political context on sentencing decisions see Johnson (2003), Kramer & Ulmer (2002), Steffensmeier, Ulmer & Kramer (1998), Ulmer & Bradley (2006), and Ulmer & Johnson (2004).
22 Among the many factors thought to influence sentencing, race, class, and gender (of the defendant and also of the victim) have received a great deal of attention, particularly the role of race, for which the findings are mixed. While much research indicates that the effect of race is contingent on the interaction of race with other variables (such as prior record, offense type, gender, and employment status), some studies
Accordingly, Baldus et al. (1990: 112) suggest that political pressures and public opinion may influence prosecutors’ decisions of which murder cases to pursue to a death sentence. In determining whether to pursue a guilty plea or a trial, the prosecutor must weigh the financial, political, and social costs of a trial against the certainty of a conviction through a plea bargain, albeit to a lesser charge and/or sentence. These considerations may be heightened during election years and are especially important in cases that garner the attention of the media and the community.

Over twenty years ago Garey (1985) argued that prosecutors would be dissuaded from plea bargaining in capital cases since doing so would involve reducing the charge or promising a lighter sentence and would render the case non-capital. However, it is important to recognize the risks inherent in capital prosecutions and that the death penalty today may not be the potent political issue it once was. In large part, a belief in capital punishment remains associated with a “tough on crime” political platform, but increasing concerns over the costs of executions and other issues have tempered this traditional linkage.

Governors and legislatures across the country have called for reviews of their capital punishment systems. For example, in 2003, then Governor George Ryan commuted the sentences of all Illinois death row inmates. While maintaining that he

reveal a race effect independent of other variables, and other studies reveal no race effect at all (see generally Spohn, 2000; Zatz, 2000; see also Crawford, Chiricos, & Kleck, 1998; Kramer & Ulmer, 2002; Meithe & Moore, 1985; Myers & Talarico, 1986; Spohn & Cederbloom, 1991; Spohn & Holleran, 2000; Steffensmeier, Ulmer, & Kramer, 1998). Where race effects are found, they may be due in part to class effects, although the effect of socio-economic status is difficult to measure and is often based only on employment status (see generally Spohn, 2000; Zatz, 2000; see also Chiricos & Bales, 1991; Meithe & Moore, 1985; Spohn & Holleran, 2000). Of particular relevance to the current study, race of victim has been found to influence sentencing in capital murder cases; defendants charged with killing white victims are more likely to receive a death sentence than those charged with killing blacks (Baldus et al., 1990; Paternoster, 1984; Radelet & Pierce, 1985). Research on the effect of gender generally finds that women receive more lenient sentences than men (see generally Daly & Bordt, 1995; Zatz, 2000; see also Daly, 1989; Farnworth & Teske, 1995; Kramer & Ulmer, 2002).
supports the death penalty, the Governor expressed concerns over problems in its administration, particularly the risks of executing an innocent person. Similarly, in his 2004 proposal for a moratorium on executions in New Jersey, then Governor Richard Codey cited the need to determine whether the state’s death penalty system is fair and also cost effective (Death Penalty Information Center, 2007).

While support for the death penalty remains high, counties are coming to question the value of a capital prosecution at the cost of higher taxes and potential bankruptcy (Dieter, 1992). Given these concerns, using the death penalty as leverage to induce a guilty plea may provide prosecutors with the ideal solution to the Catch-22 of wanting to appear tough on crime but not wanting to exhaust the county’s budget. By threatening the death penalty, the prosecutor exhibits a belief in the worst punishment for a most heinous crime, a belief that members of an affected community may demand. However, by inducing a guilty plea, the prosecutor saves his/her county the cost of a capital murder trial, and importantly, also saves his/her county the cost of a non-capital murder trial. In an era of growing concern for the human (in terms of the risk of executing an innocent person) and financial costs of capital punishment, a community’s calls for a death sentence may be satisfied by a plea bargain to a life sentence. While Americans support the death penalty, increasingly, they also support the alternative of life without parole; a plea bargain provides this without the expense of a murder trial.

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23 A 2006 Gallup Poll found that, when asked, “Are you in favor of the death penalty for a person convicted of murder?,” 65% of Americans favor the death penalty (Pastore and Maguire, 2006: Table 2.51).

24 A 2006 Gallup Poll found that, when given a choice between the sentencing options of life without parole and the death penalty, 47% of respondents favored capital punishment; 48% favored life without parole (Pastore and Maguire, 2006: Table 2.49).
Pursuing Death

Factors Influencing Plea Bargaining

Prosecutors’ decisions to pursue a plea bargain or to pursue a trial in death-eligible cases may be influenced by economic, political, and social considerations, but other factors may come into play as well. The strength of the prosecution’s case, the seriousness of the offense, and the criminal history of the defendant are the three primary factors commonly cited by researchers as shaping the plea bargaining process (Neubauer, 1974; McDonald, Rossman, & Cramer, 1979; Mellon, Jacoby, & Brewer 1981).

The strength of the prosecution’s case is evaluated in terms of the amount and nature of the evidence against the defendant and also in terms of how the evidence is likely to be perceived by a judge and jury (Neubauer, 1974). In capital cases, this has to do with evidence of guilt or innocence and also evidence of aggravating and mitigating circumstances; while the evidence may point to a conviction, concerns about the likelihood of a jury voting for a death sentence may influence the prosecution to pursue a plea bargain.

In evaluating the seriousness of the offense, prosecutors and defense attorneys consider the circumstances of the crime (Mather, 1979; McDonald et al., 1979 in McDonald, 1979). This includes such factors as the heinousness of the crime (Hessick & Saujani, 2002), the relationship between the defendant and the victim, and the “blameworthiness” of the victim (including the victim’s role in the crime and also his/her identity and reputation etc.) (Dawson, 2006; Mather, 1979; McDonald et al., 1979).

The criminal history of the defendant reflects the number and nature of the defendant’s prior convictions (Emmelman, 1996: McDonald et al., 1979). Other
characteristics of the defendant may be considered in plea bargaining as well, including age, level of education, employment background, drug and/or alcohol use, psychological problems, family background, demeanor, and expression of remorse and responsibility (Hessick & Sajani, 2002; Heumann, 1977; Mather, 1979; McDonald et al., 1979). Evidence of aggravating and mitigating circumstances also may shape prosecutors’ inclinations to plea bargain in capital cases; if there are concerns that a jury may not vote for a death sentence, the prosecutor may wish to avoid the expense of a capital trial and seek to obtain a life sentence through a plea bargain.

While these are the three primary factors that shape the plea bargaining process, they are, of course, not the only ones. Numerous other factors, such as the policy of the prosecutor’s office (Eisenstein & Jacob, 1977; Nardulli, Flemming, & Eisenstein, 1984), the involvement of the judge (Heumann, 1977; Utz, 1978), and the quality and reputation of the prosecutor and defense attorney, their motives and their relationship with each other (Alschuler, 1968; McDonald et al., 1979) influence the plea bargaining process as well. Scholars have also suggested that the type of defense attorney (assigned or privately retained) may play a role (see for example, Alschuler, 1975, Eisenstein & Jacob, 1977; Skolnick 1967), though the findings are mixed. An additional, crucial influence on this process is the defendant; some cases may go to trial because the defense attorney and his/her client cannot agree on a plea bargain (Mather, 1974; Sudnow, 1965).

25 Worden (1991) states that the research has been inconclusive and sometimes unsystematic. Where differences between types of attorneys are found, they may be due to differences in caseload, client characteristics, and other factors unrelated to the skill or ability of the attorney (Bazelon, 1973; Mather, 1979; Nardulli, 1986; Worden, 1991).

26 For a discussion of prosecutors’ consideration and management of numerous factors in decision making (particularly the decision to pursue a trial or a plea bargain), see Albionetti (1986, 1987). She argues that complete information about these numerous factors is not always known and may change over time, thus decisions are made with a degree of uncertainty. Prosecutors manage this uncertainty by limiting the
The strength of the evidence, the attractiveness of the plea offer weighed against the severity of the sentence if convicted at trial, and the likelihood of being convicted or sentenced harshly influence the defendant’s decision to accept a plea or pursue a trial (Baldwin & McConville, 1977; Casper, 1972). These factors influence the defense attorney as well, but the defendant may view them differently. For some defendants, the fear of a harsher sentence upon being convicted at trial may be incentive to plead guilty and may be incentive to plead guilty early; the weariness and social and psychological disruptions caused by the case dragging on is a consideration for some defendants not to pursue a trial. On the flip side however, other defendants, particularly those with extensive prior criminal records, may wish to “work the system” and intentionally wait to accept a plea offer until close to trial, if they plead guilty at all (Baldwin & McConville, 1977).

These factors are important in shaping the plea bargaining process in criminal cases. However, we know little about the influence of these considerations in murder cases; much research on plea bargaining focuses on felony cases more generally (see for example, Church, 1985; Eisenstein, Flemming, & Nardulli, 1988; Eisenstein & Jacob, 1977; Emmelman, 1996; Farr, 1984; Mather, 1979; Nardulli, Eisenstein, & Flemming, 1988). Although these studies often involve samples that include the offense of murder, they are not confined to an analysis of murder cases, let alone aggravated murder cases. Some research looks at the relationship between type of disposition (guilty plea or trial) and type of crime, finding that defendants charged with murder are less likely to plead

amount of information they consider in determining the appropriate course of action, a strategy Albonetti identifies as uncertainty avoidance.
guilty than defendants charged with other felonies (Eisenstein & Jacob, 1977; McCarty & Lindquist, 1985; Uhlman & Walker, 1979). However, these studies do not examine the reasons underlying such results.

A recent study by Briody (2004) examined the factors that influence the disposition (guilty plea versus trial) of homicide cases in Australia. He found that the seriousness of the offense (measured by whether the offense was murder or manslaughter) was a significant predictor of a guilty plea; guilty pleas were more likely in cases of manslaughter. Also significant were the defendant’s age (the older the defendant, the less likely the case would result in a guilty plea), the defendant’s race (cases where the defendant was indigenous were more likely to end in guilty pleas), and whether or not the defendant made a statement to the police (cases where the defendant did not make a statement or refused an interview were more likely to end in guilty pleas) (p. 246).

Haynie and Dover (1994) and Pritchard (1986) also examined the factors that influence the disposition of homicide cases. Haynie and Dover (1994: 376) found that trials were more likely in cases where the offender was a minority and the victim was white. The age of the defendant and the victim was significant as well; the older the offender and also the younger the victim, the more likely the case would proceed to

27 Eisenstein and Jacob do not examine murder cases specifically, but in one of the counties studied, they provide a distribution of the offenses to which defendants pled guilty; this distribution shows that guilty pleas occur less frequently in murder cases, as compared with other offenses.
28 The studies reveal the frequency of pleas for different offenses but the authors do not conduct separate analyses of the disposition process for these offenses, instead including type of crime as an independent variable predicting disposition type.
29 Briody (2004) attributes the greater likelihood of guilty pleas in less serious homicide cases to the requirement of a mandatory life sentence for murder, which prohibits prosecutors from offering defendants any reduction in sentence in exchange for a plea to that offense.
Unlike Briody (2004) and Haynie and Dover (1994), Pritchard’s analysis examined whether the prosecutor engaged in plea negotiations, not whether the case was disposed of with a plea bargain or a trial. He found that negotiations were more likely in cases where the offender and the victim knew each other, where the defendant had no prior record, where the charges were less serious (a lesser homicide charge versus a charge of first-degree murder), and where only one charge was involved (p. 151).

While these studies address plea bargaining in murder cases, their samples include both murder and less serious homicides. Findings indicate that the seriousness of the crime affects plea bargaining, but separate analyses examining the factors that influence plea bargaining in murder cases alone were not conducted. Accordingly, if plea bargaining is affected by the seriousness of the crime, then it is important to separate murders, specifically aggravated murders, from lesser homicides.

Existing research provides some insight into plea bargaining in murder cases but does little to inform our understanding of the factors that influence plea bargaining in the most serious homicide cases. The prosecutor’s option to pursue a sentence of life without parole (in a non-death penalty jurisdiction) or a sentence of death in an aggravated murder case may (or may not) influence the plea bargaining process. Unfortunately, systematic research exploring the factors that influence the plea bargaining process in death-eligible cases and the ways, if any, in which the possibility of a death sentence affects the decisions of prosecutors, defense attorneys, and defendants is largely lacking.

Haynie and Dover (1994) did not control for the seriousness of the offense, though their measure of homicides includes both murder and voluntary manslaughter.
Factors Influencing Charging in Death-Eligible Cases

While there has been little attention to plea bargaining in capital cases, research has addressed prosecutors’ decision to file and pursue capital charges. As discussed earlier, prosecutors’ discretion in charging is closely intertwined with their decisions in plea bargaining. Research examining the factors that affect prosecutors’ charging decisions in death-eligible cases may therefore provide some insight into the factors that influence decisions in plea bargaining.

Bentele (1985) interviewed Georgia prosecutors in the 1980s about the factors on which they based decisions to bring capital charges. Her research indicated that prosecutors considered the extent to which the defendant premeditated the crime, the brutality of the murder/whether the defendant displayed a “total disregard for human life,” and the status of the victim; prosecutors also pointed to consideration of mitigating factors (pp. 619-620). In their analyses of death sentencing in Georgia, Baldus et al. (1990: 127) found similar factors to be significant in explaining the exercise of prosecutorial discretion. Similarly, in a recent study of chief prosecutors in South Carolina, Douglas and Stockstill (2008: 327) found that charging decisions in capital cases were influenced by the egregious nature of the crime. It is also notable that a few prosecutors (their sample was relatively small) in their study pointed to their consideration of the quality of the evidence, the defendant’s background, and the wishes of the victims’ families.

Two additional factors reported by the prosecutors in Bentele’s study should be noted: concerns about the cost (time and money) of capital trials, and the public’s

31 Most of these studies focus on the role of race (finding that black offenders with white victims are most likely to have capital cases sought and pursued against them) but control for other factors. It is the significance of all of these factors, not specifically race, which is of interest here.
reaction to the crime (p. 617, 619). In the earlier discussion, it was suggested that prosecutors’ plea bargaining decisions may be affected by economic and social (community) concerns; Bentele’s research highlights the importance of these factors in the charging decision.

Paternoster’s (1983, 1984) work in this area is among the most well known. He found that prosecutors were more likely to seek the death penalty in cases where there are multiple offenders and/or multiple victims, where the victim/s are white, where the victim/s are female, where the victim/s and the offender are strangers, and where the victim/s was killed with a gun (1983: 769-770; 1984: 464-465). He also found a positive and significant association between the number of statutory and non-statutory felonies accompanying the homicide prosecutors’ decision to seek the death penalty (1984: 464, 465). Additionally, he found evidence of geographic disparity, with prosecutors in rural areas more likely to seek the death penalty than those in urban areas (1983: 780), a finding reported by Songer and Unah (2006: 196) as well.

Bienen et al. (1988: 193-194) also point to geography, finding that the decision to pursue a death penalty is influenced by the policy of the prosecutor in the particular county where the homicide occurred. In Paternoster et al.’s (2004) examination of death-eligible cases in Maryland from 1978-1999, the role of location is highlighted as well; they suggest that a prosecutor may decide not to seek a death sentence because of the potential cost to the particular county. They also suggest that the wishes of the victims’ family and the probability that a jury would return a death sentence influence this decision (p. 17).

32 In neither of these studies were influences of the strength of the prosecution’s case or the defendant’s prior record examined. Paternoster acknowledges this as a limitation but argues that his findings cannot be attributed to these variables.
In their study of prosecutorial decisions in homicide cases, Radelet and Pierce (1985) examined the factors that are associated with prosecutors upgrading a police department’s initial classification of a homicide as non-capital, to a capital crime (and the converse). They found that prosecutors were more likely to upgrade a homicide to capital murder in cases involving white victims (for both black and white offenders), in cases involving more than one offender, and in cases where the victim and the offender were strangers. Prosecutors were less likely to upgrade homicide charges in cases involving young defendants (those under 20 years of age), in cases involving the use of a gun, and in cases where the victim and the offender were related (p. 608).

Sorensen and Wallace (1999) took a more comprehensive approach, analyzing prosecutorial decisions at three points in the pretrial stages of the processing of potentially capital cases: the decision to charge first-degree murder, the decision to file a notice of intent to seek the death penalty, and the decision to advance the case to a capital trial. They found that the following circumstances significantly increased the likelihood that a case will advance through the stages of pretrial decision making: cases involving black offenders and white victims, multiple victims, death by gunshot or asphyxiation, torture/mutilation, and cases where the defendant had prior assaultive convictions. In contrast, the following factors significantly decreased the likelihood that a case will advance: cases involving only one offender, cases where the offender was female, young (under 18 years of age), and those where the offender was intoxicated (p. 574).

These studies are important, as they provide insight into prosecutorial decision making during the pretrial stages of death-eligible cases. This research may serve to inform an exploration of the decision to pursue a guilty plea or a trial in such cases.
However, because these studies did not examine this decision specifically and because most controlled for a limited number of predetermined factors, their contribution to an understanding of this decision and of the plea bargaining process in death-eligible cases more generally, is limited.

Factors Influencing Plea Bargaining in Death-Eligible Cases

Two relatively recent studies have focused on plea bargaining in death-eligible cases. Kuziemko (2006) examined plea bargaining in murder cases in New York before and after reinstatement of its capital punishment statute in 1995. She compared the frequency of pleas in murder cases from 1985-1998, controlling for the defendant’s race, sex, age, and number of prior felony convictions; she also controlled for county level variation in prosecutors’ pursuit of death sentences (suggesting that defendants’ propensity to plead may be affected by the aggressiveness of the prosecutor). To control for the possibility that the new law was a reflection of a toughening stance on criminal defendants more generally, she employed a control group of defendants arrested for burglary, forcible rape, or armed robbery, examining the frequency of pleas in these cases during the same time period.33

Kuziemko found that after reinstatement of the death penalty statute, murder defendants were more likely to plead to the original charge but less likely to plead to a reduced charge, suggesting that defendants’ may accept pleas to sentences that would otherwise be rejected were it not for the threat of capital punishment (p. 127). “These results indicate that DAs gained bargaining power in murder cases after April 1995.

33 The change in the law coincided with the election of a Republican governor, who ran largely on a “get-tough-on-crime” platform. Kuziemko suggests that the new law therefore may be part of an overall trend towards increased severity in dealing with criminal defendants and thus controls for the possibility that any change in the propensity of murder defendants to plea bargain is not a direct result of the change in the death penalty statute but a result of more broad changes that also impact plea bargaining in other felonies.
[when the law was passed\textsuperscript{34}], because defendants seem more willing to accept harsher
deals and less likely to receive generous ones [through charge bargains]” (p. 128).\textsuperscript{35}

Although Kuziemko’s findings are interesting and shed light on an understudied

topic, her conclusions should be viewed with caution. She controlled for a number of

factors that may be related to the possibility of a plea bargain. However, with one

exception, she did not control for factors that may influence defendants’ propensity to

plea bargain, the context in which she presents her study. For example, she did not

consider the strength of the evidence or the presence or absence of aggravating and

mitigating factors. Additionally, Kuziemko did not examine the factors that influence

prosecutors (and also defense attorneys) to plea bargain or to pursue a trial.

West (2002) looked at the impact of a 1995 amendment to Louisiana’s aggravated

rape statute that provided for the death penalty for those charged with aggravated rape of

a child under twelve. The enhanced penalty was intended to have a deterrent effect, but

West hypothesized that it may instead have served as a prosecutorial tool to garner guilty

pleas, suggesting that prosecutors might offer to reduce the charge to a non-capital

offense or promise a life sentence in exchange for a guilty plea.

To test her hypothesis, West used a dataset comprised of cases of rape involving a

child under twelve both three years before and three years after the amendment was

passed. She employed a pretest/posttest design, comparing the numbers of counts,

\textsuperscript{34} It should be noted that although the law was passed in April 1995, it did not become effective until

September 1 of that year.

\textsuperscript{35} Though not the focus of her study, it should be noted that Kuziemko supplements her analyses of New

York with analyses of a national cross-section of murder defendants in 1988. The results of these analyses

also suggest that the death penalty makes defendants more likely to plead to the original charge (pp. 138-

139). However, these results may be sensitive to her particular models, as they only control for a very

limited number of factors that may affect interstate variations in plea bargaining and do not control for

factors that may influence defendants, prosecutors, and defense attorneys to plea bargain or to pursue a

trial.
indictments, trials, pleas, dismissals, plea outcomes, and adjudication in pre- and post-amendment cases. She measured the deterrent effect of the amendment, using variables reflecting the certainty (whether the defendant and prosecutor entered into a plea bargain at any time, the number of charges/counts dismissed, and whether charges were reduced at any time), severity (type and length of sentence imposed), and swiftness (number of days between date of arrest and date of final disposition) of punishment. Pre- and post-amendment cases were compared using \( t \) tests for independent samples. The results of West’s analysis reveal no significant changes in the numbers of counts, indictments, pleas, dismissals, or plea outcomes before and after passage of the amendment. Similarly, there was no evidence of a deterrent effect of the amendment (pp. 168, 172).

It is important to recognize that West’s study is limited in many respects. Her sample is confined to an analysis of cases in five parishes (counties) and, perhaps more importantly, focuses on cases involving a particular type of death-eligible crime, child rape. Additionally, like Kuziemko, West did not control for or examine factors that may influence prosecutors’ (let alone defense attorneys’ or defendants’) decisions to plea bargain in death-eligible cases.

As part of their study of New Jersey’s capital punishment system, Bienen et al. (1988) analyzed the prosecution’s plea/trial decision in death-eligible cases. They found that the following circumstances significantly increased the likelihood that a case went to trial (as opposed to being resolved by a guilty plea): cases involving a white victim, cases where the offender was older than 25 years of age at the time of first conviction, where the homicide was intentional or planned, and cases where the defendant was represented by a private attorney. In contrast, the likelihood that a case would go to trial was
significantly decreased if the offender was addicted to drugs at the time of the homicide, if there was a codefendant, and if there were a large number of knife or firearm wounds inflicted on the victim/s. Bienen et al. also found the county of prosecution to be a significant factor on the likelihood of a trial (pp. 226-229).

Similarly, in their study of the process of selecting murder cases for capital punishment in North Carolina, Nakell and Hardy (1987) examined the factors that affect the probability of a trial on a charge of first-degree murder. They found that the evidence in the case and the judicial district in which the case was prosecuted significantly increased the probability of a trial. The interactions of defendant’s race and culpability, and defendant’s race and aggravating circumstances were also found to significantly increase the probability of a trial (non-white defendants with a high level of culpability and non-white defendants with a high number of aggravating factors had a greater likelihood of being brought to trial relative to non-white defendants low levels of culpability and aggravating circumstances) (p. 131).

These studies are important in highlighting the factors that affect the disposition of death-eligible cases. However, as quantitative examinations, they are limited in their ability to show and describe how prosecutors consider these factors in making the decision to pursue a plea or a trial in death-eligible cases. They also do not address the factors that influence the decisions of defense attorneys.

White (1991; 2009) has inquired into these factors, interviewing defense attorneys who specialize in capital cases about what affects the likelihood of a plea bargain in such cases. (It should be noted that he did not ask the attorneys about the factors that affect

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36 Bienen et.al. (1988) found a significant effect where the number of wounds was between two and ten but did not find a significant effect where the number of wounds was less than two or greater than ten. They do not offer an explanation for this finding.
their plea bargaining decisions specifically but about the factors that affect the likelihood of a plea bargain.) He found the location of the crime to be important, as different counties have different plea bargaining policies, and that prosecutors in smaller counties tend to be more likely than those in larger counties to offer a plea bargain (largely due to limited resources and economic concerns). He also found defense attorneys believe that the personal characteristics and political aspirations of prosecutors influence the likelihood of plea bargaining; the strategy of the defense attorney plays a role as well (in terms of filing numerous pretrial motions in hopes of inducing a plea) (1991: 55-56).

While White’s research is interesting and helps to shed light on an under studied topic, his interviews were non-systematic and only involved defense attorneys.

In her study, Ehrhard (2008) systematically explored the factors that influenced plea bargaining in death-eligible cases. She conducted in-depth interviews of defense attorneys and prosecutors in rural and urban jurisdictions who had worked on at least one death-eligible and at least one non-death-eligible murder case in a state where a capital punishment law was in effect. Her study, like West’s, was limited by a small sample and confined to one state. Nevertheless, the findings provide some guidance for exploring the decision making process among both prosecutors and defense attorneys.

Ehrhard (2008) asked participants about the most important factors that influence their decision to pursue a plea bargain or to pursue a trial in death-eligible cases. She found that prosecutors most commonly cited the strength of the case (some specifically referred to the strength of the mitigation evidence) and consideration for the victims’ family (p. 321). Defense attorneys similarly mentioned the strength of the case, and a majority pointed to the possibility that the defendant would be sentenced to death if
convicted at trial (pp. 317-318). Nearly all of the defense attorneys cited the importance of political factors in the prosecutor’s decision (p.321), a factor also cited by the attorneys White interviewed (1991: 55). However, not one of the prosecutors mentioned the influence of political factors.

Ehrhard (2008) also asked participants about the factors that influence the decision to pursue a plea or a trial in non-death-eligible murder cases where the maximum sentence is either life or life without parole. Again, she found that most prosecutors pointed to the strength of the case and consideration for the victims’ family (p. 321). A majority of defense attorneys also cited the strength of the case, and about half mentioned the fairness of the plea offer, a factor that was not mentioned by one defense attorney when discussing death-eligible cases (p. 318).

Interestingly, Ehrhard (2008) found that while a total of only twelve different factors were cited among defense attorneys as influencing their decision making in death-eligible cases, a total of twenty-two different factors were cited in non-death-eligible cases (p. 318). The variety and number of factors considered accords with the different weight the attorneys give to the maximum sentence; as just noted, most defense attorneys interviewed said that the possibility of a death sentence was the most important factor influencing their decision to pursue a plea or a trial in death-eligible cases. However, only a small minority said that a sentence of life without parole was the most important factor influencing their decision making in non-death-eligible cases (p. 317).  

37 The possibility of a death sentence also influences when plea discussions, if any, are first raised and by whom. Defense attorneys and prosecutors both reported that in death-eligible cases, the defense attorney is more likely than the prosecutor to initiate a plea and to do so early in the process. In contrast, in non-death-eligible cases, one side does not necessarily initiate plea discussions more often than the other (see Ehrhard, 2008: 317, 320).
A recent study by McCord (2005) takes a different approach to the study of the factors that influence decision making in the pretrial stages of death-eligible cases. McCord compiled a national database of all death-eligible cases with a sentence outcome in 2004. Given that no mechanism exists for collecting data on such cases across the United States,\(^{38}\) he relied primarily on news reports appearing in searchable online databases. McCord identified 583 death-eligible defendants; of these, 140 defendants were tried and sentenced to death, 120 were tried (capitally) but spared a death sentence by a sentencer, and 323 defendants were spared a death sentence because of decisions made by prosecutors (pp. 826-828).\(^{39}\) This latter group of cases is of most interest here.

McCord (2005) compiled information from the news reports on the reasons prosecutors stated for their decisions not to pursue death sentences in death-eligible cases. The most common reasons given mirror those cited by prosecutors in Ehrhard (2008): factors pertaining to the strength of the evidence (in terms of being able to prove the defendant’s guilt) and the wishes of the victims’ family. McCord also found that prosecutors cited the cost of prosecuting a death penalty case,\(^{40}\) the age of the case (how “old” it is, due to a delay in solving the case, extensive pretrial motions, a retrial due to appellate reversal/s etc.), and the defendant’s cooperation in divulging the identity and/or location of other victims (p. 862). These factors were similarly cited in a recent analysis by the Associated Press of prosecutors’ decisions in capital cases (Welsh-Huggins 2009).

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\(^{38}\) It is also difficult to collect this data at the state level; many states do not maintain information on the nature of the disposition of death-eligible cases in particular (they are often grouped with murder cases generally). Paternoster et al. (2004) for example, painstakingly identified death-eligible cases from a list of all first and second-degree murders maintained by the Maryland Division of Corrections. Information on the disposition of these cases was then obtained by examining court transcripts, trial judge reports, and state’s attorney’s case files. Obtaining county level information on the disposition of aggravated murder cases was met with similar difficulty in Ohio and Michigan, the sites of the proposed study (see Chapter 3, pp. 69-70 for a more detailed discussion)

\(^{39}\) McCord states that these decisions most often involve plea bargains.

\(^{40}\) Cost was also a factor cited by prosecutors in Ehrhard’s (2008) research.
While the findings are revealing, they only capture part of the picture. McCord’s research, and that of the Associated Press, focused on the decisions of prosecutors in death-eligible cases; the factors that influence defense attorneys’ decisions in such cases were not addressed. Another limitation is McCord’s reliance on news reports; prosecutors may “filter” the reasons they provide to the media, expressing only those considerations they deem to be appropriate. The possibility that prosecutors were not completely forthcoming or candid is a limitation of Ehrhard’s (2008) study as well. However, her research involved one-on-one interviews (as opposed to a prosecutor speaking in front of an audience) and a guarantee of anonymity, circumstances that may have provided for a more open discussion of prosecutorial decision making.

**Summary and Conclusions**

All of these studies are important and contribute in some way to our understanding of plea bargaining in death-eligible cases. However, as discussed above, they are also limited in ways. They each address the issue to some extent, but none paint a complete picture of the process. The present research is intended to be a step towards filling the gaps that exist. Thus, it involved in-depth interviews of a systematic sample of both prosecutors and defense attorneys about what influences their decisions in pursuing a plea bargain or a trial. Significantly, as discussed in the earlier chapter, the sample not only involved attorneys in a state with a death penalty but also involved attorneys in a state without a death penalty. It is important to have a comparison group in order to understand whether the factors that influence plea bargaining in death-eligible cases are unique to such cases or are common to murder cases where the maximum possible sentence is life without parole.

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41 Such a discussion may not have been possible with the data that McCord uses.
Chapter 3: Research Questions, Data, and Methodology

Introduction

This research was exploratory, delving into an area of study that has yet to be thoroughly examined or understood. Literature addressing plea bargaining and the death penalty is limited, and only a few attempts have been made to study the topic in an empirical manner. These studies are sometimes plagued by small sample sizes and in many cases fall short of exploring the decisions of prosecutors and defense attorneys throughout the plea bargaining process and how, if at all, the availability of a death penalty influences their decisions.

Qualitative research is especially suited to advancing our understanding of this issue, in which theories explaining the behavior of participants or a population are largely absent and where variables cannot be clearly identified (Creswell, 1998). Qualitative research has been “advocated as the best strategy for discovery, exploring a new area [and] developing hypotheses” (Miles & Huberman, 1994: 10). It allows for in-depth inquiry into issues, paying special attention to detail, context, and nuance (Patton, 2002). The issues here involved exploring the various facets and elements of decision making at every stage of the plea bargaining process in death and non-death-eligible murder cases in order to better understand the role of the death penalty in plea bargaining.

Miles and Huberman’s (1994) discussion of the strengths of qualitative data further illustrate their appropriateness as a method for the current study. Miles and Huberman argue that, because of their emphasis on people’s “lived experience,” qualitative data are “fundamentally well suited for locating the meanings people place on the events, processes, and structures of their lives” (p. 10). Similarly, Berg (1998) states
that qualitative data are appropriate when the researcher is “interested in understanding
the perceptions of participants or learning how participants come to attach certain
meanings to phenomena or events” (p. 64).

An additional strength of qualitative data discussed by Miles and Huberman
(1994) is the richness of such data and their potential to reveal the complexities of the
event or process being studied. Qualitative data enable us to assess “how and why things
happen as they do” (p. 10). Accordingly, this method allows for an exploration of how, if
at all, the death penalty influences the decisions of both prosecutors and defense attorneys
in plea bargaining and why it influences their decisions.

A particular type of qualitative data collection was chosen for this study,
interviews. Interviewing is particularly well suited to a study such as this one where the
focus was on exploring in-depth the process of plea bargaining in cases where the
maximum punishment equals the death penalty and life without parole from the
perspectives of prosecutors and defense attorneys. “The in-depth format…permits the
researcher to explore fully all the factors that underpin participants’ answers: reasons,
feelings, opinions, and beliefs. This furnishes the explanatory evidence that is an
important element of qualitative research” (Legard, Keegan, & Ward, 2003: 141).

Research Questions

While there is no established “theory of plea bargaining in capital cases” on
which to base the proposed study, this project was nevertheless informed by prior
research on the disposition of death-eligible cases and, as stated in Chapter 1, guided by a
number of research questions:
1. Whether the statutory availability of the death penalty for aggravated murder serves as an inducement in plea bargaining, exerting greater pressure on defendants to plead guilty, compared to circumstances where the maximum sentence authorized is life imprisonment or life without parole.
   a. Whether and under what circumstances prosecutors use the death penalty as leverage to induce a guilty plea.
   b. Independent of whether prosecutors use the availability of the death penalty as leverage, whether defense attorneys perceive it is used in this way.

2. What influence the availability of the death penalty has on the process of plea bargaining, compared with the influence of a sentence of life or life without parole.
   a. Who initiates the possibility of a plea in aggravated murder cases, and at what point in the disposition process is the possibility of a plea first raised?
   b. Do plea discussions continue throughout the process, or are they confined to a specific point or points?
   c. Do discussions involve negotiation and bargaining, or do they entail offers of “take it or leave it?”
   d. What are the most important factors in the decision to pursue a plea bargain or a trial in aggravated murder cases?
e. Compared with other factors, how important is the possibility of a death sentence or a sentence of life without parole in the decision to pursue a plea bargain or a trial?

These questions were explored in a state where the death penalty is the maximum possible punishment for aggravated murder and a state where life imprisonment without the possibility of parole is the maximum possible punishment for aggravated murder.

**Selection of States**

**Ohio and Michigan**

That’s a nice comparison. In fact, I’ve often used that comparison. Fundamentally there’s a lot of similarities to the two states. (Response of an Ohio Defense Attorney upon learning that the study includes interviews with attorneys in Michigan as well as in Ohio.)

*Demographic and Geographic Considerations.* This study focused on two states: Ohio, a state with the death penalty, and Michigan, a state without the death penalty.

While Ohio and Michigan are not mirror images of each other, they are similar in many respects and allowed for a better comparison than would including a number of other states. Restricting the sample in this way also allowed for an in-depth exploration of the process of plea bargaining in murder cases in two states, as opposed to a more superficial exploration of the process in many states. Ideally, additional states would be studied with the depth and detail of a study focused on Ohio and Michigan. However, limited time and resources precluded this possibility. While confining the study in this way limits the generalizability of the findings, qualitative research is more concerned with understanding the way a particular process operates than it is with the generalizability of the findings to other settings (Mason, 2002; Miles & Huberman, 1994).
Ohio was chosen for a number of reasons. One is that it has a large death row (N=181). Although Ohio has only recently begun to execute those sentenced to death, between 1999 (the year of the first post-Furman execution in Ohio) and 2008, there have been an average of 3 executions per year (Office of the Ohio Public Defender, 2009). Thus, not only is the possibility of being sentenced to death real, but the possibility of being executed is real as well. This is not necessarily the case in other states with capital punishment. A second reason for choosing Ohio was that it is sufficiently large and diverse to allow for examination of capital cases in both rural and urban counties. This was important because prior research shows intrastate variations in the use of the death penalty (see Chapter 2, pp. 46, 51). Finally, Ohio was accessible in terms of obtaining both information about indictments for capital cases and contact information for the prosecutors and defense attorneys who handled those cases.

Michigan was chosen because it has a long history without the death penalty and, like Ohio, is large and diverse enough to allow for examination of first-degree murder (the highest level of murder in Michigan) cases in various counties. Additionally, Michigan and Ohio are located in the same part of the country and are similar with respect to demographic and socio-economic factors (see Table 3.1). Each state’s population is about fifty percent male. Nearly two-thirds of the population in each state is white, and over ten percent is black or African-American, with small minorities of

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42 This figure is current as of January 2009 (Death Penalty Information Center, 2009).
43 Ohio has the 6th largest death row in the country (Death Penalty Information Center, 2009).
44 In 2006, Ohio was second only to Texas in the number of executions for that year. (Texas executed 24 inmates; Ohio executed 5 inmates, four states each executed 4 inmates; eight states each executed 1 inmate (Death Penalty Information Center, 2007).) Reflecting a national trend, relative to 2006, Ohio had fewer executions in 2007 and 2008 but nevertheless continued to be among the states that had carried out at least two executions in those years (Death Penalty Information Center 2007, 2008).
45 For example, in Pennsylvania there are currently 226 individuals on death row (as of January 2009), but only three executions have been carried out in the past thirty years (Death Penalty Information Center, 2009).
Hispanics and other races and ethnicities. About three quarters of the population in each state is eighteen years of age or older. The states are also similar with respect to per capita income and poverty level (United States Census, 2000). Given that this was a study concerned with plea bargaining in murder cases, it is useful to point out that the states have murder rates comparable with the rate for the entire U.S. population (Bureau of Justice Statistics, 2005).

Table 3.1: Demographic and Socio-economic Factors

<table>
<thead>
<tr>
<th>Variable</th>
<th>Ohio</th>
<th>Michigan</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number</td>
<td>Percent</td>
</tr>
<tr>
<td>Total Population</td>
<td>11,353,140</td>
<td>X</td>
</tr>
<tr>
<td>Male</td>
<td>5,512,262</td>
<td>48.6</td>
</tr>
<tr>
<td>Female</td>
<td>5,840,878</td>
<td>51.4</td>
</tr>
<tr>
<td>Median age (years) 18yrs and over</td>
<td>8,464,801</td>
<td>74.6</td>
</tr>
<tr>
<td>White</td>
<td>9,645,453</td>
<td>85</td>
</tr>
<tr>
<td>Black or African American</td>
<td>1,301,307</td>
<td>11.5</td>
</tr>
<tr>
<td>Hispanic or Latino (of any race)</td>
<td>217,123</td>
<td>1.9</td>
</tr>
<tr>
<td>High school grad or higher*</td>
<td>6,149,655</td>
<td>83</td>
</tr>
<tr>
<td>In labor force**</td>
<td>5,694,708</td>
<td>64.8</td>
</tr>
<tr>
<td>Median household income in 1999</td>
<td>40,956</td>
<td>X</td>
</tr>
<tr>
<td>Per capita income in 1999</td>
<td>21,003</td>
<td>X</td>
</tr>
<tr>
<td>Families below poverty level</td>
<td>235,026</td>
<td>7.8</td>
</tr>
<tr>
<td>Individuals below poverty level</td>
<td>1,170,698</td>
<td>10.6</td>
</tr>
</tbody>
</table>

*for population 25yrs and over
**for population 16yrs and over
Source: U.S. Census, 2000

The significance of size and diversity in the selection of Ohio and Michigan should not be underestimated. In order to allow for the possibility that attorneys may decline to participate, the study sites needed to have a large number of counties (particularly counties with at least one aggravated murder) so that the impact of refusals could be absorbed; Ohio and Michigan met this criterion. As mentioned earlier, representation of both rural and urban counties is of particular importance in a study involving a state with the death penalty, and the size of the state is also important in this respect. Not only does Ohio have a large number of counties, but most importantly, it has
a large number of counties with capital indictments, and these indictments occurred in rural and urban jurisdictions.

**Statutory Considerations.** An indictment on a capital charge in Ohio must contain one or more specifications of aggravating circumstances listed in the statute.\(^{46}\) Within fifteen days after a capital indictment is filed, the clerk of the court of jurisdiction must file a notice with the Supreme Court indicating that such indictment has been filed (Ohio Revised Code §2929.021). A defendant has the right to plead guilty to the charge/s in the indictment or to plead not guilty and pursue a course to trial (a decision that is subject to change pending plea discussions or reconsideration for other reasons).

Defendants in Ohio may plead guilty to aggravated murder and still face the death penalty. Defendants who plead guilty to the charge without any prior sentence agreement with the prosecutor waive their right to a jury trial, and a panel of three judges determines

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\(^{46}\) The aggravating circumstances are: the offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not, committed the aggravated murder with prior calculation and design; the offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit terrorism; the offense was committed while the offender was under detention or while the offender was at large after having broken from detention; prior to the offense, the offender was convicted of an offense involving the purposeful killing of or attempt to kill another, or the offense was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender; The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender; the offense was committed for hire; the offense was the assassination of the president of the United States or a person in line of succession to the presidency, the governor or lieutenant governor of the state of Ohio, the president-elect or vice president-elect of the United States, the governor-elect or lieutenant governor-elect of the state of Ohio, or a candidate for any of these offices; the victim of the offense was a law enforcement officer whom the offender had reasonable cause to know or knew to be a law enforcement officer and, at the time of the commission of the offense, the victim was either engaged in his or her law enforcement duties, or it was the offender’s specific purpose to kill a law enforcement officer; the victim of the aggravated murder was a witness to an offense who was purposely killed to prevent the victim’s testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for the victim’s testimony in any criminal proceeding; the offender, in the commission of the offense, purposefully caused the death of another who was under thirteen years of age at the time of the commission of the offense, and either the offender was the principal offender in the commission of the offense or, if not, committed the offense with prior calculation and design (Ohio Revised Code §2929.04)
sentence. This panel decides whether the defendant is guilty of the aggravated murder charge or a lesser offense and then determines sentence. Upon conviction for aggravated murder, the judges weigh the aggravating circumstances and mitigating factors; if they unanimously determine, beyond a reasonable doubt, that the aggravating circumstances outweigh the mitigating factors, a sentence of death is imposed. If the aggravating circumstances do not outweigh the mitigating factors, one of four lesser sentences is imposed: life imprisonment without the possibility of parole, life imprisonment with parole eligibility after thirty years, life imprisonment with parole eligibility after twenty-five years, or life imprisonment with parole eligibility after twenty years (Ohio Revised Code §2945.06 and §2929.03 (A)(1)).

If the defendant pleads not guilty and invokes his/her right to trial, he/she may choose to waive his/her right to a jury trial and have the case heard by a panel of three judges. If the defendant is found guilty of aggravated murder, the judges must then weigh the aggravating circumstances and mitigating factors and determine sentence as discussed above. Where a defendant chooses to have his/her case heard before a jury, the jury determines guilt or innocence on the charges and, if the defendant is found guilty of aggravated murder, recommends whether or not he/she should be sentenced to death.

The trial jury shall recommend to the court that the sentence of death be imposed if the jurors unanimously find, by proof beyond a reasonable doubt, that the aggravating circumstances outweigh the mitigating factors (Ohio Revised Code §2929.03 (D)(2)). Upon such finding, the trial court then reviews the evidence; if it finds, by proof beyond a

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47 If the offender is also convicted of “a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder” a sentence of life imprisonment without the possibility of parole shall be imposed (Ohio Revised Code §2929.03 (D)(3)(b)).
reasonable doubt, that the aggravating circumstances outweigh the mitigating
circumstances, a sentence of death is imposed on the offender. However, if either the trial
jury or the trial judge finds that the aggravating circumstances do not outweigh the
mitigating factors, the offender is given one of four lesser sentences indicated above. The
jury recommends a specific sentence to the judge, who then imposes such sentence on the
offender (Ohio Revised Code §2929.03 (D)(2),(3)).

Life without parole is a sentencing option for the highest degree of murder in
Ohio (aggravated murder) and also in Michigan (first-degree murder), where it is the
maximum possible sentence a defendant may face. In Michigan, life imprisonment
without the possibility of parole is mandatory upon conviction for first-degree murder,
whether the conviction is obtained as a result of a trial or a guilty plea (Michigan Penal
Code §750.316 (1)). This means that any plea bargains involving a reduced sentence
must also necessarily involve a reduction in the level of homicide charge.

Knowledge of the aggravated and first-degree murder statutes in these two states
was imperative for both theoretical and practical reasons. However, it was also important
to understand the statutes pertaining to less serious levels of criminal homicide, which
represent alternative charges and sentences that may be available for negotiation during
any plea discussions.

48 The aggravating circumstances that make a homicide eligible for the death penalty in Ohio are listed in
footnote 46 of this chapter. Murders that involve any of the following are eligible for life without parole in
Michigan: murder perpetrated by means of poison, lying in wait, or any other willful, deliberate, and
premeditated killing; murder committed in the perpetration of, or attempt to perpetrate, arson, a major
controlled substance offense, robbery, carjacking, breaking and entering of a dwelling, home invasion in
the first or second degree, larceny of any kind, extortion, kidnapping, or vulnerable adult abuse in the first
and second degree, criminal sexual conduct in the first, second, or third degree, or child abuse in the first-
degree; murder of a peace officer or a corrections officer committed while the peace officer or corrections
officer is lawfully engaged in the performance of any of his or her duties, knowing that the peace officer or
corrections officer is a peace officer or corrections officer engaged in the performance of his or her duties
(Michigan Penal Code §750.316 (1)).
In Ohio, a possible sentence of death can be avoided by a plea agreement involving one of the lesser sentences for aggravated murder. Alternatively, a prosecutor may reduce a capital charge to murder, an offense carrying a sentence of fifteen years to life and a possible fine of not more than $15,000 (Ohio Revised Code §2903.02), or to voluntary manslaughter, punishable by anywhere from three to ten years imprisonment (Ohio Revised Code §2903.03, §2929.14).

In Michigan, the maximum sentence for first-degree murder can only be avoided with a guilty plea to a lesser charge. A first-degree murder charge may be reduced to second-degree murder, punishable by life imprisonment or any term of years at the discretion of the trial court (Michigan Penal Code §750.317) or to voluntary manslaughter, carrying a sentence of not more than fifteen years imprisonment or a fine of not more than $7,500 or both (Michigan Penal Code §750.321). It should also be noted that Michigan law does not require a prosecutor to choose between first or second-degree murder when issuing an indictment or even at trial. A prosecutor may charge “open murder,” enabling the jury to determine first or second-degree murder based on the evidence (Michigan Penal Code §767.71, §750.318). Thus, a defendant faces a maximum sentence of life without parole under a charge of first-degree murder and also under a charge of open murder.

49 The length of the sentence is based on statutory sentencing guidelines. The guidelines dictate the minimum and maximum number of years that an offender is to serve upon conviction for a particular offense. Judges retain the discretion to sentence an offender to a number of years within the range determined by the guidelines. In determining the applicable sentencing range, the guidelines take into account such factors as the offender’s prior record and the number of contemporaneous felony convictions (Robertson-Deming 2000; State of Michigan Sentencing Guidelines Manual 2008).
Selection of Participants

Identifying and Contacting Attorneys

The selection of participants was guided by a purposive sampling strategy. This is a type of non probability sampling used by qualitative researchers in which participants are selected based on their characteristics and relevance to the purpose of the study (Patton, 2002; Ritchie et al., 2003; Strauss & Corbin, 1998). Samples of this type are not intended to be statistically representative; the objective is not to enable generalization but to ensure that only those participants who meet the selection criteria are included and that within those criteria, there is some diversity to allow for exploration of differences in the perspectives and experiences of the participants (Ritchie et al., 2003).

Theoretical sampling was used to select participants for this study. “Theoretical sampling is a particular kind of purposive sampling in which the researcher samples incidents, people, or units on the basis of their potential contribution to the development and testing of theoretical constructs” (Ritchie et al., 2003: 80). Accordingly, participants were selected based on their experience with prosecuting or defending aggravated/first-degree murder cases, as it is this population that was able to inform an exploration of the process of plea bargaining and the role of the maximum sentence in capital and non-capital murder cases. In Ohio, only those attorneys who handled one or more capitaly indicted murder cases were selected, and in Michigan, only those who handled one or more first-degree murder cases were selected. The sample was stratified to include attorneys who practiced in urban jurisdictions and those who practiced in rural jurisdictions.
Additionally, an effort was made to include both assigned and privately retained attorneys (see discussion in Chapter 2, p. 41). Ohio and Michigan each have mixed indigent defense systems. In both states, a county may employ a contract system, a public defender system, or a system of appointed counsel (in Michigan, a combination of the latter two systems may also be employed) (Michigan State Appellate Defender Office, 2007; Office of the Ohio Public Defender, 2007). Defendants who do not qualify for indigent defense are represented by private counsel. In Ohio, attorneys must meet state requirements of training and experience in order to represent a person accused of a capital crime (Rules of Superintendence for the Courts of Ohio, Rule 01). 

Most death-eligible cases are handled by appointed, qualified attorneys in private practice. The death penalty division of the Office of the Ohio Public Defender handles death-eligible cases in situations where there are no qualified attorneys available (such as in a small county) or where there are multiple defendants and conflicts of interest cause a shortage of locally qualified counsel. The office may also assist the appointed counsel in a case (M. M. Koosed, personal communication, July 16, 2007; S. A. Shank, personal communication via M. M. Koosed, July 17, 2007).

Attorneys in Ohio were identified from a comprehensive list of capital indictments. The Office of the Ohio Public Defender maintains lists of the number of capital indictments in each county. At the time this research began, the most recent year

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50 Previous research has highlighted capital cases where indigent defendants were provided grossly inadequate representation (see generally, Berger, 1991; Bright, 1994). While the state requirements for capital defense in Ohio preclude representation by unqualified or inexperienced attorneys, the system, like that in other death penalty jurisdictions, has been criticized as being under funded (see generally Bright, 1994; Coyle, Strasser, & Lavelle, 1990), and limitations on the compensation provided to appointed attorneys in capital cases is an important consideration of which to be mindful. In Ohio, each county sets its own reimbursement fee structure, and the Office of the Ohio Public Defender reimburses a percentage of what the counties pay for indigent defense representation in capital cases (S. A. Shank, personal communication via M. M. Koosed, July 17, 2007).
for which these lists were available was 2005. The lists of indictments includes the name of the defendant in each case, the date of the indictment, and the disposition of the case. With the aid of a personal contact, the Office of the Ohio Public Defender was contacted for the names of the attorneys who handled cases in 2005. Internet searches were subsequently conducted for the attorneys’ addresses and phone numbers.

Prosecutors were contacted through the prosecuting attorney’s office in each county. An effort was made to contact prosecutors in the same counties as the defense attorneys. Rather than contacting specific attorneys in the office, the prosecuting attorney was contacted directly. This decision was made for a number of reasons: 1) it was not always clear who prosecuted a case, 2) past experience (Ehrhard 2008) suggested that attorneys may need the consent of the prosecuting attorney to be interviewed, and 3) capital cases are sometimes handled by the prosecuting attorney him/herself.

Prosecutors in Michigan were also contacted through the prosecuting attorney’s office in each county. However, the identification of defense attorneys was necessarily less systematic than the procedure that was followed in Ohio. In Michigan there is no comprehensive list of attorneys who have handled first-degree murder cases. Thus, the determination of attorneys to select initially proved challenging. However, with the aid of a personal contact well known in the defense community, eligible participants were identified. This contact was informed of the selection criteria and subsequently provided names and phone numbers of defense attorneys in counties throughout the state.

Attorneys were first contacted with a letter informing them about the study and requesting their participation (see Appendix A: Letter to Prosecutors, Ohio; Appendix B: Letter to Defense Attorneys, Ohio; Appendix C: Letter to Prosecutors, Michigan; and
Appendix D: Letter to Defense Attorneys, Michigan). The letter assured them that their anonymity would be protected and emphasized that I was interested in the process of plea bargaining and not in the specific details of any cases.\textsuperscript{51} The letter indicated that the attorney should expect a phone call within a couple of weeks to set up an interview.

In a few cases, participants contacted me after receiving the letter, and an interview was scheduled. However, this was the exception. In most cases, at least one phone call was needed to follow-up. Oftentimes messages were left on voicemails or with secretaries. If I did not hear back from an attorney within two weeks, I called again. A third phone call was made two weeks later if contact had not yet been made. At that point, an attorney’s failure to respond was interpreted as a passive refusal. Most refusals were of this nature; a minority of potential participants spoke with me only to say that they did not wish to speak with me any further.\textsuperscript{52} In some cases, making it clear that it was not necessary that I speak with the attorney right away but that I could wait until his/her schedule freed up weeks later proved crucial. Emphasizing this enabled me to schedule interviews with attorneys who otherwise may have refused to participate not because they were unwilling but simply because they did not have the time. Indeed, lack of time was one reason given by those who outright refused, declining to participate even after I made it clear that the interview could be scheduled weeks later. Other reasons included an office’s blanket policy of refusing all requests for interviews and/or surveys and simply a lack of interest.

\textsuperscript{51} In the pilot study this was a concern of some attorneys. In cases where attorneys expressed an initial reluctance to participate, I assured them that I was not interested in discussing specific defendants or the details of any particular crimes. This often lessened their concerns, and they agreed to participate.\textsuperscript{52} Notably, one defense attorney who at first indicated that he did not wish to participate, nevertheless inquired further about the study, and, thanks to my powers of persuasion, ultimately agreed to be interviewed.
Characteristics of the Sample

In designing a qualitative study, one is at the mercy of the cooperation of members of the desired sample group. Achieving one’s sample size goals results from a mixture of skill and persistence in contacting potential participants; having contacts and sheer dumb luck also helps. Once recruited, participants may express great interest in the study, going above and beyond merely humoring the interviewer by answering her questions so that she will stop leaving messages on their voicemails. Other participants may prove to be cooperative but less than enthusiastic, and still others may be so difficult and seem so bored as to make one wonder why they agreed to be interviewed, other than as a means to get the interviewer to stop leaving messages on their voicemails.

At the outset of the study, a goal of sixty participants was established: fifteen defense attorneys in Ohio and fifteen in Michigan, and fifteen prosecutors in Ohio and fifteen in Michigan. Samples of this size are common in qualitative studies and must be relatively small to do justice to the complexity and depth of information generated from this type of research (Patton, 2002; Ritchie, Lewis, & Elam, 2003). In spite of refusals, the sample size goals for each of the four groups were met or exceeded (see Table 3.2), resulting in a total sample of 67 attorneys. As discussed earlier, the selection of

<table>
<thead>
<tr>
<th>Group</th>
<th>Response Rate</th>
<th>Sample Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>OH Prosecutors</td>
<td>52%</td>
<td>17</td>
</tr>
<tr>
<td>OH Defense Attorneys</td>
<td>50%</td>
<td>15</td>
</tr>
<tr>
<td>MI Prosecutors</td>
<td>47%</td>
<td>18</td>
</tr>
<tr>
<td>MI Defense Attorneys</td>
<td>64%&lt;sup&gt;53&lt;/sup&gt;</td>
<td>17</td>
</tr>
<tr>
<td>Total Participants</td>
<td></td>
<td>67</td>
</tr>
</tbody>
</table>

<sup>53</sup> The relatively high response rate among Michigan defense attorneys may be attributable to the aid of the personal contact, whose name was referenced in the letters sent and phone calls made to many of the attorneys.
attorneys to contact was designed to represent urban and rural jurisdictions. Despite the limitations imposed by non-response, this goal was met. Table 3.3 shows the number of attorneys from each of the four groups and the population size of the counties from which they were drawn.

Table 3.3: Number of Participants in Each Group by County Population

<table>
<thead>
<tr>
<th>Group</th>
<th>County Population</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>&lt;=75,000</td>
</tr>
<tr>
<td>OH Prosecutors</td>
<td>4</td>
</tr>
<tr>
<td>OH Defense Attorneys</td>
<td>5</td>
</tr>
<tr>
<td>MI Prosecutors</td>
<td>6</td>
</tr>
<tr>
<td>MI Defense Attorneys</td>
<td>2</td>
</tr>
</tbody>
</table>

Not shown in the table is the number of counties represented by each of the four groups. The seventeen Ohio prosecutors represent fourteen different counties; the fifteen Ohio defense attorneys represent at least fifteen different counties;\(^{54}\) ten counties are held in common between the two groups. The seventeen Michigan prosecutors represent sixteen different counties; the eighteen defense attorneys represent at least thirteen different counties;\(^{55}\) six counties are in held in common between the two groups. It is important to understand that where a prosecutor and a defense attorney from the same county were interviewed, they did not necessarily handle the same case/s. The overlap is nevertheless notable in that it indicates that when prosecutors and defense attorneys were discussing the process of plea bargaining, at least some of them were describing this process with reference to the same particular jurisdiction.

\(^{54}\) As discussed earlier, defense attorneys were drawn from a list of capitally indicted cases. This list contained the county in which the indictment occurred; attorneys were interviewed from cases in fifteen different counties. However, it is possible that the attorneys practice in more than one county, and indeed, in interviews some referenced other counties where they have handled cases. Thus, fifteen is likely an underestimate of the number of counties represented by the sample.

\(^{55}\) This figure is based on the county in which an attorney’s practice is located. However, it is reasonable to assume that attorneys practice in more than one county. Thus, this figure is likely an underestimate of the number of counties represented by the sample.
In selecting the attorneys, an effort was made to include public defenders and attorneys in private practice and to include appointed and privately retained attorneys. The Ohio sample of defense attorneys is composed primarily of appointed attorneys in private practice; only two of the fifteen attorneys are public defenders. However, most capital-eligible cases are handled by appointed attorneys in private practice (see p. 67). Thus, this proportion reflects that of the population it represents.

Similarly, the Michigan sample of defense attorneys includes only one public defender. However, most of the counties in Michigan employ either a contract system or a system of assigned counsel for the provision of indigent defense; only five counties use public defender offices, either alone or together with assigned counsel systems. Thus, the one public defender in this sample reflects a similar proportion of the number of county public defenders in all of Michigan. The sample includes attorneys who handle cases both as retained attorneys and/or appointed counsel.

The majority of the participants in each of the four groups are male; only four females were interviewed. The race of the participants is unknown; participants were not asked their racial or ethnic background. The level of experience attorneys had with criminal cases and with murder cases in particular varied. Table 3.4 shows the years of experience of attorneys in Ohio and in Michigan with criminal cases and the numbers of capital-eligible and non-capital murder cases, and first-degree or open murder cases they have handled, respectively. Table 3.5 shows the mean percent of capital-eligible and non-capital murder cases and first-degree or open murder cases that resulted in plea bargains and trials for the sample. It is interesting to note that ten of the prosecutors in Ohio had

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56 A fifth female was interviewed. However, her interview was conducted jointly with a male participant who answered most of the questions. Given her lack of involvement, he is considered the primary respondent.
Table 3.4: Attorneys’ Experience

<table>
<thead>
<tr>
<th>Group</th>
<th>Years Experience with Criminal Cases</th>
<th># of Capital Eligible CasesProsecuted/Defended</th>
<th># of Non-Capital Murder CasesProsecuted/Defended</th>
<th># of First Degree or Open Murder CasesProsecuted/Defended</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Low</td>
<td>High</td>
<td>Mean</td>
<td>Low</td>
</tr>
<tr>
<td>OH Prosecutors</td>
<td>4</td>
<td>30</td>
<td>20</td>
<td>1</td>
</tr>
<tr>
<td>OH Defense Attorneys</td>
<td>10</td>
<td>38</td>
<td>24</td>
<td>3</td>
</tr>
<tr>
<td>MI Prosecutors</td>
<td>3</td>
<td>32</td>
<td>20</td>
<td>X</td>
</tr>
<tr>
<td>MI Defense Attorneys</td>
<td>18</td>
<td>43</td>
<td>30</td>
<td>X</td>
</tr>
</tbody>
</table>

Table 3.5: Mean Percent of Cases Resulting in Plea Bargains and Trials

<table>
<thead>
<tr>
<th>Group</th>
<th>Capital-Eligible Cases</th>
<th>Non-capital Murder Cases</th>
<th>First-degree or Open Murder Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>% Plea</td>
<td>% Trial</td>
<td>% Plea</td>
</tr>
<tr>
<td>OH Prosecutors</td>
<td>59%</td>
<td>41%</td>
<td>57%</td>
</tr>
<tr>
<td>OH Defense Attorneys</td>
<td>69%</td>
<td>31%</td>
<td>74%</td>
</tr>
<tr>
<td>MI Prosecutors</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>MI Defense Attorneys</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
</tbody>
</table>

experience defending criminal cases; three of the defense attorneys had experience prosecuting criminal cases. In Michigan, ten of the prosecutors had experience defending criminal cases, and eight of the defense attorneys had experience prosecuting criminal cases.

Data Collection

The Interview Method

This study relied on interviews as the means of data collection. Because the focus was on particular elements of the plea bargaining process and the role of the maximum possible punishment in that process, an interview questionnaire with specific questions to

\(^{57}\) This figure is the average of the 50-75 death-eligible cases that one attorney estimated he has handled. 

\(^{58}\) One response was missing, and one attorney who said that a majority of his cases resulted in pleas but did not provide a numerical answer was excluded from the calculation of the mean trial and mean plea bargain percentages.

\(^{59}\) Two attorneys who said that a majority of their cases resulted in trials but did not provide a numerical answer were excluded from the calculation of the mean trial and mean plea bargain percentages.
be asked of each participant was developed. McCracken (1988) provides a useful outline and description of the utility of a questionnaire. One of its functions is to ensure that the researcher covers all the ground in the same order for each participant. Another function is the care and scheduling or ordering of the prompts within the interview. This is important, as the researcher or interviewer cannot be expected to formulate or recall the prompts in each interview and in the same way. Additionally, a questionnaire establishes avenues for the direction and scope of the interview; it is useful to focus the interview so that the time will be used efficiently (Patton, 2002). Finally, a questionnaire enables the researcher or interviewer to devote all of his/her attention to the interviewee’s account. “In sum, the questionnaire protects the larger structure and objectives of the interview so that the interviewer can attend to immediate tasks at hand” (McCracken, 1988: 25).

Although a questionnaire is important, its use does not “preempt the ‘open-ended’ nature of the qualitative interview. Within each of the questions, the opportunity for exploratory, unstructured responses remains. Indeed, this opportunity is essential” (McCracken, 1988: 25). Seidman (2006: 84) similarly notes the value of open-ended questions: “[They] establish the territory to be explored while allowing the participant to take any direction he or she wants.” Accordingly, an open-ended, semi-structured interview questionnaire was used for this study.

Questions were formulated and carefully and fully worded to be sure that each participant was asked the same questions and in the same way. Although there was a structured order to the questions, it was flexible, permitting me to follow the respondent’s lead and ask particular questions as they came up (and to raise them if they did not). Anticipated explanations or clarifications of questions were written into the instrument as
well as probes for more elaborate and detailed responses. Standardizing questions in this way reduced the need for interviewer judgment and minimized the likelihood of interviewer effects, yet, importantly, still allowed the participant to answer the questions in his/her own words (Patton, 2002).

**Interview Instruments**

With some modification, the same semi-structured, open-ended interview instruments (one instrument for prosecutors and one for defense attorneys) that were used in the earlier pilot study (Ehrhard 2008) were used for this project. Attorneys in Ohio were asked two sets of nearly identical questions pertaining to their experiences with the process of plea bargaining in death-eligible and non-death-eligible murder cases (see Appendix E: Questions for Prosecutors, Ohio and Appendix F: Questions for Defense Attorneys, Ohio); attorneys in Michigan were only asked the set of questions pertaining to non-death-eligible first-degree or open murder cases (see Appendix G: Questions for Prosecutors, Michigan and Appendix H: Questions for Defense Attorneys, Michigan). Although this research was focused on a comparison of plea bargaining in a state with and a state without the death penalty, it was nevertheless useful to ask the attorneys in Ohio about plea bargaining in murder cases where the death penalty was not an option. Doing so provided for a more in-depth exploration of plea bargaining in death and non-death-eligible cases in a state with capital punishment and shed further light on the generalizability, or lack thereof, of the findings from the earlier pilot study.

The instruments encompassed questions pertaining to who initiates a plea discussion, at what point in the process a plea discussion is initiated, whether plea discussions continue or are confined to specific points in the process, and whether
discussions involve negotiations and bargaining or entail offers of “take it or leave it.” These questions were explored extensively, with participants being asked to discuss the factors that influence their decisions at every step of the process. Participants were also asked about the influence of the maximum sentence (whether that be death or life or life without parole) in their decisions throughout the disposition process, as compared with the influence of other factors (such as the defendant’s characteristics, the nature of the crime, etc.).

With some exception, the same sets of questions were asked of prosecutors and defense attorneys, although the precise wording of the questions sometimes differed between the two groups in accordance with their differing roles and responsibilities. Prosecutors were asked one question that defense attorneys were not; they were asked about the factors that influence their decision to or not to seek an indictment for capital murder in an aggravated murder case. This decision is important because it determines whether or not a case will subsequently be treated as capital. Furthermore, it was thought that having a greater understanding of the factors that influence the charging decision might help elucidate the pursuit of plea bargains (and the terms under which they are discussed) or trials in capital cases (see Chapter 2).

The instruments also included questions concerning the factors that influence defendants’ desires to pursue a guilty plea or a trial, with specific attention to the role of the maximum sentence. These questions were asked of both prosecutors and defense attorneys. However, defense attorneys were asked three additional questions pertaining to the attorney-client relationship and the resolution of any disagreements regarding the pursuit of a trial or a plea bargain. Given their more frequent and intimate contact with
their clients, defense attorneys were in a better position to discuss the factors influencing defendants. However, it was important to ask prosecutors to speculate on these factors as well; their perception of how defendants view a possible death sentence in comparison with a sentence of less than death furthered an understanding of prosecutors’ beliefs in the potential of a death sentence to influence a defendant to plead guilty. Similarly, their perception of how defendants view a sentence of life without parole in comparison with a lesser sentence of imprisonment furthered an understanding of prosecutors’ beliefs in the potential of this sanction to influence a defendant to plead guilty.

The Interviews

Ideally, the interviews would have been conducted in-person. However, given limited resources, all interviews were conducted over the phone. With the participant’s consent, each interview was recorded (using a digital recorder and a speaker phone). Recording allows the interviewer to focus on what the participant is saying without having to be concerned with writing everything down and without having to worry about recalling specific details and quotes from memory (Kvale, 1996; Lofland & Lofland, 1984; Taylor & Bogdan, 1998).

Interviewing began in mid May of 2008 and was completed in early November of 2008. On average, interviews with attorneys in Ohio were about an hour long; interviews with attorneys in Michigan lasted about a half hour. All but seven interviews were recorded. Interviews were not recorded either because the participant refused to allow it;

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60 There are advantages and disadvantages to both face-to-face and phone interviews (see generally, Wilkinson & Birmingham, 2003). In my earlier study (Ehrhard, 2008), most of the interviews were conducted in-person, although a few were done over the phone. While non-verbal cues are necessarily lost with phone interviews, generally, I found little difference between those interviews and those that were conducted in-person.

61 As noted earlier, attorneys in Ohio were asked more than twice as many questions as attorneys in Michigan (see Appendices E, F, G, and H).
because the interview was conducted unexpectedly, and the recorder and speaker phone were not immediately available; or because of technological difficulties. Recorded interviews were subsequently transcribed in preparation for coding. For interviews that were not recorded, diligent notes were taken during and immediately after the interview.

While participants were generally cooperative in answering all of the questions, inevitably some questions were skipped in the interest of encouraging attorneys to elaborate on discussions of particular cases or issues. Additionally, responses to particular questions may be missing because an answer was not given (i.e. a response of “don’t know”) or because an attorney’s answer was not clear or did not address the question. Although I tried to follow the interview protocol as closely as possible, I felt it more important to engage the attorneys in a discussion of their perspectives and experiences than to be sure each and every question was precisely answered.

Data Analysis

According to Kvale (1996), the purpose of the qualitative interview is to describe, interpret, and understand the central themes the participants’ experience and to describe, interpret, and understand the meanings of those central themes. In order to do this, those themes must be ascertained; this was done through coding. “Coding is a procedure for organizing the text of [the] transcripts and discovering patterns within that organizational structure” (Auerbach & Silverstein, 2003: 31).

62 For example, when calling one attorney to reschedule an interview he suggested we do it right then.
63 The interviews were supposed to be supplemented with vignettes or hypothetical cases. The vignettes were designed to provide an element of consistency to the study, with all participants responding to questions about the same particular cases. This would have allowed for an additional and perhaps more refined comparison of decision making and plea bargaining in capital and non-capital cases. At the end of each interview, participants were asked if it would be all right to mail them a set of three vignettes with questions (similar to those in the interview) to answer about the likely disposition process of each case. A decision was made to mail the vignettes so as not to add additional time to an already potentially lengthy interview. Although most attorneys consented to receiving the vignettes, too few attorneys returned them to allow for any meaningful analyses.
In the initial stages of coding, the researcher seeks to “pull together and categorize a series of otherwise discrete events, statements, and observations” (Charmaz, 1983: 112) that are identified in the data (interview transcripts). The researcher does not approach the data with predetermined categories or codes in mind, but instead, the categories emerge from the data themselves (Charmaz, 1983). The process involves grouping perceptions, actions/interactions, events etc. that are found to be conceptually similar or related in meaning into categories. The data are closely examined for similarities and differences, which allow for differentiation among the categories. Strauss and Corbin (1998) refer to this stage as “open coding.”

In subsequent stages of coding these initial categories are refined; the properties that define the categories, delineate their characteristics, and demonstrate the conditions associated with them are identified. This more focused coding also sometimes entails the development of subcategories, which expound upon the more general category (Charmaz, 1983). Additionally, the researcher seeks to integrate the categories, uncovering relationships among them (Strauss & Corbin, 1998); “by showing relationships between categories in ways that explain the issues and events studied, focused coding helps to provide the groundwork for developing explanations and predictions” (Charmaz, 1983: 118). This stage of coding, which Strauss and Corbin (1998) refer to as “axial coding” prepares the researcher for the final stage of coding, “selective coding” where the categories are further integrated and refined with an eye towards forming theory.

Importantly, throughout this procedure, not only is the researcher coding for properties but he/she is also coding for process. This involves paying careful attention to whether and how perceptions and actions/interactions change or evolve in response to
changes in context and/or circumstances. In analyzing the data in this way, the researcher looks closely at participants’ statements, examining them for patterns, inconsistencies, contradictions, and anticipated or unanticipated consequences. This type of analysis is completed throughout the coding procedure, but it is in the latter stages where the researcher is able to draw linkages among categories and discern relationships between the structure of data and the processes the data reveal (Charmaz, 1983; Strauss & Corbin, 1998).

These procedures guided the coding of the data for the present study. NVivo, a qualitative data analysis software program, was used to aid coding and analysis. This program provided a means of managing and organizing the data and facilitated the development of categories and subcategories and the linkages between them. Once the interviews were transcribed they were imported into NVivo, and the data were subsequently coded and analyzed.

Separate categories were created for each interview question from each of the four groups of attorneys. Responses to individual questions were then sub coded into categories reflecting common themes among participants’ answers. For example, a category was created for the question pertaining to who usually initiates a plea bargain. Based on a review of the responses, subcategories were then created that indicated that it is usually raised “mutually,” or by the “defense attorney,” or by the “prosecutor,” or that it “varies.”

Where needed, further sub coding within questions was undertaken. This was necessary with more involved questions, such as those pertaining to the factors that influence attorneys to pursue a plea bargain or a trial. For example, defense attorneys in
capital cases in Ohio cited the characteristics of the defendant. However, some defense attorneys specifically mentioned particular characteristics, such as defendants’ mental state or mental capabilities, their age, and their prior record. Thus, a subcategory to this question was created to capture all responses having to do with the “characteristics of the defendant,” and further subcategories were created to capture all responses specifically reflecting “mental state/capabilities,” “age,” and “prior record.” In addition to representing commonalities and patterns within questions, categories were sometimes created to represent commonalities and patterns across questions. Exploring the data in this way was important in deducing any relationships, linkages, and inconsistencies along the path of decisions that attorneys make and the factors that influence those decisions.

**Presentation of Findings**

The results of the analyses are presented in the next three chapters. In Chapter 4 the findings from Ohio are presented. This chapter encompasses a discussion of the plea bargaining process and the factors that influence decision making in capital and non-capital cases. It includes findings from both the interviews with prosecutors and those with defense attorneys. In Chapter 5 the findings from Michigan are presented, including a discussion of prosecutors’ and defense attorneys’ descriptions of the plea bargaining process and the factors that influence decision making in first-degree and open murder cases. In Chapter 6 the findings among Michigan prosecutors and among Michigan defense attorneys are discussed relative to those in Ohio capital and non-capital cases. Additionally, the findings among prosecutors and defense attorneys in each of the three groups (capital cases in Ohio, non-capital cases in Ohio, and first-degree or open murder cases in Michigan) are compared and contrasted. The dissertation concludes with a final
chapter in which the main conclusions are highlighted and policy implications, limitations, and directions for future research are discussed.
Chapter 4: Ohio

In this chapter, decision making in capital and non-capital cases in Ohio will be discussed. The chapter is divided into two parts: Part A focuses on prosecutorial decision making, and Part B focuses on defense attorney decision making. Each part is divided into three sections: Section 1 involves a discussion of capital cases; Section 2 involves a discussion of non-capital cases; and in Section 3 the plea bargaining process and decision making in capital and non-capital cases will be compared and contrasted.

In discussing the plea bargaining process and the factors that influence decisions throughout this process, attorneys were asked who usually initiates discussions and why, and when any plea discussions usually begin and why. They were also asked to describe the tenor and nature of the bargaining process, whether it involves actual negotiation or if offers are presented as ‘take it or leave it,’ and if discussions tend to be more continuous or confined.

The course of discussions is affected by prosecutors’ and defense attorneys’ desires to resolve a case with a plea bargain or a trial. Accordingly, attorneys were asked about the most important factors that influence their inclination to pursue a plea bargain or a trial. They were also specifically asked to discuss the relative weight of the maximum possible sentence in their decision; this was important in order to provide a

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64 Non-capital cases were intended to include only those homicides that were charged for murder, carrying a penalty of fifteen years to life (see Chapter 3). However, although attorneys were specifically asked to discuss these cases (see Appendix E: Questions for Prosecutors, Ohio and Appendix F: Questions for Defense Attorneys, Ohio), in a few of the interviews it became clear that the attorneys included aggravated non-capital cases in their discussion. In such cases the maximum possible sentence is life without parole. Throughout the discussions of non-capital cases it was reiterated that the attorneys should only be speaking about those cases where fifteen years to life was the maximum possible punishment. Nevertheless, the possibility that the findings pertaining to plea bargaining in non-capital murder cases were slightly confounded by a few attorneys’ discussion of cases where life without parole is the maximum possible punishment is acknowledged.
more in-depth understanding of attorneys’ consideration of the possibility of a death, relative to a life, sentence.

The influence of the maximum sentence, particularly the death penalty, was further explored through attorneys’ discussion of the death penalty as a plea bargaining tool. One of the central questions this study was designed to explore is whether and under what circumstances prosecutors use the death penalty as leverage to induce a guilty plea and, independent of this, whether defense attorneys perceive the death penalty is used in this way. Attorneys’ discussion of this provides valuable insight into the role of the death penalty in plea bargaining.

**Part A. Prosecutorial Decision Making in Capital and Non-Capital Cases**

*Section 1: Decision making in capital cases*

Prosecutorial decision making in capital cases is influenced by a number of factors, including the strength of the evidence, the likely outcome at trial, concerns about resources, and consideration for the wishes of the victim’s family. These factors and numerous others impact how cases are handled from the time they are indicted capital through their final disposition, whether that be as a result of a plea bargain or a trial. Prosecutors’ consideration of these factors often changes as cases develop and as hearings continue, and while some factors may come into play early on, others may not be given much weight until the case unfolds.

*The Charging Decision.* While this study is primarily concerned with plea bargaining, as discussed in Chapter 2, it is important to call attention to prosecutors’ charging decisions, particularly in capital cases. These cases are unique in that they involve not only a decision regarding the degree of murder to charge but also an
additional decision regarding the degree of penalty to seek. Given the question of prosecutors’ use of the death penalty as leverage to induce a guilty plea, it is important to explore the factors that influence prosecutors’ decision to bring capital charges.

The decision to indict an aggravated murder case capitally is the first among many that prosecutors make in the processing of a death-eligible case. This decision is not one that prosecutors take lightly, given the magnitude of the punishment at stake and the expenditure of resources required to obtain this punishment. Yet while prosecutors must necessarily exercise some discretion in making this decision, they are also keenly aware of the potential inequalities brought about by the consideration of extralegal factors. In order to apply the death penalty in a fair and equitable manner, prosecutors may seek to indict all death-eligible cases capitally:

If the evidence meets the statute, I let the grand jury vote on it (OHP1565).

If the evidence fits with the statute, then I think we need to follow the statute as prosecutors and not try to put too many of our personal views into the charging decisions. I really try to avoid that because I think that just muddies the waters… (OHP9).

In emphasizing the importance of considering the evidence and the statutory requirements alone, Prosecutor 9 continued,

… If you’re going to decide whether or not to charge a death case just because your victim may have been a gang member and may not have been a sympathetic victim, then that’s not a fair and equitable application of the death penalty statute in my opinion.

Similarly, in discussing a case involving drug dealers that he66 pursued capitally, one prosecutor said that some might question his decision to indict the case for the death penalty, but in his view, it was a capital case:

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65 This abbreviation refers to Ohio Prosecutor #15.
66 In order to protect the anonymity of respondents all gender references are male.
He [the defendant] robbed the guy, he violently killed him, he murdered him, and this guy, even though he was smoking crack, was the victim, and he’s got a little boy. So to me it’s a capital case (OHP17).

However, while most prosecutors, first and foremost, said they consider whether or not an aggravated murder case meets the statutory requirements for the death penalty, and many also consider the strength of the evidence in the case, only a few indicated that their charging decision is based on these two factors alone; all but four referenced additional factors, such as the characteristics of the victim.

Who the victim is and the victim’s role in the crime were among the mitigating factors cited by slightly less than half of the prosecutors.\(^67\) Contrasting the approach of the prosecutors above, one prosecutor discussed the pivotal importance of the victim in the charging decision, saying that he and his colleagues look at what role, if any, the victim played in the offense, “and the more innocent the person is, that’s where we start leaning towards a capital decision” (OHP1). This prosecutor referred to a few cases that had met the statutory requirements and could have been indicted capitally but were not because they involved a drug robbery or the victim was a drug dealer. Interestingly, he specifically mentioned that race, politics, and other “improper considerations” were not a factor in the charging decision. Unlike the prosecutors mentioned earlier, this individual did not view the consideration of the victim’s role in the crime as “improper.”

The characteristics of the victim, viewed in the context of mitigating evidence, point to the likelihood of obtaining a death sentence at trial, a consideration mentioned by about a third of the prosecutors. Similarly, about a third mentioned concerns about resources, pointing to the exorbitant expense of capital cases, particularly for a rural

\(^67\) A few prosecutors also cited mitigating factors having to do with the characteristics of the defendant, such as age, criminal record, and mental capacity.
county. Those who mentioned cost made it clear that it is not the primary consideration, but given other factors such as the likelihood of a death sentence, it does come into play:

If we know that it’s unlikely that we’re going to get a death penalty conviction because of mitigation evidence, why go through the trouble, the expense, and everything else when you know early on that it’s unlikely that you’re going to receive the death penalty (OHP14).

Similarly, another prosecutor said that cost is not considered in cases where the likelihood of a death sentence is high, but in cases where the likelihood is low, you consider the cost and do not indict the case capitally. He pointed out that the additional expense of a capital case begins right away, once it is indicted and two death qualified attorneys are appointed.

Even in cases where the likelihood of a death sentence is high, a case may not be indicted capitally if the victim’s family does not want the death penalty to be sought. Accordingly, it is important to note that prosecutors are legally required to consult with the victim or victim’s family. The Ohio statute on victim’s rights states that the prosecutor must, “to the extent practicable,” confer with the victim or victim’s family before amending or dismissing an indictment and before agreeing to a negotiated plea for a defendant (see Ohio Revised Code Chapter 2930, particularly §2930.06 and §2930.08).

Prosecutors are not required to abide by the wishes of the victims’ family, but they are required to discuss the case and their decisions throughout the processing of the case with them.

While most prosecutors cited consideration for the wishes of the victim’s family at later decision points, noting that the time of charging is usually too soon to speak with family members overcome with emotion, about a quarter mentioned the influence of their wishes at this early stage. Two of these prosecutors expressed concern over family
members’ understanding of the length of time between a defendant’s conviction and eventual execution, saying that a life sentence at least gives the family some closure in having the case done.

*The Plea Bargaining Process.* Once an aggravated murder case is indicted for the death penalty the disposition process of a capital case begins. If prosecutors indict the case with the intention of pursuing it to trial (about a third of the sample said as much), any possibility of a plea bargain is likely to be initiated by the defense attorney, not the prosecutor. Whereas the prosecutor seeks to impose the death penalty, the defense attorney seeks to avoid it; about a third of the prosecutors said the defense attorney would initiate a plea for this very reason:

They’re there to save their client’s life; we’re there to do justice and hopefully get rid of him as long as possible (OHP3).

Indeed, a majority of prosecutors (11/17) said that it is usually the defense attorney who raises the possibility of a plea. However, there are circumstances in which the prosecutor may initiate the discussion, such as in cases involving co-defendants where the prosecutor needs the testimony of one defendant against another. Also, just as a prosecutor may not indict a case capitally if the victim’s family does not want the death penalty pursued, he may raise the possibility of a plea bargain with the defense attorney if the victim’s family asks him to do so. This may occur early in the process or not until much later.

Conversely, if the victim’s family wants to see the death penalty imposed, a prosecutor would not be inclined to initiate a plea discussion. Of the five prosecutors who referenced the wishes of the victim’s family, three said they would not discuss a plea

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68 Three prosecutors said that it is usually they who raise it, and three said it varies.
bargain with the family until and unless they knew the defense was interested in pleading guilty; if the prosecutor were to initiate the plea discussion, the family might perceive him as not caring about their loved one and not wanting to do the work of a trial. While prosecutors indicated that the wishes of the victim’s family do not control the decisions they make, one prosecutor noted that “life is a lot easier if everybody is on the same page” (OHP14).

Only a few prosecutors mentioned the strength of the evidence as a factor explaining who initiates a plea. If the prosecutor has a strong case he will not raise the possibility of a plea; if he has a weak case or if he needs the defendant’s testimony in another case he will raise it, particularly given concerns about the expenditure of resources, a consideration cited by a couple of prosecutors at this stage. If evidence comes to light that weakens the likelihood of a death sentence, a prosecutor may approach the defense attorney about a plea in order to save the expense of a trial that is unlikely to end in the desired result.

While only few prosecutors cited the evidence regarding who initiates a plea, this factor was cited by all of the prosecutors regarding when a plea is initiated. The strengths and weaknesses of the evidence and the time needed for both sides to review any changes or developments in the evidence influence whether the possibility of a plea bargain is raised earlier or later in a case. While other factors come into play, including the facts of the case and the style of the defense attorney, the evidence was the one and only factor mentioned by at least half the prosecutors.

Although a number of prosecutors cited the defense attorney’s desire to avoid the death penalty as a factor explaining who initiates a plea, only one prosecutor mentioned
this factor here, and this same prosecutor said that plea discussions do not often begin
until later in the process. He said that the defense attorney, like himself, needs time to
investigate the case and understand the evidence:

If he [the defense attorney] came in early on and said, ‘I’ll plead to 30 to life if
you drop the death spec’ without a full opportunity on his behalf to make an
assessment of what the strength of the state’s case is, he may be selling his guy
down the river, because maybe if he really looked at the case he’d say, ‘you know
what, this isn’t even aggravated murder, this is voluntary manslaughter; I think
I’ve got a good shot at not only avoiding the death penalty but maybe even
avoiding a life sentence’ (OHP14).

Thus, while it is more common for plea discussions to be initiated by the defense attorney
than by the prosecutor, partially because of the defense attorney’s desire to avoid the
possibility of the death penalty, this desire does not necessarily impel defense attorneys to
inquire about a plea early in a case, at least in prosecutors’ experience. In fact, about a
third of the prosecutors said that plea discussions do not begin until later in the process;
slightly less than half said they begin at or soon after the first pre-trial conference when
discovery is exchanged, and less than a third said that discussions may begin early or
later in the process; it varies.

Variability would seem the most apt description of the plea bargaining process in
capital cases. Not only does the point at which discussions begin vary but the point at
which they end varies as well. Slightly more than half the prosecutors said that
discussions are ongoing, continuing throughout the process and even up to and during
trial. On the other hand, a few prosecutors said discussions are confined, and a few said it
varies. Furthermore, there is little relationship between when a plea is raised and the
extent of the discussions; four of those who said discussions are ongoing said they begin
early, three said they begin later, and two said it varies. Similarly, the responses of those
who said that discussions are usually confined were fairly evenly spread with respect to
the time at which discussions begin. It is interesting to point out that even when
discussions are confined, they do not necessarily happen quickly:

If a defense attorney sends a signal that he’s interested, I’m gonna work with
him…If his client is interested in pleading guilty to something, I’m gonna try to
see if we can reach an agreement on something. I’m not gonna stall it out and
wait. But plea discussions in and of themselves can go over a period of weeks and
weeks and weeks because I’ve got to talk to the police, I’ve got to talk to the
victims, I’ve gotta consider it, I’ve gotta get back in touch with the attorney, he’s
gotta talk with his client. So even if the two of you, the prosecutor and the defense
attorney, are trying to reach an agreement, in a death penalty case it’s not done in
days or even a week; it usually takes weeks (OHP17).

Plea agreements take time, whether they involve negotiation and bargaining or
whether offers are accepted or rejected as presented. As the passage above illustrates,
even where there may be little discussion between attorneys over the parameters of a plea
bargain, there is still discussion with other involved parties. One prosecutor who said that
plea offers are more take it or leave it, nevertheless said that there is a little wiggle room
in the following sense:

The defense lawyer has to be able to say to his client, ‘they’ve offered this but I
think I can get them to this’ and the second ‘this’ is what we’ve already offered
(OHP4).

Slightly less than half the prosecutors said that there is little actual negotiation in plea
bargaining:

Usually because we like to indict only when we have really strong cases, we can
pretty much dictate the terms of the sentence, say, ‘look, if you want to get the
death penalty dismissed, then you’re gonna get the maximum sentence’ (OHP14).

This is the best I can give you; if want it, fine; if not, fine (OHP2).

That being said, most prosecutors indicated that counter offers would be considered,
particularly if their case gets weaker as evidence develops or if mitigation evidence arises
that makes them reevaluate the case. Accordingly, slightly less than half the prosecutors said the extent of negotiation involved in plea discussions varies.\footnote{69} In negotiating a plea, one prosecutor said that it is important to him to know what type of mitigation the defense has, to know what led the person to commit the crime:

To me it is slightly different if someone had been abused all their life, not that that’s an excuse, [but] I sometimes have less sympathy for someone who was raised with a silver spoon in his mouth and does something like this as opposed to somebody who spent his high school years homeless and his parents used drugs, that type of thing (OHP8).

Similarly, other prosecutors indicated that the extent of actual negotiation involved in plea bargaining is case and defendant specific. The offers, if any, that prosecutors are willing to consider and their inclinations to pursue a case to trial or to try and reach a plea agreement are influenced by a number of factors, among them the evidence, which most prosecutors agreed is “always changing” (OHP16).

The evidence is a key factor throughout the processing of a capital case. It is considered in the decision to bring capital charges, it influences the time at which plea discussions begin and the nature of those discussions, and it influences prosecutors’ disposition inclinations. One prosecutor who said that he only indicts cases for the death penalty with the intention of pursuing a capital trial, nevertheless said:

It is certainly not the case that we try everyone of these cases because it really isn’t until you get into the actual hands on preparation that you can make the type of judgments that go into determining whether a negotiated plea is appropriate, and that means you have to really understand what your available evidence is, the evidence that will be admissible in court and the quality of your verbal testimony, usually from your civilian witnesses. They may not be on paper the most credible people for any number of standard reasons. Maybe they have a criminal background and a prior record, maybe they are gang members, maybe they’re drug abusers, maybe their memories aren’t as clear as you would want them to be or maybe they are reluctant to testify, and because of that they are fudging what

\footnote{69} Less than a third indicated that plea discussions usually involve negotiation.
they remember. So there are a multitude of things that come into play before you can reach a decision as to whether a plea bargain should be instituted (OHP14).

When asked about the most important factors that influence their desire to pursue a plea bargain or to pursue a trial, just about all of the prosecutors mentioned the evidence; six prosecutors specifically cited the mitigation evidence (see Table 4.1). The strength and admissibility of the evidence, both in the trial and in the penalty phase, is indicative of the likely outcome of the case, a factor mentioned by slightly more than half the sample. Recall that this factor, particularly the likelihood of a death sentence, was mentioned by a few (though not as many) as influencing their charging decision as well.

<table>
<thead>
<tr>
<th>Factor</th>
<th># of Prosecutors Citing It</th>
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<tr>
<td>The evidence</td>
<td>16</td>
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<tr>
<td>Consideration for the victim's family</td>
<td>15</td>
</tr>
<tr>
<td>The likely outcome at trial</td>
<td>9</td>
</tr>
<tr>
<td>Resource concerns</td>
<td>9</td>
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<tr>
<td>The nature/circumstance of the crime</td>
<td>7</td>
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<tr>
<td>The need for the defendant's testimony</td>
<td>6</td>
</tr>
<tr>
<td>Consideration for the community</td>
<td>6</td>
</tr>
<tr>
<td>The facts of the case</td>
<td>5</td>
</tr>
<tr>
<td>The defendant's prior record</td>
<td>4</td>
</tr>
<tr>
<td>Consideration for the investigators</td>
<td>4</td>
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<tr>
<td>Who the victim is/the victim's role</td>
<td>4</td>
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<tr>
<td>Consideration for the jury's view of the evidence</td>
<td>4</td>
</tr>
<tr>
<td>The plea offer the defense will agree to</td>
<td>3</td>
</tr>
<tr>
<td>Other</td>
<td>5</td>
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</tbody>
</table>

In discussing the likelihood of a death sentence, a number of prosecutors talked about juries having the option of life without parole; a sentencing option that was added to the capital punishment statute in 1996. Prosecutors said that since this change, jurors are less likely to return a death sentence:71

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70 Six prosecutors specifically mentioned the mitigation evidence.
71 The statistics confirm this. Between 1977 and 1995 there was an average of 13.75 death sentences per year in Ohio; between 1996 and 2007 the average was nearly half that, 7.5 per year (Death Penalty Information Center, 2009).
Prior to 1996 we never had the life without parole option… It’s hard to ask 12 people to sign a verdict of death. These people have to live with that the rest of their life, and now you’re giving them an opportunity to say, ‘well, we can put him in prison and he’ll never get out again, and then it’s not such a burden on us.’ I think it’s affected tremendously the number of death sentences we get here (OHP16).

One prosecutor recalled a particular case where the jury returned a sentence of life without parole:

It was a cold blooded, execution style killing, and there was no doubt that this person did the killing, and in my previous career, before the law was changed, I’m pretty sure this guy would have got the death penalty, but in this case, he got life imprisonment without parole (OHP17).

Given that juries are not likely to vote for a death sentence, one prosecutor said that pursuing a trial to get that sentence is not as important to him as it used to be. Indeed, over two thirds of the sample said that the desire to secure a death sentence is not an important consideration for them. In discussing this, many prosecutors openly shared their personal feelings about capital punishment and the value of life without parole or equivalent alternative sentences:

With the possibility of life without the possibility of parole as an ultimate resolution or life without the possibility of parole for 30 years and the guy is 50 years old, death is not that important to me. Getting the death sentence just for the sake of getting the death sentence is not a significant factor for me (OHP4).

I have mixed feelings...I think if we can get through this and everybody is satisfied with a life sentence and the victims feel like they were treated fairly and that justice has been done, then we’re probably better to do that and be done with this and let everybody move on (OHP11).

One prosecutor who expressed his support for the death penalty but who nevertheless said it is not an important consideration in his decision to pursue a trial minimized his decision making role in the process:

Apart from the more general question about the most important factors that they consider in their decision to pursue a plea bargain or a trial, prosecutors were asked about the relative influence of the importance of the possibility of securing a death sentence in this decision (see Appendix E: Questions for Prosecutors, Ohio).
I don’t play god; it’s the jury’s role to decide. It’s important for me to enforce the law, but it doesn’t sound right saying it’s important for me to get the death penalty. It’s important for me to pursue justice and prosecute the case and let a jury decide. In that process, if we can work out a plea, we can work out a plea, if we can’t, we can’t…Some of the cases that we’ve pled out to life in prison without parole are cases where I believe the guy should get the death penalty, but I’m not the jury, and if he’s in prison for life, and there’s a chance that that’s what he’s gonna get anyhow, why would I spend all of our time and work and efforts and the expense just to assert what I think? (OHP17).

Notably, a similar rationale was offered by one of the few prosecutors who said that securing a death sentence is a significant consideration in his decision to pursue a trial:

It’s of utmost importance, because there is no point in wasting state resources and office resources and the time of the police and the time of the jurors and the court if we can reach an agreement as to what we think we’re gonna wind up at anyway (OHP15).

Thus, even amongst the minority for whom the desire for the death penalty is an important factor, it is not, in and of itself, the driving factor; it is weighed against other considerations, including the expenditure of resources and the likely return on that investment.

Indeed, resources are an important consideration in prosecutors’ inclinations to pursue a trial or a plea bargain. Recall that this was a factor in the decision to indict as well. However, whereas about a third of the sample cited the influence of cost in charging a capital case, about half cited it as a factor in disposing of a capital case. Again, prosecutors said that although cost is not a primary concern, it is a factor, especially when considered in tandem with the likelihood of a death sentence at trial. One prosecutor said that while he does not like to think of himself as a “bean counter” (OHP3), he cannot ignore the cost factor, especially in a rural county where he said there is pressure to resolve a capital case because of monetary concerns. Another prosecutor pointed out that a capital trial can last five to seven weeks (compared with a week to ten days for a non-
capital murder trial), and the defendant may end up with life without parole. Given this, he said that he looks at the commitment of time for prosecutors and the courts and the financial expense of a capital trial, and he strongly considers the likely outcome. Similarly, in discussing two cases that resulted in plea bargains, a prosecutor referenced the savings in cost:

Ultimately they [the plea bargains] save money; they certainly save a lot of wear and tear on the victim’s family over the next 10 or 15 years, and justice is done. There is no possibility of parole, so they’re not going to be out on the street anytime soon (OHP4).

In addition to cost, this prosecutor’s mention of the victim’s family is notable. Whereas similarly small numbers of prosecutors (about a quarter) cited the influence of the victim’s family on their charging decision and on their decision to or not to initiate the possibility of a plea bargain, almost all of the prosecutors cited consideration for the wishes of the victim’s family as a factor influencing their desire to pursue a plea bargain or to pursue a trial.73 Most prosecutors said they speak with the victim’s family to understand what they want to see happen in the case and to explain to them the risks and benefits of reaching a plea agreement versus going to trial. A few prosecutors specifically expressed concern over the effect of the death penalty on family members over time:

You’ve gotta go through so many hurdles to get the death penalty from a jury, then you’ve gotta go through so many hurdles to keep it in tact during the initial appeals, and then 20 years down the line, a federal court can overturn it. I think it’s hard on a lot of victims’ families (OHP15).

This prosecutor went on to say:

I’ve had victims say to me, ‘why go for the penalty? It’s 25 years before they impose it, if they do, or some court can overrule it. We’ll be thinking about this guy for the rest of our lives. If you just take straight agg murder and he gets life, I can forget about this loser.’ They can go on with their lives. That’s what I’ve had victims say to me, ‘we can go on with our lives.’

73 Recall that prosecutors are required by law to consult with the victim’s family (see p.87).
One prosecutor even said that seeing how the death penalty affects the family over time has made him more ambivalent about it. Another prosecutor who shared this concern added that the feelings of the victim’s family may change over time; a family that at first wanted the death penalty may no longer want to go through a trial as time goes on and as they become more familiar with the system.

Accordingly, one prosecutor who said that generally speaking, the victim’s family wants the death penalty, emphasized the importance of explaining to the family the consequences of going to trial on a capital case, “and if successful, that the case never ends for who knows how many years” (OHP4). He said that he goes through a lengthy discussion with the victim’s family because he wants to make sure that they understand the consequences of going to trial “with respect to them personally.” In communicating with the victim’s family and considering their wishes in deciding how to dispose of a case, one prosecutor said,

It’s an art to sit down with somebody, [and] if you do it right, they’ll agree and they can understand why you’re doing it [discussing the benefits of a plea agreement]. But then there are some people that are just as stubborn as can be and they’re not going to like what you want to do (OHP12).

His comment is notable in that it reflects what most prosecutors said about the wishes of the victim’s family being an important consideration but not the determining factor in their decision to pursue a plea bargain or to pursue a trial. Prosecutor 12 said that you want the victim’s family to know what is going on and why, and you try to do what they want, but ultimately, he, not the family, is the decision maker.

In addition to the wishes of the victim’s family, a few prosecutors said they consider the wishes of the community. Prosecutors said that they might pursue a trial
either because they feel the community needs to hear the particular case and/or because they feel it is not a case that the community wants to see pled out:

It wasn’t a strong case at all, but it was one of those cases where we just said look, there are some things that the community has a right to know, and we’re gonna put the evidence out there and let the jury decide (OHP6).

Honestly, in the back of our minds, there’s always that thought of…‘if we plead this thing out, what’s the community gonna think about us?’ Unfortunately, that’s a little bit of the process in the decision making. My boss is an elected official, and you’ve got to always keep in the back of your mind, ‘what’s the press gonna do with this one?’ (OHP16).

Other prosecutors also expressed feelings of pressure from the community as well as the press. For example, Prosecutor 11 said:

There’s so much more public attention, so much more public interest [in capital cases]. The reality is, we handle numerous cases that don’t get any public attention. I think how these cases are handled does affect the public’s confidence in the criminal justice system, and so I think that it probably makes it more important that some of these cases are resolved at trial.

He went on to say that capital cases tend to be the most egregious, high profile cases, and that makes it difficult to resolve them. Accordingly, about half the sample cited the nature and circumstances of the crime as factors influencing their decision to pursue a plea or a trial. Additionally, four prosecutors mentioned the victim, who he/she is and his/her role in the crime; it is notable that in the cases referenced by the two prosecutors above, the victims were children.

*Use of the Death Penalty as a Plea Bargaining Tool.* In theory, prosecutors may bring capital charges in a death-eligible case with the intention of disposing of the case with a plea bargain. As discussed in Chapter 2, defendants facing such charges may be more inclined to plead guilty than those for whom the difference between a plea bargain and a trial conviction is a matter of years and not a matter of life and death. Prosecutors
may capitalize on defendants’ fear, filing capital charges in order to induce a defendant to plead guilty, quite possibly to a higher sentence than he otherwise would, were the defendant not faced with the risk of losing his life, should he go to trial. A plea of guilty saves the county the expenditure of resources required for any murder trial, let alone a capital murder trial. However, the findings indicate that what makes for good theory does not necessarily make for good practice.

When asked about prosecutors’ (their own and others’) use of the death penalty as leverage in plea bargaining, slightly more than half the sample said that prosecutors use the death penalty in this way. Of these, only three indicated that they had or would personally use the death penalty to induce a plea bargain. One of the many prosecutors who said that he does not use the death penalty as a plea bargaining tool nevertheless acknowledged the use of leverage:

Most of what we do in the criminal justice system is about the exertion of the proper leverage…Have I known that by indicting a death case there is more leverage to try and resolve it short of a plea, yeah, I mean, everybody knows that. When you have a death penalty case, people tend to be a little more open to the possibility of resolution because the risks are so high…but I’ve never thought to myself, ‘I need to indict this as a death case and then I’ll be able to get a plea because I’ll take death off the table’ (OHP9).

While many prosecutors indicated that the death penalty is leverage and is used by some as leverage, they also expressed concerns with such a practice:

It’s a double-edged sword. If you charge somebody with death specs with the hopes that you’ll eventually use it as leverage to get a plea, then how do you justify the plea later on? Now you have to go back to the victims and try to explain what is going on. So I’m sure it’s been done before, we’ll put some pressure on the defendant or he’ll testify against his co-defendant with that hope,

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It is important to recognize that prosecutors may not have been entirely candid when answering what may have been perceived as an accusatory question. However, this question was asked well into the interview, after a rapport had been established, thereby diminishing the likelihood of a less than honest answer. It is believed that most responses were given honestly and sincerely. Nevertheless, the possibility that prosecutors’ were not entirely forthright is acknowledged.
but sometimes that can backfire. You got to be careful with what you’re doing (OHP12).

To me, it’s almost unethical, because if you don’t intend to pursue that [the death penalty] than you shouldn’t indict it [the case] that way. You know, capital cases aren’t cheap, so you’re spending a lot of money because most of these cases don’t resolve themselves until shortly before the trial…Once you indict these cases, the money starts (OHP16).

Considerations of the victim’s family, ethics, resources, and one’s own reputation were cited both by prosecutors as reasons why they personally would not use the death penalty as a bargaining tool and by those who do not believe other prosecutors use the death penalty in this way either:

The person who does it should be ashamed to ever admit it if he does do that…You pretty much want to indict what you think your evidence is and what you’re gonna be prepared to prove. If you start off from that point, then you start off on a sure foot. You have good footing. If you start off on over indicting or indicting on something you’re not really ready to prove or you’re not convinced of, that will be the case that will go to trial and you’ll look bad, and you want to have strong cases (OHP17).

Just seeking a death penalty indictment changes the whole way these cases are handled…You don’t want to be seeking a death penalty indictment without some pretty serious thought because you’re just going to change how the case is handled and the expenditure of money…People think that prosecutors are just trying to plead these cases out so they don’t have to do the work of going to trial, well there is a whole lot of work involved in getting a case resolved (OHP11).

Recall the earlier discussion of resource concerns as a factor influencing prosecutors’ indictment and disposition decisions. While resolving a capital case with a plea bargain saves the expense of a trial and subsequent appeals, as Prosecutors 11 and 16 point out, plea bargains are not often made right away, and not seeking a capital indictment is more cost effective than seeking and later dismissing one as part of a plea agreement. Given the additional expense, work, attention, and scrutiny that capital cases garner, one prosecutor
said, “It’s not something you use as a tool; we would much rather stay away from it than go into it lightly (OHP6).

Section 2: Decision making in non-capital murder cases

The decisions prosecutors make in the disposition of non-capital murder cases are determined by factors such as the strength of the evidence, consideration for the wishes of the victim’s family, and the parameters of the plea bargain the defense is willing to accept. Some of these factors were cited by a majority of prosecutors as affecting their decisions throughout the disposition process, while others were only mentioned by a few prosecutors and at particular stages of the process.

The Plea Bargaining Process. More often than not, any discussions regarding the possibility of a plea bargain are initiated by the defense attorney. While a majority of prosecutors (10/17) said as much, the reasons given for who initiates a plea vary, and no one particular reason was cited by more than five prosecutors. The defendant’s desire to avoid the maximum sentence was among the more common reasons given for why plea discussions are usually initiated by the defense attorney. Referring to the defendant’s exposure to the open life sentence at trial, one prosecutor said, “They don’t want that tail” (OHP5).

Another factor is simply the custom or routine that has developed in the county. One prosecutor said that his office handles a lot of cases and he is overwhelmed, and so it is up to the defense attorney to make a point of initiating a discussion in a particular case:

Our office is right outside the courtroom; it’s easy for them just to stop by (OHP6).
Notably, his comment not only reflects the practice of his office but also the physical location of it, a factor that has been discussed in the research literature. In some counties it may be customary for the prosecutor, not the defense attorney, to initiate the plea discussions. Of the four prosecutors who said they usually raise the possibility of plea bargain, three said that is just how things work:

Generally speaking, when we send out the discovery we send out an offer so there’s something on the table right away…so the defense knows what’s on the table (OHP4).

A few prosecutors said they do not initiate discussions because they feel that doing so would be a sign of weakness. This points to the strengths and weaknesses of the evidence; prosecutors indicated that they would not raise the possibility of a plea bargain if they have a strong case. However, if there are issues with the evidence and/or with witnesses, or if they need the testimony of the defendant in another case, they may approach the defense.

Also suggestive of who initiates a plea are the wishes of the victim’s family. If the family does not want a trial the prosecutor may propose a plea bargain, otherwise he is likely to wait to speak with the family unless and until he knows the defense is interested in resolving the case. However, it is notable that only less than a quarter of the prosecutors mentioned consideration for the family’s wishes at this stage of the disposition process.

While the defense attorney is more often the one to raise the possibility of a plea, he does not necessarily do so early in the process, or later for that matter. About half the prosecutors said plea discussions begin relatively early, at or soon after the first pre-trial

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75 See for example, Eisenstein, Flemming, and Nardulli (1988), and Eisenstein and Jacob (1977).
76 Three prosecutors said that who initiates the possibility of a plea varies.
conference when discovery is exchanged; about a quarter said they begin later; and about a quarter said it is variable. The factor driving the point at which discussions begin is the evidence, including the strengths and weaknesses of the evidence and the time necessary for the defense attorney to investigate the prosecution’s evidence:

Before he [the defense attorney] starts even considering anything, he’s gonna want to see what evidence the prosecutor has, and then he wants to confront his guy with the evidence…he’s gonna want to get a handle on it, I think, before he feels comfortable bringing the idea of a plea up (OHP8).

Another prosecutor said that plea discussions begin once the defense attorney has had a chance to look at the prosecutor’s evidence and “once everybody kind of knows what’s going on and has a sense as to where we’re at” (OHP9).

Although some prosecutors mentioned other factors to explain when the possibility of a plea is initiated, the evidence was the only factor cited by more than half the sample. Only one other factor was cited by even a quarter of the sample, the style of the defense attorney and/or the prosecutor’s relationship with him/her.77 One prosecutor said that some defense attorneys send a signal very early on that they are interested in discussing a plea bargain, whereas others never initiate discussions.

While there is great variability pertaining to when plea discussions begin, once they commence, they often continue; an overwhelming majority (13/17) said that discussions are usually ongoing. In describing this process, one prosecutor referenced the style of the defense attorney:

The plea bargain dance is an ongoing affair because even if you say, ‘this is my best offer, take it or leave it,’ the best defense attorneys are persistent and will not take no for an answer…Some defense attorneys however can’t take the begging part and they won’t keep coming back and begging you and working you over. They’ll just go to their client and say, ‘this is the best deal I can get you, take it or leave it’ (OHP14).

77 A few prosecutors cited the facts of the case, and a couple mentioned the involvement of the judge.
Although discussions often continue, they do not necessarily change very much. About a third of the sample said that offers are usually presented and either accepted or rejected as such. One of these prosecutors said the ongoing nature of discussions really just consists of him reiterating the same offer to the defense throughout the process; another said that he is typically pushing the defense attorney throughout to decide whether or not he wants to accept the offer. Notably, the only two prosecutors who said that plea discussions are usually not ongoing but are confined to a specific point or points in the process were among those who said that there is little going back and forth over the parameters of the plea. One of these prosecutors said that he does a lot of work preparing a case for trial, and if the case is going to be resolved with a plea, he wants it resolved sooner than later; his office tries to establish a reputation of not entering into plea bargains close to the commencement of trial.

This being said, it is important to point out that about a third of the sample said that plea discussions do involve negotiation and bargaining. About a third said that it varies, offers may be up for discussion or they be presented as “take it or leave it.” Prosecutors said that the nature of the discussions depends on the particular case, including such factors as the strength of the evidence and the style of the attorneys involved:

Generally you like to know what the strength of your case is, and then if there is a way to settle it, like in any case…you’d rather settle it than actually go through the procedure of a trial because you get something certain. Where you make your decision is what level do you want to settle it… We know when we make settlement offers whether they’re [the defense] likely to take it or not. A lot of times we’ll make a settlement offer that you have to plead to the indictment (OHP6).

The character of discussions and the nature of the offer may reflect prosecutors’
inclination to pursue a plea bargain or to pursue a trial. Echoing the comment above, another prosecutor said that if you want to resolve a case short of a trial, you need to make an offer the defense will consider:

If I don’t offer anything, the defense attorney and his client are gonna say, ‘what have I got to lose; I might as well go to trial,’ and no matter how good a case you have, you’re never guaranteed a conviction, and so a good plea is better than a good trial... I know I have to offer something as an inducement to avoid a trial, because I don’t want to have a trial. I don’t want to try a case just to try a case, and so I have to offer something, but I don’t want to offer more than I need to (OHP14).

It is notable that both of these prosecutors referenced the parameters of the plea offer that the defense will accept. About half the sample cited this factor as influencing their decision to enter into a plea agreement or to pursue a trial (see Table 4.2). In emphasizing this, one prosecutor said that he thinks more about what the defendant should be convicted of than about the process through which the defendant should be convicted:

We’re not pursuing either one [a plea bargain or a trial]; we’re pursuing a specific result. The trial is not an end; the trial is a means to an end. The end is we think he should be convicted of A, B and C and sentenced to something else, and then if the defense won’t do that, that’s fine, we’ll have a trial (OHP11).

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<tr>
<th>Table 4.2: The Most Important Factors Cited by Prosecutors Influencing Their Plea/Trial Decision in Non-capital Murder Cases</th>
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<tbody>
<tr>
<td><strong>Factor</strong></td>
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<tr>
<td>The evidence</td>
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<td>The nature/circumstance of the crime</td>
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<td>Consideration for the victim's family</td>
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<td>Consideration for the investigators</td>
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<td>Other</td>
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78 Of those who cited this factor, six specifically mentioned a defendant’s prior record (or lack thereof); three specifically mentioned a defendant’s likelihood of re-offense; and two specifically mentioned a defendant’s age.
In some cases the prosecutor’s plea offer involves nothing short of the life tail, a sentence the defense is unlikely to accept, given that defendants are rarely released upon their first parole hearing. When asked about the relative importance of securing the life tail in their decision to pursue a trial, about a third of the prosecutors said that it is important but only in light of other considerations. Similarly, about half said that it may or may not be important depending on the particular defendant and the particular case:

Is this a bad dude with a long record who deserves to be locked up for the rest of his life, or this some guy that murdered his neighbor after an argument over some stupid thing who has been gainfully employed all of his life and has no prior record...that kind of stuff makes a difference. If I’m prosecuting the guy who just made a horrible mistake but otherwise is a decent taxpaying, god fearing citizen, he’s gonna get more of a break from me than some long time burglar, robber, rapist who I finally got on a murder case; he’s going in for life, if I can prove it, if I’ve got a good enough case, that’s my goal (OHP12).

Accordingly, in discussing the factors that influence their inclinations to pursue a plea bargain or a trial, a number of prosecutors mentioned their consideration of the nature or circumstances of the crime and the characteristics of the defendant, particularly whether or not he has a prior record. However, while these factors influence prosecutors’ inclinations, as the individual quoted above noted, the decision to pursue a trial is also affected by the strength of the evidence, a factor that every prosecutor cited:

If I’ve got good strong evidence, I’m not inclined to plead to less than anything than what it is (OHP17).

Prosecutors’ confidence in pursuing a trial if a particular plea offer is not accepted is affected by the strength and availability of the evidence in the case. The evidence is an important consideration throughout the disposition process; recall that it was mentioned

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79 Apart from the more general question about the most important factors that they consider in their decision to pursue a plea bargain or a trial, prosecutors were asked about the relative influence of the importance of the possibility of securing a life sentence in this decision (see Appendix E: Questions for Prosecutors, Ohio).
by a number of prosecutors as influencing who raises the possibility of a plea bargain and when.

Notably, in discussing their consideration of this factor in their desire to pursue a plea bargain or a trial, a few prosecutors specifically mentioned the respectability and reliability of witnesses. For example, one prosecutor said that his decision is influenced by “how dependable your case is” and “how clean your witnesses are” (OHP10). Although only cited by a few others, it is notable that Prosecutor 10 also mentioned “how clean your victim is,” referencing a tenet he learned years earlier, “I’d rather have bad facts and a sympathetic victim than good facts and an unsympathetic victim.

While consideration for who the victim is and/or his or her role in the crime is not a factor for most prosecutors, consideration for the victim’s family is. One prosecutor pointed to the necessity of considering their wishes out of concern for negative publicity:

You always have to take them into account. It’s more of a practical aspect, you could end up reading about it in the paper, and frankly, nobody wants that (OHP9).

Accordingly, another prosecutor emphasized the importance of building a rapport with the victim’s family. Many prosecutors who cited a concern for them said that the wishes of the victims’ family do not control their decision but they do influence it.

Section 3: Comparing and Contrasting Prosecutorial Decision Making in Capital and Non-Capital Murder Cases

Generally speaking, prosecutorial decision making in capital cases looks very similar to prosecutorial decision making in non-capital cases. There are few differences pertaining to who initiates a plea and when and few differences pertaining to the nature of the discussion process. The factors influencing prosecutors’ decisions in both types of cases are similar. However, some differences in the number of prosecutors citing
particular factors and in the factors that were and were not cited in capital and non-capital cases are notable.

In both types of cases it is usually the defense attorney who initiates the possibility of a plea bargain. In discussing defense attorneys’ willingness to enter into plea discussions in capital compared with non-capital cases one prosecutor said:

Defense attorneys are always willing to enter into plea negotiations; they wouldn’t be doing their job if they weren’t. It’s not that they’re more willing [to enter into plea negotiations in capital cases] (OHP14).

The factors that account for defense attorneys initiating the discussion include the defense’s interest in avoiding the maximum sentence, the strength of the evidence, and prosecutors’ consideration for the wishes of the victim’s family. Interestingly, similar numbers (about a third) of prosecutors in both capital and non-capital cases mentioned the influence of the maximum sentence. The possibility of the death penalty does not appear to impel defense attorneys to initiate a plea discussion any more than the possibility of a life sentence, at least in prosecutors’ experience.

However, charging a case capitally may dissuade prosecutors from initiating plea discussions; about a third said they indict a case capitally with the intention of pursuing it to a capital trial (and would therefore not be inclined to initiate a plea discussion). In contrast, not one prosecutor cited his intention to pursue a case to trial from the beginning as a factor indicating why the defense attorney is the one who often initiates plea discussions in non-capital cases.

It is also notable that while about a third of the prosecutors said that routine or custom dictates who initiates the discussions in non-capital cases, only one prosecutor said as much in capital cases. Given that most homicides are not death-eligible (see
Chapter 2), this disparity may be due to the rarity with which capital cases are encountered; due to the infrequent nature of the cases, no routine or custom may have developed among prosecutors and defense attorneys concerning how they are handled.

The time at which the defense attorney (or in some situations, the prosecutor) raises the possibility of a plea bargain varies. In neither capital nor non-capital cases did a majority of prosecutors indicate that plea bargains were usually initiated earlier or later in the disposition process. These findings suggest that the possibility of the death penalty in capital cases is not in and of itself an inducement for the defense to inquire about a plea bargain early on. Indeed, as noted earlier, only one prosecutor cited the defense’s desire to avoid the death penalty as a factor at this stage, and this same prosecutor said that plea discussions do not often begin until later in the process, after the defense has had time to review the evidence.

Accordingly, a majority of prosecutors cited the strengths and weaknesses of the evidence as a factor explaining when the possibility of a plea bargain is raised in both capital and non-capital cases. Interestingly, the next two most commonly cited factors were the same in both types of cases: the facts of the case, and the style of the defense attorney and/or the prosecutor’s relationship with him/her. It is noteworthy that only one prosecutor in capital and non-capital cases mentioned consideration for the wishes of the victims’ family at this stage. Generally speaking, prosecutors indicated that the victim’s family needs time to digest the crime and understand the trial process before discussing the possibility of a plea bargain; thus, their wishes more often are considered at later stages.

80 Though similar, the numbers of prosecutors citing these two factors was relatively small.
Regardless of when plea discussions are initiated, once they begin they tend to continue; this is especially true in non-capital cases. It is notable that a majority of prosecutors said that discussions are ongoing in non-capital cases, but only slightly more than half said as much about capital cases; a number of prosecutors described the nature of discussions as confined or variable. This finding is particularly interesting given that the amount of negotiation and bargaining over plea offers does not differ in capital and non-capital cases; in both types of cases about a third of the prosecutors said there is negotiation over the parameters of the plea bargain, about a third said there is little to no negotiation, and about a third said it varies. Furthermore, as noted earlier, the amount of negotiation does not correlate with the ongoing or confined nature of the discussions.

Recall that a number of prosecutors cited the custom or routine practice in a county as a factor for who initiates plea discussions in non-capital but not in capital cases. As mentioned earlier, this suggests that while norms or routines may have developed regarding the disposition process of non-capital cases, no such norms may have developed guiding the disposition of (relatively infrequent) capital cases. This may account for the greater variability found among prosecutors’ descriptions of the confined or continuous nature of discussions in capital cases.

Another possible explanation is that sometimes discussions may be confined in those capital cases where the prosecutor has made it clear that he has charged the case with the intention of pursuing it to trial. In such cases the defense attorney may inquire about the possibility of a plea bargain only to be told in no uncertain terms that there will be no offer. However, only one of those prosecutors who said that he indicts to pursue also said that discussions are usually confined. Furthermore, although the prosecutor may
intend to pursue the case to trial, evidence may arise that causes him to reevaluate the case and the potential for a plea bargain. Generally speaking, although the possibility of the death penalty may cast a shadow over negotiations, the character of discussions is influenced more by case specific factors than by the possible maximum sentence:

I don’t think there’s any difference because murder is murder, and you’re dealing with the most serious cases that you come across as a prosecutor, so whether you have a capital case or a straight murder or an aggravated murder without death specs, the process of plea bargaining isn’t any different. You’re looking at what you have and how strongly you feel you can get a conviction. You wait until the defense attorney comes to you, you talk to the victim’s family, and you can either resolve it or you can’t; if you can’t, you go to trial (OHP16).

Similarly, another prosecutor said that in capital cases discussions are,

Probably a little more sober because the stakes are higher, but by and large you go through the same things: here’s what our case looks like, here’s what your case looks like, these witnesses are going to say this, here’s the physical evidence we have, that sort of thing (OHP6).

Prosecutors’ inclinations to pursue a trial or a plea bargain in capital and non-capital cases is influenced by case specific factors as well, such as the evidence and the nature or circumstances of the crime. These two factors, and also consideration for the wishes of the victim’s family, were the three factors most frequently cited by prosecutors in non-capital cases and were among the five most frequently cited in capital cases.81 While these similarities are notable and reflect prosecutors’ experience of there being little difference in the decision making process in the two types of cases, there are nevertheless some stark discrepancies in the factors as well.

Whereas about half the prosecutors cited concerns over resources as a factor in their inclination to pursue a trial or a plea bargain in capital cases, only one prosecutor

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81 Nearly all of the prosecutors cited the wishes of the victim’s family in capital cases; about two thirds cited them in non-capital cases. More prosecutors may have cited the influence of this factor in capital cases given the magnitude of the sentence and the effect of the death penalty on the family over time (i.e. years of appeals).
mentioned this as a factor in non-capital cases. Perhaps reflecting the investment of time and money in capital cases, a slight majority of prosecutors referenced consideration for the likely outcome of a trial, a consideration mentioned by about half as many in non-capital cases. Given the resources required to try a capital case, prosecutors may be reluctant to do so unless they are confident that the case will result in a death sentence, an outcome that would not otherwise be obtainable through a more cost effective plea disposition. In contrast, the risk of trial is one that prosecutors seem more willing to take in non-capital cases, particularly if the defense will not agree to the prosecutor’s plea offer, a factor cited by more than twice as many prosecutors in non-capital than in capital cases. As one prosecutor said, “When you’re arguing back and forth over a few years, sometimes it’s easier to just try it” (OHP3).

The offer that prosecutors are willing to agree to in lieu of pursuing a trial may be influenced by the characteristics of the defendant, such as his age, prior record, and likelihood of re-offense. One prosecutor noted that you look at a guy who killed his wife because she was cheating on him differently from how you look at a cold-blooded murderer. While half the sample cited the influence of such characteristics in their inclination to pursue a plea or a trial in non-capital cases, less than a quarter cited them in capital cases. However, in discussing the factors that influence their decision to bring

\[82\] As noted earlier, in capital cases these characteristics included the defendant’s age, criminal record, and mental capacity. It is notable that mental capacity was a characteristic mentioned by prosecutors only in capital cases. This may reflect the Supreme Court’s prohibition on the execution of the mentally retarded (Atkins v. Virginia 2002). It is also notable that the likelihood of re-offense was mentioned by prosecutors only in non-capital cases. While future dangerousness is an oft-discussed concept in the capital punishment literature (see for example, Sorensen & Marquart 2003), these findings indicate that prosecutors may be less concerned with it in capital than in non-capital cases. This may reflect the different negotiating points in the cases. In non-capital, non-aggravated murder cases carrying a sentence of fifteen years to life (barring additional charges), most prosecutors expressed a reluctance to accept a plea bargain to reduced charges that would carry a flat sentence (one that does not carry the life tail) that would allow the defendant a definitive release date. In contrast, in capital murder cases, prosecutors indicated that getting the death
capital charges, about a third of the prosecutors cited the consideration of mitigating factors having to do with the defendant. One prosecutor said that he is not concerned about the defendant’s age or prior record in his decision to pursue a case to trial or to pursue a plea bargain because he would have already considered these factors when he decided to charge the case capitally. These findings suggest that the characteristics of the defendant may influence prosecutors’ decisions very early in capital, compared with non-capital cases.83

It was noted earlier that some prosecutors said they indict a death-eligible case capitally with the intention of pursuing it to trial. This runs counter to the argument that prosecutors may seek the death penalty in order to have leverage in plea bargaining, a central question being explored in this study. Although a number of prosecutors indicated that some use the death penalty as leverage, many also expressed concern about the use of the death penalty in this way. In discussing the relative ease or difficulty of coming to a plea agreement in capital versus non-capital cases one prosecutor said,

On the one hand, if you were willing to use those death specs as bargaining chips, just as a matter of doing business, it would be easier [to come to a plea agreement] because you know, what a tremendous hammer you have over the defendant. But because you don’t want to do that, in a way it’s more difficult to resolve those cases because you don’t want to put yourself in that ethical conundrum (OHP13).

Interestingly, while some prosecutors reflected this individual’s belief in the power of the death penalty as a plea bargaining tool, others questioned it. One prosecutor said that he thinks that for defendants, “the prospect of looking at the rest of their life in prison could be more daunting than death” (OHP1). Similarly, another prosecutor said

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83 This finding is suggestive and not conclusive given that prosecutors were not asked about the factors that influence their charging decisions in non-capital murder cases.
that he thinks the death penalty has less real value than any other type of enhancement in sentence negotiation because the defendant does not know if he is going to be sentenced to death upon conviction. In contrast, in non-capital cases the defendant knows what punishment he will receive if he is convicted. This prosecutor added that even if a death sentence is handed down, it will be years before or if the defendant is executed, a sentiment echoed by others:

As a practical matter, there is not a lot of incentive for a defendant to do that [enter into a plea bargain] because if he gets the death sentence, in many cases that’s gonna get changed to a life sentence at some point in the appeal process anyway, and the reality is that most of the juries in Ohio, with the life without parole option, the vast majority, that’s what they end up with on their sentencing rec anyway, so they [the defendants] don’t get the death sentence at trial. So in my mind there is not a lot of incentive: the defendant is probably better just to take his chances, cause the likelihood of the state getting a death sentence is not very high, and then the likelihood of it being carried out isn’t high (OHP11).

In discussing the likelihood of execution, or lack thereof, prosecutors talked about the changing attitudes of the public and the courts and pointed to a lengthy appeals process, one in which death sentences are often reversed. The prosecutor cited above went on to say that “the small likelihood of these death sentences being carried out makes me in some ways feel like I’m chasing something that’s not likely.” He recalled a case in which he rejected a proposal by the defense to plead to thirty years to life:

Now I don’t know who was right and who was wrong; he got the death sentence, but he’s been on death row for over [#]84 years. I’ve got [#] more years under my belt since then, and I don’t know if I’d have made the same decision today as I did then. I don’t know; I’d have to think that out.

Similarly, another prosecutor said that defendants he tried over a decade ago are still sitting on death row. He said that the death penalty is not as important to the public as it

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84 The specific numbers of years stated by this individual are omitted in the interest of protecting his anonymity.
used to be and added that he is not even sure the United States will have a death penalty in the future.

**Part B. Defense Attorney Decision Making in Capital and Non-Capital Cases**

*Section 1: Decision making in capital cases*

The decisions defense attorneys make in capital cases are influenced by a number of considerations, including the possibility of the death penalty, the strength of the evidence, and the involvement of the jury in sentencing. These are among many factors that impact the disposition process of capital cases and the nature of the discussions that ultimately end with a plea agreement or a trial.

*The Plea Bargaining Process.* Most defense attorneys (9/15) said it is they and not the prosecutor who initiate any discussions regarding the possibility of a plea bargain. This is primarily due to the defense’s desire to avoid the possibility of the death penalty, a factor cited by about half the sample, and the prosecution’s intention to pursue it, a factor cited by about a quarter of the sample:

> It’s always going to come from me; if they indict him with a death specification, they intend to go forward (OHD5\(^{85}\)).

Similarly, another defense attorney, pointing out that capital cases are often high profile and politically charged, said that if the prosecutor indicts someone for the death penalty he does so with the intention of pursuing the case to trial. In such situations, if there are to be any plea discussions, it would seem to be up to the defense attorney to initiate them; avoiding the possibility of the death penalty is powerful incentive to do so:

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\(^{85}\) This abbreviation refers to Ohio Defense Attorney #5.
My ultimate job is to protect my client’s best interest, and that’s based on the rights that he has. Well, life, liberty, and the pursuit of happiness, life being the first. It doesn’t matter that you have a right to remain silent when you’re dead. So my thing is to immediately explore, if I think it’s [the death penalty] a possibility, to immediately explore how to protect the ultimate right my client has, and that’s his right to live (OHD11).

This attorney’s remark about the likelihood of the death penalty is notable. While defense attorneys want to avoid the death penalty, the very possibility of it in and of itself does not necessarily impel them to inquire about a plea bargain. Although some attorneys indicated that when the death penalty is involved they are always trying to resolve the case, others, such as the attorney quoted above, indicated that they consider the likelihood of the death penalty, not just the very existence of it. For example, one attorney said that although the question of punishment looms large, he would not necessarily always initiate a plea discussion; he considers the possibility that the jury will impose death.

In some situations, the prosecutor, not the defense attorney, will initiate discussions.\textsuperscript{86} They may do so in cases involving co-defendants where the prosecutor seeks the testimony of one defendant against another. Relatedly, a couple of attorneys indicated that the prosecutor may initiate if he becomes concerned about the strength of his case. An additional factor is the wishes of the victim’s family; two defense attorneys pointed to prosecutors’ concern for their wishes and said that a prosecutor may seek to discuss a plea if asked to do so by the victim’s family. One attorney gave an example of a case where a woman was viciously raped and murdered. He said the victim’s family was not in favor of capital punishment (nor was the victim herself) and told the prosecutor they could not live with themselves if the defendant got the death penalty.

\textsuperscript{86} Two attorneys said that the prosecutor usually initiates plea discussions and four said that it varies; discussions are sometimes initiated by the prosecutor and sometimes by the defense attorney.
Notably, one defense attorney who said that the prosecutor usually initiates plea discussions said that he has primarily worked in rural counties where the expense of a capital case is particularly draining on county resources. He said that capital cases are often politically charged, and the prosecutor is looked to by the public and by the family of the victim as their only means of justice, but at the same time, the prosecutor does not necessarily want the work or especially the expense of a capital prosecution.

Interestingly, when discussing the point at which plea discussions are often raised, this defense attorney said they are raised early “to get death off the table,” indicating that this was his primary concern. However, given that such discussions are usually initiated by the prosecutor (in his experience), the defense attorney is clearly not alone in his consideration of the costs, albeit very different ones, of going to trial on a capital case.

The only other attorney who said that plea discussions are usually initiated by the prosecutor also said that discussions begin relatively early, at or soon after the first pre-trial conference when discovery is exchanged.\(^{87}\) Indeed, a majority (9/15) of the defense attorneys said that discussions usually begin around this time. Only three attorneys said discussions begin early in order to get the death penalty off the table. Interestingly, among these three, only one also said that he usually initiates the discussions; as noted above, one attorney said that the prosecutor often initiates discussions; another said it varies.\(^{88}\)

The most oft cited factor influencing when the possibility of a plea bargain is raised (and the only factor cited by more than half the attorneys) was the evidence. A

\(^{87}\) This attorney said that the prosecutor starts the discussions in all cases, not only capital cases; it is simply the custom or routine that has developed in his county.

\(^{88}\) The attorney who indicated that it varies said that the prosecutor would raise the possibility of a plea bargain in a case involving co-defendants; otherwise, he is likely to raise it.
related factor, the facts of the case, was cited by a third of the sample. Although theoretically the evidence and the facts reflect strengths and weaknesses in the prosecutors’ and also the defense attorneys’ case, “in the majority of cases the evidence [against the defendant] is overwhelming” (OHD9).

Given this, one might assume that discussions would begin early and would be initiated by defense attorneys. However, it is notable that a sizable minority said that discussions begin later or that the time at which they begin is variable. Although most defense attorneys said they usually initiate discussions, only five said they do so early. Many said it takes time to examine the prosecutor’s evidence and to get a solid handle on the evidence and the facts in the case. It also takes time for the defense attorney to do his own investigation. Discussing this, one attorney said, “in order to have productive negotiations, we need to be conversant with the facts” (OHD7). Similarly, although the attorney quoted in the previous paragraph said there is usually strong evidence against the defendant, he also said that he is “always looking for some leverage somewhere in the case” for negotiating the terms of any possible plea bargain, such as mitigation issues, possible evidentiary problems, and/or the testimony of his client against a co-defendant.

Indeed, about a third of the sample cited the prosecutor’s need for the testimony of a co-defendant as a factor influencing when plea discussions begin. In talking about this and other factors, most attorneys indicated that the evidence often points to certain conviction on a capital charge and that plea discussions are initiated, either by themselves or by the prosecutor, to discuss the issue of sentence, upon a plea of guilty to that charge.

However, it is notable that two defense attorneys explicitly pointed to their consideration of the legitimacy of the capital charge. One attorney said that when plea
discussions begin “depends on whether you think you’re in a death case or not” (OHD3).

He said that if he does not think a particular case is one that the prosecutor will pursue to trial, he would not initiate a plea discussion early. Similarly, although the other attorney indicated that plea discussions usually begin early, he said that this is because,

Generally you know reasonably soon whether it’s a case that you have anything to talk about on the merits of the underlying charge or whether it’s a case where you are going to concentrate on getting the right penalty and trying to negotiate an appropriate penalty (OHD8).

Both attorneys said that who initiates the discussion varies, depending on such considerations as the facts of the case and not just the likelihood that a jury will impose death, but also the likelihood that a jury will convict on the capital charge itself.

Defense Attorney 8’s comment about trying to “negotiate” an appropriate penalty is notable in that it points to the tenor of plea discussions, which he said is also influenced by the facts of the case:

The facts dictate how tough or not tough one side or the other can be. If you got a big stick and you want to say, ‘take it or leave it,’ that’s what happens, [whereas] sometimes the facts give you a little wiggle room and you can convince the prosecutor that they have some risk that makes it so they oughta consider a negotiated plea.

Only a few attorneys said that plea discussions are usually characterized by the prosecutor saying “take it or leave it.” It is interesting to note that all of those who said this also said that they usually initiate plea discussions. The two attorneys discussed earlier who said that the prosecutor often initiates discussions said that the terms of any possible plea bargain involve negotiation. These findings suggest that if the prosecutor indicates a willingness to resolve the case short of a trial, there may be some flexibility with his offer, flexibility that may or may be not be present in cases where the defense
attorney approaches him and where the prosecutor may intend to pursue the case to trial and is not inclined to give on his offer, if there is one (and in some cases, there is not).

Most defense attorneys however, said that plea discussions are characterized by negotiation and bargaining:

I’ve had the luxury of not having a representative of the state of Ohio that says, ‘I like the press that we get from this’…or ‘yeah, I’m an eye for an eye guy.’ They do their job, and they believe it should be done, but they are more than willing to keep an open mind for everything (OHD11).

It’s like a cat and mouse game. They’ll start off real high to something like life without parole, and then we come in with something like 15 to life, which they won’t take, and then through all the hearings of all the motions…eventually a plea is worked out (OHD2).

Defense Attorney 2’s remarks reflect what a majority of attorneys said about the duration of plea discussions, which is that they are often ongoing, continuing throughout the disposition process, even up to and during trial. One attorney said that the possibility of a plea bargain “probably permeates the entire process” (OHD13). In describing this, however, attorneys spoke about different reasons for the ongoing nature of discussions.

For example, a few attorneys mentioned the time it takes for themselves and for the prosecutor to discuss any possible plea agreements with the defendant and the victim’s family, respectively. Others pointed to the perpetual filing of motions; one attorney said “the best way to get a plea bargain is to work the shit out of everybody” (OHD9). This attorney said that he is continually prodding the prosecutor about working out an agreement, always trying to find some leverage. Relatedly, a few attorneys indicated that discussions continue as the investigation continues and as both sides learn more about the case; changes in the evidence may impact the parameters of the plea bargain each side will accept.
Consideration of the evidence is a primary factor influencing defense attorneys’ inclination to pursue a plea bargain or to pursue a trial (see Table 4.3). Recall that it is also a factor that influences when discussions about the possibility of a plea bargain are initiated. In discussing the evidence, attorneys pointed to both quantity and quality (physical evidence, witnesses etc.) and also to any evidentiary issues the prosecutor may have. Many indicated that “normally these cases are so locked down tight…the evidence is just overwhelming and you know it going in, and you never want to try them” (OHD13). However, while acknowledging this, a few attorneys also referenced the importance of exploiting legal issues with the prosecutor’s case, either with the intention of coming to a desired plea agreement or with the intention of winning an appeal, should the defense be unsuccessful at trial.

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<tr>
<th>Factor</th>
<th># of Defense Attorneys Citing It</th>
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<td>The evidence</td>
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<tr>
<td>The likely outcome at trial&lt;sup&gt;89&lt;/sup&gt;</td>
<td>10</td>
</tr>
<tr>
<td>Involvement of the jury in sentencing</td>
<td>7</td>
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<tr>
<td>The wishes of the defendant</td>
<td>7</td>
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<tr>
<td>The characteristics of the defendant&lt;sup&gt;90&lt;/sup&gt;</td>
<td>6</td>
</tr>
<tr>
<td>The facts of the case</td>
<td>5</td>
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<tr>
<td>The culpability of the defendant</td>
<td>4</td>
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<tr>
<td>The strength of the defense</td>
<td>4</td>
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<tr>
<td>Who the victim is</td>
<td>3</td>
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<tr>
<td>Mitigating factors/evidence</td>
<td>3</td>
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<tr>
<td>The nature/circumstance of the crime</td>
<td>3</td>
</tr>
<tr>
<td>Other</td>
<td>5</td>
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The likely outcome of a trial was in fact a consideration mentioned by a majority of the sample. Reflecting the strength of the evidence in many cases, most specifically

<sup>89</sup> Nine attorneys specifically mentioned the likelihood of a death sentence; five specifically mentioned the likelihood of conviction.

<sup>90</sup> Five attorneys specifically mentioned the defendant’s mental state or mental capabilities; three specifically mentioned the defendant’s age; one specifically mentioned the defendant’s prior record.
only cited the likelihood of a death sentence. However, a number of attorneys also cited the likelihood of conviction on the capital charge:

If somebody qualifies for the death sentence in Ohio law, and I can get them a life sentence and if the evidence looked like they’re gonna get a conviction, I would never just take it to trial. The primary function of the defense lawyer is to get your client less than death (OHD5).  

It really all comes down to, I think, how certain is the probability of death, and you work backwards from there (OHD3).

Reflecting their concern over the likelihood of a death sentence, assuming the defendant is likely to be convicted of capital murder, a number of attorneys said they consider the jury’s involvement in sentencing. One attorney pointed out that you only need one juror to reject the death penalty in order to beat it. He said that in weighing the decision to pursue a plea or a trial he asks himself if he can get just one juror not to vote for death. In asking himself this question, he considers the county in which the case is being tried, whether it is a county with a reputation for having jurors who are reluctant to return a death sentence or one for having jurors who are “eager to kill.” Reflecting this, one attorney gave an example of a case that he tried in an urban county. He said that he did not have the same fear that the jury in that particular county would vote for death that he would have in a different (more rural) county. Similarly, another attorney said that jurors’ attitudes about mitigation evidence are different in different counties. In the rural areas where he primarily works, he said that unless the defendant is pretty close to being

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91 This attorney’s remark about somebody qualifying for the death sentence is notable. He was among the few who mentioned the defendant’s culpability as a factor in their inclination to pursue a plea bargain or a trial. Of those who cited this factor, three pointed to the defendant’s culpability of capital murder versus a lesser charge, and two pointed to the defendant’s culpability of any murder (the defendant’s innocence) (one attorney mentioned both). However, the way this consideration influences attorneys’ inclinations varies. For example, one attorney said that you have a better chance at a plea bargain if your client is not the principle offender, whereas another said that he would be inclined to pursue a trial if he believed his client was not culpable of capital murder.
mentally retarded or severely mentally ill, jurors are probably not going to listen to any mitigation.

The defendants’ mental state or mental capabilities was one of the factors attorneys mentioned when discussing the influence of the defendants’ characteristics on their inclination to pursue a plea bargain or a trial. These characteristics also included the defendant’s age and prior record and are, in some ways, intertwined with another consideration, that of the wishes of the defendant. One attorney said that a number of his clients have had mental deficiencies that made it difficult to work with them. He said that:

A lot of them don’t appreciate the impact of death. They grew up rough, they have a lot of mental issues; they don’t fully comprehend that someday down the road they’re gonna … strap you into a room and a guy is gonna come there and put a needle in your arm. They don’t comprehend it (OHD13).

Nevertheless, while he discusses the likely outcome of the case with the defendant and his family, this attorney said that ultimately, “you’re working for the client, and if the client says, ‘I want to go to the box,’ you go to the box.” Other attorneys echoed this statement.

In addition to defendants’ mental capabilities, a few attorneys discussed defendants’ age in terms of their own inclination to pursue a plea or a trial and in terms of their consideration of the defendant’s wishes. One attorney talked about a case involving a middle-aged defendant. He said the prosecutor offered his client a deal in exchange for testimony against a co-defendant, a deal that was refused. The attorney said that he did not believe the prosecutor was going to pursue a capital trial, and his client was willing to take that chance. Given his age, the attorney and his client felt he had nothing to lose; either he was going to die in a prison cell or on a gurney. In contrast, the possibility of
death and the quality of life hold a different meaning in a case where the defendant is young.

Indeed, the relative weight of the factors is influenced by characteristics specific to the case and the defendant, and the death penalty does not necessarily carry the greatest weight. Although almost all of the attorneys indicated that the possibility of the death penalty is an important consideration in their inclination to pursue a plea or a trial, about half said that it is only important relative to other factors (discussed above).\textsuperscript{92} For example, although he pointed out that death “is such a final penalty,” one attorney nevertheless said, “If I have a triable case, then I’m gonna try the case whether the death penalty is on the table or not” (OHD10). Similarly, another attorney said that he does not “endorse the notion that victory is defined solely by beating the death penalty” (OHD3).

He said that some lawyers are eager to consider the case closed by getting the death penalty off the table, but he believes that such an approach short circuits the kind of work that should be done to determine what factors should be in place to take the case to trial. He added that if you are perceived as someone who just wants to stop the death penalty, you may only get a plea to life without parole, and that may be too much for the case:

The problem with some capital trial lawyers is if you get too fixed on just simply stopping the death penalty, you may be giving away the farm anyway, and you may be missing a chance to give your client the opportunity of freedom someday.

In emphasizing the importance of keeping one’s personal beliefs on the death penalty separate from the case, he said, “I represent clients; I don’t represent a cause.”

This approach contrasts sharply with that of other attorneys who indicated that avoiding the death penalty is the most important factor for them, a sentiment shared by

\textsuperscript{92} Apart from the more general question about the most important factors that they consider in their decision to pursue a plea bargain or a trial, defense attorneys were asked about the relative influence of the possibility of a death sentence in this decision (see Appendix F: Questions for Defense Attorneys, Ohio).
about half those interviewed:

The death penalty, I think, drives me to try to resolve the case from the minute the judge calls me and says, ‘Would you mind taking this case?’ (OHD9).

I believe even life in prison is life. It’s not the form of life we would all like; it is life in confines, but life is precious, and even incarceration is a form of life. There are some people who are in penitentiaries and adjust very well, from the standpoint of surviving (OHD13).

Thus, the sample was about evenly divided regarding their approach to capital cases and the influence of the death penalty on their inclination to pursue a plea bargain or to pursue a trial. While some said that the possibility of the death penalty in and of itself does not deter them from pursuing a trial, others indicated that their primary goal is to resolve the case with a plea bargain.

The approach of the latter would seem to contradict these attorneys’ discussion of other factors that influence their decision to pursue a trial or a plea bargain. However, recall that many attorneys indicated that the evidence is often overwhelming in these cases. Nevertheless, others suggested that potential mitigating factors and evidentiary issues give them leverage in arriving at what they feel is an appropriate disposition.

Similarly, although the facts are often egregious, a jury in one county may not view the same case the same way as a jury in a different county. Thus, it would seem that for some attorneys, consideration of the evidence and additional factors is largely subsumed by the risk that their client could die, whereas for others, these factors are considered in tandem with this risk.

*Use of the Death Penalty as a Plea Bargaining Tool.* The contrasting approaches to the disposition of capital cases suggests that the possibility of the death penalty does not hold the same meaning for all defense attorneys. While it is most certainly a sentence
that attorneys want to avoid, it is not necessarily one that induces attorneys to pursue a plea bargain in every case. This finding points to the viability and use of the death penalty as a plea bargaining tool. As discussed earlier, in theory, prosecutors may bring capital charges in a death-eligible case with the intention of inducing a guilty plea. This would enable prosecutors to secure a conviction without the expense of a capital, let alone a non-capital, murder trial, and it may enable them to reach a plea agreement to a higher sentence than the defense would otherwise accept, if not for the possibility of the death penalty.

When asked about prosecutors’ use of the death penalty as leverage to induce a plea bargain, about half the defense attorneys said that prosecutors use the death penalty in this way and had done so in their own experience. More broadly, one attorney said that “some counties in Ohio have a reputation generally of over indicting to try and use that lever to scare clients into high end plea bargains” (OHD3). This attorney and others indicated that prosecutors do this in cases where their evidence is weak and/or where the likelihood of a death sentence is questionable, given the circumstances of the case:

In drug dealing deaths, where they have, on the face of it, the fixings for a capital indictment, a death-eligible murder, but they [the prosecution] don’t really believe that a jury is likely to return a death verdict, but they indict it that way because it shifts the stakes on the table across the board so that the life sentences are harsher. It increases the ante, and they wind up frequently, I think, getting tougher sentences for plea bargains than they would have without indicting for death (OHD3).

It’s been my experience that the death specs are alleged in order to make up for the prosecutor’s perceived weaknesses in his case…There’ve been cases where I really didn’t believe that the prosecuting attorney really wanted this particular individual, given the facts of the case, to go to death row, but they spec’d it in order to have a little bit of extra leverage in the plea bargaining process (OHD4).
One attorney who also discussed a case involving a drug deal that he believes was over indicted for leverage said that he does not think, “as a general matter prosecutors really consider what is the appropriate charge. I think they say, ‘can I make this a death case and should I make this a death case’” (OHD7). Notably, his belief contrasts sharply with that of another attorney:

They don’t create death penalty cases for the sake of getting leverage to get a murder conviction. I believe that when they death spec a case thinking that it may give them leverage to get a conviction, they’re considering, ‘do we want to put the family through this, can we get a conviction. This guy murdered somebody, it is death penalty eligible, maybe the death penalty gets us the murder conviction that saves everybody the horrible process and grief of that.’ So I think that’s a fair consideration. I think it’s fair to charge somebody with a death spec and hope that you end up somewhere with life with no parole for 25 years. I don’t see anything wrong with that. I think it’s fair game. You shouldn’t force a death spec on a case that’s wishy washy…I would not think that would be appropriate (OHD11).

This attorney was among half those interviewed who said that prosecutors had not used the death penalty as leverage in their experience. They indicated that if a prosecutor indicts a case capitally, he does so with the intention of pursuing it to trial:

To even get a rural prosecutor to bring a death case, they’re going to have to be pretty sure they can get it; they’re not gonna spend the time and money and resources if they think there’s a chance they’re gonna lose it...Because Ohio law now allows a straight agg murder to get life without parole, he [the prosecutor] can avoid the death expense to the county and get the same result (OHD1).

In this part of the state, when you get a death indictment, to me that says, ‘hey we are really going after this guy’ because they don’t have to, they can get life without parole with just doing a regular old agg murder indictment now (OHD12).

The comments of these two attorneys speak to county differences in indictment practices and also to the effect of a 2005 change in the statute that increased the penalty for non-capital aggravated murder to life without parole. The combined impact of counties’ concerns over the cost of capital cases and the availability of the life without
parole option in non-capital aggravated murder cases was discussed by other attorneys as well. One attorney, who said that prosecutors used to indict cases capitally for leverage all of the time, said that he has not seen this practice as much since the change in the statute. He said that rather than indicting a case for the death penalty and avoiding a trial with a plea bargain, a prosecutor would rather indict a case for non-death aggravated murder and pursue a trial for life without parole; once a case is indicted capitally the additional costs of two attorneys and experts begins, costs that are not incurred (at all or to the same extent) in non-capital cases.

Notably, the impact of these factors, and also the increasing reluctance of juries to return a verdict of death, is not confined to rural counties. Defense Attorney 12, quoted above, later added, “the threat of it [the death penalty] has become kind of hollow” because so few death sentences have been imposed in recent years. He discussed a particular urban county that has not had a death verdict in quite some time. He said that the county indicts for non-death aggravated murder more so than it used to because death sentences upon conviction are so uncommon.

Section 2: Decision making in non-capital murder cases

Defense attorneys’ decisions in the disposition of non-capital murder cases are influenced by factors such as the strength of the evidence, the possible defense/s in the case, and the terms of the plea bargain that the prosecutor will accept. These and other factors are among the many that determine who initiates a plea and when, and whether a case will ultimately be resolved with a plea agreement or a trial.

The Plea Bargaining Process. In non-capital murder cases, neither the prosecutor nor the defense attorney is necessarily more likely to initiate plea discussions. Equal
numbers of defense attorneys said they usually raise the possibility of a plea or that who raises it varies; a smaller number said the prosecutor usually raises it. The reasons that account for this vary, and only two reasons were cited by even a quarter of the sample.

One of these reasons, the strength of the prosecutor’s case, was referenced by an attorney who said that he would initiate a plea discussion if “the cards are in the prosecutor’s hands” (OHD6). He noted that the prosecutor does not need to make an offer if he has a strong case. However, if the prosecutor needs the defendant’s testimony against a co-defendant, he may approach the defense attorney about a plea bargain.

The other reason cited by a number of defense attorneys was the routine practice of a county. Of those who cited this factor, two said they usually initiate plea discussions, and two said the prosecutor does:

Normally, at least in our jurisdiction, the prosecutor will make an offer and the lawyer for the defendant will respond; that’s generally the way it works (OHD8).

Reflecting the custom of different jurisdictions, another attorney said that whether he or the prosecutor raises the possibility of a plea depends on the strategy of the particular prosecutor’s office. He said that in some offices, prosecutors want the defense attorney to make the first move, but in others, the prosecutor has a particular agreement in mind and will raise it. One attorney, who said that he would not initiate a plea discussion unless his client asks him to, said that he almost always gets an offer from the prosecutor shortly before the trial is set to begin. He and another attorney who echoed this said that the prosecutor has an interest in disposing of cases through efficient plea bargains rather than time-consuming trials.

The comments of these two attorneys point to the time at which plea discussions begin. They were among the third of the sample who said that discussions do not begin
until later in the disposition process; slightly less than half said discussions begin relatively early, at or soon after the first pre-trial conference when discovery is exchanged; a few said the time at which they begin is variable. A close examination of who raises a plea and when it is raised revealed no significant patterns. For example, among the three attorneys who said that the prosecutor often initiates plea discussions, one said the discussions begin early, one said they begin later, and one said it varies.

One factor influencing the point at which discussions begin is the evidence, including the quantity and quality of the evidence and the time necessary for the defense attorney to review it. A related factor is the strengths and weaknesses of the defense in the case:

[When discussions begin] completely depends on the development of the evidence, how fast does the defense get up to speed on seeing the cards in the deck. My first focus is always on trying to figure out…what are the odds that the government can carry its burden of the elements of this offense. And if it looks like they’ve got the better odds of that, do I then in turn have evidence that could defeat that (OHD3).

It’s not really discussed until I’ve had a chance to review the prosecutor’s discovery and have our investigator go out and interview witnesses and have a number of discussions with the client to get a better idea of what the evidence is (OHD7).

These were the only two factors that were cited by more than a third of the sample. A few attorneys mentioned the wishes of the defendant. Two attorneys mentioned the involvement of the judge; both said the judge would ask about any plea discussions early in the case. Interestingly, two attorneys who said that discussions do not begin until later cited the absence of the death penalty. They indicated that, unlike capital cases, these cases are not driven by the possible maximum sentence.
While there was a great deal of variability regarding who initiates plea discussions and when they are initiated, responses were far more consistent regarding the character of plea discussions. Most attorneys said that discussions involve negotiation and bargaining and they are ongoing, continuing throughout the disposition process. One attorney compared the negotiation process to that of bargaining over the price of a car:

It’s like buying a used car. You know what you want to pay, and the other guy knows what he wants to get, and you don’t come out of the gate offering that. It’s like any other negotiation (OHD9).

He said that he is constantly working the case and speaking with the prosecutor about the defense in the case. Similarly, another attorney said that discussions are “vigorously” throughout the disposition process. However, a few who said discussions are ongoing indicated they do not often change very much. One attorney said that by the first or second meeting with the prosecutor to talk about a plea bargain he has everything he needs to know about the case, and in subsequent discussions the terms of the plea offer are unlikely to change.

Accordingly, four attorneys indicated that from the time discussions commence there is very little negotiation. One said, “it’s not like the prosecutor is doing you a favor” (OHD5), adding that he has to show the prosecutor where the prosecutor’s case is weak and why, and usually the prosecutor already has a pretty good idea of that when discussions begin, a sentiment echoed by another attorney. Three of the attorneys who said there is little negotiation or bargaining were among the four who indicated that discussions are usually confined to one or more points, often closer to trial.93

93 Of the four attorneys who said that discussions are confined, three said discussions do not often begin until late in the process. However, among these three, only two were among those who also characterized discussions as involving very little bargaining.
Attorneys consistently mentioned the evidence as a factor influencing decision making throughout the disposition process. The significance of the evidence was underscored by attorneys when discussing the most important factors influencing their inclinations to pursue a plea bargain or a trial (see Table 4.4):

If they’ve [the prosecution] got a rock solid case, if they’ve got a confession and they can prove every element beyond a reasonable doubt, then you take what you can take [in terms of a plea offer]. The client may still say no, and you’ve gotta try it then, but if you’re dead to rights, then you better work it out, if they’re [the prosecution] willing to work it out (OHD5).

In contrast, another attorney discussed a case where the only evidence against his mildly retarded client was a confession obtained by the police after a two-hour interrogation. He said that a case like that is clearly different than a bar fight turned deadly in front of numerous witnesses. Another attorney gave the example of a bar fight when discussing his defense to the prosecutor’s evidence. He said that you may have a self-defense claim in such a situation, in which case you may admit to the killing but argue that it was justified. However, he added that you also need to factor in the characteristics of the defendant and his ability to testify successfully in his own defense.

<table>
<thead>
<tr>
<th>Factor</th>
<th># of Defense Attorneys Citing It</th>
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<tbody>
<tr>
<td>The evidence</td>
<td>12</td>
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<tr>
<td>The plea offer</td>
<td>10</td>
</tr>
<tr>
<td>The defense in the case</td>
<td>5</td>
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<tr>
<td>The characteristics of the defendant</td>
<td>5</td>
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<tr>
<td>The likely outcome at trial</td>
<td>4</td>
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<tr>
<td>The facts of the case</td>
<td>3</td>
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<tr>
<td>Who the judge is</td>
<td>3</td>
</tr>
<tr>
<td>Other</td>
<td>6</td>
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94 Four attorneys specifically mentioned the defendant’s prior record; three attorneys specifically mentioned the defendant’s age.
A number of attorneys pointed to the defendant’s characteristics, particularly the defendant’s prior record (or lack thereof), when discussing the importance of the plea offer as a factor influencing their inclination to pursue a plea bargain or a trial. Many said that in plea discussions they are really trying to get the prosecutor to move off the open life sentence (“life tail”) and agree to a determinate sentence, thereby giving their client the certainty of getting out of prison. Given that defendants are unlikely to be released upon their first parole hearing, getting a plea bargain to a determinate sentence is particularly important where the defendant has a prior record:

The life tail is a problem for experienced defendants who’ve been in and out of the penitentiary because they know a life tail for them means life; they know you can get them 15 to life and it don’t mean a damn bit of difference to them because they’re going to do 30 years (OHD9).

The significance of the plea offer in attorneys’ inclinations to pursue a plea bargain or a trial was underscored when they were asked about the relative importance of the possibility of a life sentence upon conviction at trial.95 Most attorneys said that the possibility of a life sentence is only important if the plea offer involves a determinate sentence:

It’s influential….If you can get it out of the life tail and get to a determinate sentence, then that’s real progress….You’re [the defendant] getting out (OHD12).

I definitely try to get off the life tail if I can so that my client has certainty of life going forward (OHD15).

Defense Attorney 15 added that if a plea agreement to a determinate sentence cannot be reached, then you have little to lose by going to trial, a sentiment echoed by other attorneys. One attorney indicated that even if the likelihood of conviction were high, he

95 Apart from the more general question about the most important factors that they consider in their decision to pursue a plea bargain or a trial, defense attorneys were asked about the relative influence of the importance of the possibility of avoiding a life sentence in this decision (see Appendix F: Questions for Defense Attorneys, Ohio).
would not be inclined to accept a plea agreement to what is essentially a non offer; he would rather go to trial and make the prosecution prove its case.

The exception to the lack of significance of a plea offer that involves the life tail may be a case where additional offenses are involved and the defendant is young, and especially if the defendant does not have a prior record. A few attorneys indicated that in such cases you may accept a plea agreement that involves the life tail in exchange for the prosecutor dropping the additional charges. Such a plea has the benefit of minimizing the amount of time the defendant has to serve before he is eligible for parole. Even if the defendant is not released at his first eligibility, if he is young, he can still have a life once he is released.

Section 3: Comparing and Contrasting Defense Attorney Decision Making in Capital and Non-Capital Murder Cases

In their discussion of capital and non-capital murder cases, defense attorneys cited many similarities in the ways in which the cases are handled and the factors that influence the decisions they make. However, there are also some notable differences in attorneys’ descriptions of the disposition process in the two types of cases and in the number of attorneys who describe the process and the factors they consider in like ways.

Slightly more defense attorneys said they initiate plea discussions in capital than in non-capital cases. The most commonly cited reason for this in capital cases was the defense’s interest in avoiding the possibility of the death penalty. In contrast, in non-capital cases, not one attorney mentioned the desire to avoid the maximum possible sentence as a factor. Similarly, in capital cases about a quarter of the sample said the prosecutor indicts a case with the intention of pursuing it to trial and is therefore unlikely
to initiate any plea discussions, a factor mentioned by only one defense attorney in non-capital cases.

While small numbers of attorneys cited the strength of the evidence and the custom or routine of a county as factors in both types of cases, it is notable that half as many cited these factors in capital than in non-capital cases. Given that many attorneys later pointed to the overwhelming strength of the prosecutor’s evidence in capital cases when discussing their inclination to pursue a plea bargain or a trial, the influence of the evidence at this early stage may be subsumed by attorneys’ consideration of the possibility of the death penalty. Regarding the custom or routine of a county, given that capital cases are relatively infrequent (see Chapter 2), it may be that no routine or custom has developed among defense attorneys and prosecutors pertaining to how the cases are handled.

Compared with non-capital cases, in capital cases slightly more defense attorneys said that plea discussions begin relatively early, at or soon after the first pre-trial conference when discovery is exchanged. However, what is particularly notable is the difference in the numbers who said that discussions usually do not begin until later in the process. In non-capital cases, a third said that discussions do not begin until later, whereas in capital cases, only one attorney said as much (in both types of cases a few attorneys said the time at which discussions begin varies).

Although attorneys generally indicated that they need time to examine the evidence and do their own investigation, the possibility of the death penalty may present a pressure on the defense attorney (and also on the prosecutor, given cost considerations for example; see pp. 86, 87 and pp. 95, 96) to commence plea discussions sooner than
later. As one defense attorney said, “I guess the greatest impetus to promote plea negotiations is the ultimate penalty itself” (OHD11). This attorney reiterated the pressure exerted by the death penalty when discussing the process of plea bargaining in capital compared with non-capital cases:

I don’t necessarily believe there’s much of a difference, [but] the urgency relaxes when it’s not death-eligible…Everybody’s professionalism, everybody’s attention to detail is peaked when the death penalty is possible. No one takes it lightly, the court, officers, prosecutors, defense attorneys; nobody takes it lightly.

This attorney’s characterization of the plea bargaining process reflects that of most attorneys. Although a few indicated that discussions involve little negotiation and are confined in capital and non-capital cases, most said there is actual bargaining over the terms of the plea agreement and that such bargaining is ongoing. However, just as the individual above indicated, a number of attorneys said that although the process is similar in both types of cases, in capital cases the stakes are higher and the discussion is more intense: “The degree of the potential penalty heightens the significance of plea negotiations” (OHD4).

In addition to being more intense, plea bargaining in capital cases is also more involved. A number of attorneys said that discussions entail more negotiation and are more difficult in capital compared with non-capital cases. This has to do with the length of time the cases take and the additional motions that are filed by both sides and also with the greater attention they receive, by the media and the prosecutor’s office. One attorney said that negotiations in capital cases “take more work because you have to satisfy more people” (OHD2), most notably, the victim’s family.

Highlighting prosecutors’ consideration of their wishes, one attorney said that “a prosecutor won’t reduce a case unless he gets the approval of the victim” (OHD9).
Another attorney discussed a high profile case in which the victim’s family initially balked at the plea agreement that he and the prosecutor had worked out. Noting that prosecutors are elected officials, he said that most do not want the risk of the victim’s family yelling at them and having that in the media.

Cognizant of the influence of the victim’s family on prosecutors, a couple of defense attorneys said that they try to speak with the victim’s family to discuss the possibility of resolving the case with a plea bargain. One attorney said this was crucial in a particularly heinous case involving multiple victims. He said that it was important to the victims’ families to know why the defendant committed the murders. He assured them that as part of any plea agreement they would have the opportunity to question his client privately and ask him anything they wanted. He added that if the victims’ families would not have agreed to the plea bargain, neither would the prosecutor. This attorney said that although he considers what the victim’s family wants to see happen in non-capital cases, he gives their wishes greater consideration in capital cases.

In discussing the influence of the victim’s family on plea discussions, one attorney pointed to the attention that capital cases receive and the impact of who the victim and the victim’s family are:

If it’s an African American family in the projects, are they gonna have as much clout as the suburban family whose husband was gunned down? I think the media is gonna play that up; I think the prosecutor is going to be cognizant of this poor white man in suburbia who got killed (OHD7).

Although defense attorneys did not necessarily point to the characteristics of the victim as an influential factor at any particular point or points in the process, about half referenced the victim in more general discussions about the indictment and disposition of capital cases:
Some of the prosecutors are very hardcore on this, and the senior prosecutors only get the really solid cases where you have a nice white suburban family who is screaming for the death penalty in the newspaper, in the prosecutor’s office, and you have some minority who has killed their son or daughter. Let’s face it, the prosecutors don’t look at these cases from the legal point of view. They don’t say, ‘well this case meets the statute, legally.’ No, they’re not Roscoe Pound up there. They’re like, ‘ok, is this an especially gory, nasty, you know, nice person who gets killed?’ That’s the case they want for the death penalty…They only pick the nastiest cases with the most sympathetic victims, in my view, for the death penalty. Two drug dealers going at it, who cares? The community doesn’t care. The white suburbanites who sit on our jury don’t care about two black guys dueling it out in some alleyway, but when it’s some poor white girl who also happens to be a dancer, or a stabbing or something heinous; it has to have some smarmy, nasty component to it that will make jurors mad (OHD12).

Recall the earlier discussion of prosecutors’ use of the death penalty as leverage where a few defense attorneys indicated that murders involving drug dealers are not likely to result in death sentences and are more likely to be resolved with plea bargains. Accordingly, another attorney said that “if you’ve got a bad victim, that helps you” (OHD5). He went on to say,

Cases get worked out because you’ve got limited evidence or you’ve got a bad victim or bad circumstances or you’ve got some sort of self-defense or something like that…but if you’ve got an innocent kid who was beaten to death for no reason and they’ve [the prosecution] got all the forensic evidence and all that, who’s gonna work that out? The whole word is pissed. Even the defense lawyers might be mad.

Echoing this comment, a few attorneys said that if the victim is a child or a police officer it will be particularly difficult to work out a plea agreement, and the likelihood of the defendant being sentenced to death is high. Again however, it is important to emphasize that other factors are considered. One attorney discussed a case where the victim was a beloved cop. He said there was no question his client committed the crime, but the prosecution’s theory was flawed and there were problems with the forensic evidence. In spite of these problems, this attorney was reluctant to take the case to trial,
given the high likelihood of a death sentence should his client be convicted. However, given these problems, the prosecutor was concerned about an acquittal, and ultimately a plea agreement was reached. Thus, even in cases where the prosecutor may intend to pursue a trial and where the likelihood of a death sentence upon conviction is high, the defense may be able to exploit weaknesses in the prosecution’s case that lead to a plea agreement.

In this particular case, the possibility of the death penalty was a significant factor in the defense attorney’s desire to resolve the case with a plea bargain. This case is an example of an attorney’s comment earlier that the death penalty is “the greatest impetus to promote plea negotiations.” However, it is important to note that the death penalty is not necessarily the greatest impetus to promote plea agreements.

As discussed earlier, the sample was largely split on the relative importance of the death penalty in their inclinations to pursue a bargain or a trial. While about half the attorneys indicated that the possibility of the death penalty in and of itself drives them to resolve a case with a plea bargain, other attorneys said that the possibility of the death penalty is important only in tandem with the consideration of other factors. Among these factors are the evidence, the characteristics of the defendant, the jury’s involvement in sentencing, and the likely outcome of the case at trial (which for some includes the likelihood of conviction and not only the likelihood of a death sentence). Similar numbers of attorneys cited the first two factors when discussing the relative importance of the maximum sentence in their inclination to pursue a plea bargain or a trial in non-capital cases. One attorney said that he does not “consider anything different in a straight murder and a murder with a death spec on it” (OHD1). This reflects what most attorneys said
about there being little difference in the plea bargaining process in the two types of cases.

However, recall that attorneys also said that although the process is similar, the stakes are higher. Accordingly, it is notable that fewer than half as many attorneys cited consideration of the likely outcome at trial in non-capital than in capital cases. This finding suggests that defense attorneys may be more inclined to take the risk of trial in non-capital cases where the stakes do not involve a possible death sentence if the defendant is convicted. Discussing the relative influence of the maximum sentence in his inclination to pursue a plea bargain or a trial in non-capital compared with capital cases, the attorney quoted above said, “it’s not as big a factor, by any means, as the possibility of death.” Similarly, another attorney said, “there’s more at stake in the death cases” (OHD14).

The number of attorneys who cited the plea offer as a factor in their decisions provides further indication of differences in attorneys’ inclinations to pursue a trial in the two types of cases. A majority of attorneys cited the terms of the plea bargain the prosecutor will accept as a factor in non-capital cases; in contrast, not one attorney cited this as a factor in capital cases. In non-capital cases, attorneys indicated that if the plea offer is bad (i.e. involves the life tail for a defendant with a prior record) there may be little risk in going to trial; the difference between the sentence upon a guilty plea and that upon a trial conviction is essentially non-existent.

In capital cases however, the difference is, literally, the defendant’s life. In some cases the prosecutor, if he will accept a plea at all, will only accept a plea to life without parole.96 However, while the defense may try to negotiate a better plea, one that (at least

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96 Defendants may plead guilty to the offense/s as charged without the prosecutor’s consent. However, in so doing, the defendant still faces the possibility of the death penalty. In this situation, the defendant pleads
theoretically) gives the defendant the chance of parole, there is, nevertheless, a significant
difference between a sentence of life without parole upon a guilty plea and a sentence of
death upon a trial conviction. Thus, even if the desired plea bargain cannot be reached,
the risk of going to trial is significant. The findings regarding attorneys’ consideration of
the likely outcome at trial and the plea offer in the two types of cases suggest that in non-
capital cases the likely outcome of trial may be of minimal consequence if the defendant
has little to gain by pleading guilty, whereas in capital cases the likely outcome may be of
critical importance where the defendant has a lot to lose by not pleading guilty.

**Summary and Conclusions**

The plea bargaining process and the factors influencing the decisions prosecutors
and defense attorneys make in capital and non-capital cases share a number of similarities
and differences. Regardless of whether the death penalty or a life sentence is at stake,
prosecutors indicated that plea discussions often begin with the defense attorney but the
time at which they begin varies, depending on the strengths and weaknesses of the
evidence, among other factors. Considerations of the evidence are important throughout
the process, and a number of prosecutors indicated that even in cases where they do not
intend to negotiate any plea offer they make, changes in the evidence may cause them to
reconsider. Accordingly, while some prosecutors indicated that they only indict a capital
case with the intention of pursuing it to trial, the consideration of other factors, including
the evidence, the likely outcome at trial, and the wishes of the victim’s family, may cause

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guilty and waives his right to a jury trial. A panel of three judges then decides whether the defendant is
guilty of aggravated murder or a lesser offense and determines the sentence (see Chapter 3 p. 60, 61).
However, defense attorneys said this method of disposing of a case is rarely used. They indicated that if the
case cannot be resolved with a plea agreement with the prosecutor, you try it before a jury unless you have
some indication from the presiding judge on the panel or otherwise reason to believe that the panel will not
impose the death penalty.
them to reevaluate their inclinations.

The indictment of a capital case with the intention of pursuing it to trial runs counter to the argument that prosecutors may indict for the death penalty in order to have leverage to resolve the case with a plea bargain. While some prosecutors use the death penalty as a plea bargaining tool, most expressed concerns with doing so. Notably, some prosecutors emphasized the additional costs of capital cases and pointed out that those costs begin the moment the case is indicted. These costs are weighed against the value of indicting and pursuing the death penalty in a particular case, a value that a few prosecutors indicated they are increasingly beginning to question, given the trend they have seen among jurors’ reluctance to sentence a defendant to death, and the likelihood that a death sentenced defendant will ever actually be executed.

Defense attorneys also pointed to the consideration of the likely outcome of a case in their inclination to pursue a trial or a plea bargain, particularly in capital cases. About half the attorneys indicated that they would not necessarily automatically pursue a plea bargain in a capital case but would consider pursuing the case to trial, depending on such considerations as the likely outcome and the strengths and weaknesses of the evidence. Although the possibility of the death penalty influences some defense attorneys to initiate a plea discussion and to do so early, for others, the death penalty, in and of itself, is no greater consideration than any other factor. This speaks to the use of the death penalty as a plea bargaining tool, a discussion that also revealed a split among the sample of defense attorneys.

About half said that prosecutors use the death penalty as leverage, particularly in certain types of cases; it is notable that at least one attorney indicated it does not always
work. He was among the group who pointed to the influence of the evidence and other factors in deciding whether or not to pursue a plea bargain or a trial. He and others also indicated that discussions over the possibility of a plea bargain often involve negotiation and bargaining over the parameters of any plea bargain; most attorneys indicated that in both capital and non-capital cases, offers of ‘take it or leave it’ are not the norm.

However, although discussions tend to go back and forth and also to be ongoing in both types of cases, it is notable that a number of attorneys characterized the discussion process in capital cases as more intense, given the possibility of the death penalty, and more involved, particularly given prosecutors’ concern for the wishes of the victim’s family.
Chapter 5: Michigan

In this chapter, plea bargaining and decision making in murder cases in Michigan where life without parole is the maximum possible sentence will be discussed. This sentence is mandatory upon conviction on a charge of first-degree murder, whether as a result of a guilty plea or a verdict at trial (see Chapter 3). Recall from Chapter 3 that first-degree murder is a charge in and of itself, and it is also a charge encompassed under “open murder,” which is an unspecified charge that includes both first and second-degree. Thus, the discussion encompasses charges of both first-degree and also open murder. The chapter is divided into two parts: Part A focuses on prosecutorial decision making; Part B focuses on defense attorney decision making.

Attorneys in Michigan, akin to attorneys in Ohio, were asked who usually initiates discussions and why, and when any plea discussions usually begin and why. They were also asked to describe the tenor and nature of plea discussions, whether they involve actual negotiation or if offers are presented as ‘take it or leave it,’ and if discussions tend to be more continuous and ongoing or confined. Additionally, attorneys were asked about the most important factors that influence their inclinations to pursue a plea bargain or a trial. They were also specifically asked to discuss the relative weight of life without parole upon a conviction for first-degree murder in their decision.

The influence of life without parole was further explored through attorneys’ discussions of the penalty as a plea bargaining tool. This was important in order to provide insight into the role of the maximum sentence in plea bargaining, particularly the influence of life without parole in Michigan, a state without capital punishment, compared with the influence of the death penalty in Ohio, a state with capital punishment.
Part A. Prosecutorial Decision Making

The decisions prosecutors make in the disposition of first-degree or open murder cases are influenced by factors such as the strength of the evidence, consideration for the wishes of the victim’s family, and the customs or routine practices in the jurisdiction of a case. Some of these factors were cited by many prosecutors throughout the disposition process, while others were only mentioned by a few and at particular stages of decision making in the process.

The Plea Bargaining Process

About the half the prosecutors said the defense attorney is usually the one to initiate any discussion about the possibility of resolving a case with a plea bargain. About a quarter of the prosecutors said they usually initiate the discussion, and about a quarter said that it varies. Attorneys pointed to a number of different factors to explain why they or the defense attorney would initiate. Not one factor was cited by a majority, and only two factors were cited by more than even a quarter of the sample.

One of these factors was the routine practice of a county. One prosecutor who mentioned this said “the defense attorney will automatically say ‘what’s available’” (MIP6). Similarly, another prosecutor said,

Our defense attorneys know that we are always open to those discussions, but usually the first actual contact regarding the possibility of a plea is made by the defense. That’s just how it works (MIP12).

In contrast, in some counties it is customary for the prosecutor to raise the possibility of a plea bargain. One prosecutor said that he and most defense attorneys in the county know

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97 One prosecutor indicated that the discussion is usually mutually initiated by he and the defense attorney.
98 This abbreviation refers to Michigan Prosecutor #6.
each other, and they know that he will initiate a plea discussion if he intends to have a discussion at all.

The other factor cited by a number of prosecutors was the evidence, including the quantity and quality of the evidence and any issues with it. Depending on the strengths and weaknesses of the evidence, the possibility of resolving a case with a plea bargain may be raised by either the defense attorney or the prosecutor. Two of the prosecutors who mentioned this factor said that they do not usually initiate plea discussions because they indict a murder case with the intention of pursuing it to trial. However, if the evidence changes or issues arise such that a case is no longer as strong as they thought or the original charge no longer seems appropriate, they would initiate the possibility of a plea bargain with the defense attorney.

In discussing his evaluation of a case, one prosecutor also mentioned the wishes of the victim’s family, a consideration cited by a couple of others at this stage as well. This particular prosecutor said that he goes to the defense attorney with an offer in most cases because he feels that he is in a better position than the defense attorney to make a determination about an appropriate disposition in a case:

We always make good faith efforts to try to resolve cases without trials because we know the uncertainties of a jury trial, and because we are stewards of the public interest, so we take all factors into consideration…We represent all the people, including the defendant really, so we try to do justice in the case. We are in the best position to evaluate how this case is with respect to how other cases are, how much time the person should get; we talk to the victim’s family, so we generally have the most facts at hand in order to make the most appropriate decision, and we’re not just looking at our client’s interest like the defense attorney is, we’re looking at everybody’s interest (MIP10).

Whether the prosecutor or the defense attorney initiates a discussion about the possibility of resolving a case with a plea bargain, it is a discussion that begins relatively
early, usually at or around the time of the preliminary exam. Most of the prosecutors indicated as much; about a quarter said it varies. A majority of attorneys pointed to the evidence to explain why discussions typically begin around this time:

You want to see how strong your case is at the preliminary exam; you want to see how the witnesses will testify (MIP10).

A lot depends on the factors you have in the case, what the strengths of your evidence are etc., but at the preliminary exam I have to show probable cause to believe a crime was committed and that the person charged may have committed it. So we’re talking at that point in the process about avenues for resolution. The discussion starts early on in the process. The defense attorney is going to be talking about what his options are so he can discuss it with his client; I’m going to be interested in what the defense attorney’s thoughts are (MIP16).

Although other factors also influence when discussions begin, including the routine practice of a county, the style of the defense attorney, and the involvement of co-defendants (where the prosecutor seeks one defendant’s testimony against another), the evidence was the only factor that was cited by more than even a quarter of the sample.

Not only was there a fair amount of consensus among the sample regarding when discussions begin but there was also a fair amount of consensus regarding their duration. A majority of prosecutors said plea discussions are ongoing. One prosecutor, who described plea discussions as “a continuing process,” said that the first discussion may be fairly general and then things are explored further and revisited as the case proceeds to trial. However, a few attorneys indicated that although discussions are ongoing, absent changes with the evidence, there usually comes a time where both sides are at a standstill and the discussions do not change much. This points to the tenor of plea discussions, about which there was far less consensus.

About a third of the sample said that plea discussions involve negotiation and
bargaining; about a third said there is very little, if any, bargaining; and about a third said that it varies. 99 Reflecting the description by some of the discussion process as one that continues but does not always change, one attorney said,

Almost all the time there is give and take going on after an offer is extended, but most of the time it [eventually] comes down to, ‘this is our offer, and it’s either this or go to trial’ (MIP2).

While some attorneys indicated that discussions always go back and forth, others said that is not the norm:

We don’t get into a lot of back and forth type bargaining; it can be a little bit. We tend to evaluate a case, make a considered decision…and we put that offer out there, and that usually would be the offer unless something changed. If we get a counteroffer there’s a possibility of tweaking our offer a little bit, but we don’t go back and forth horse trading (MIP7).

Prosecutor 7’s remark, “unless something changed,” is notable in that it points to the effect of the evidence on plea discussions. In describing the extent of bargaining involved, a few attorneys referenced the evidence. For example, one attorney said, “if the case is very strong, there is no reason to bargain it away” (MIP8). Similarly, another attorney who indicated that his offers are usually ‘take it or leave it,’ nevertheless said that if his case is not as strong as he thought it was, there would be more negotiation and bargaining.

The evidence is a consideration that influences prosecutors’ decisions throughout the disposition process, including their inclinations to pursue a plea bargain or a trial (see Table 5.1). In discussing the strengths and weaknesses of the case, many prosecutors pointed to possible evidentiary issues and to the credibility and reliability of witnesses.

One prosecutor noted that in many cases the person murdered is also a criminal (a drug

99 Close examination of the data revealed no patterns regarding who initiates a plea and the tenor of the discussions. For example, among those who said they usually initiate the possibility of a plea bargain, half said the discussions involve negotiation and bargaining, and half said they do not.
deal gone bad for example), and in that situation, your witnesses may not be the most upstanding citizens.

| Table 5.1: The Most Important Factors Cited by Prosecutors Influencing Their Plea/Trial Decision |
|-----------------------------------------------|-------------------------------------------------|
| **Factor**                                   | **# of Prosecutors Citing It**                   |
| The evidence                                 | 17                                              |
| Consideration for the victim's family        | 11                                              |
| The characteristics of the defendant         | 10                                              |
| The nature/circumstance of the crime         | 10                                              |
| The likely outcome at trial                  | 5                                               |
| The need for the defendant's testimony       | 5                                               |
| Who the victim is/the victim's role          | 5                                               |
| The plea offer the defense will accept       | 3                                               |
| The facts of the case                        | 3                                               |
| The defense in the case                      | 3                                               |
| Other                                        | 6                                               |

Relatedly, about a third of the prosecutors said they consider who the victim is and the victim’s role (if any) in the crime. Two prosecutors gave examples of cases where the victim had maltreated the offender or the offender’s family member. In both cases, the prosecutors took into consideration that the victim was not entirely innocent of any wrongdoing. The cases involved domestic disputes, and given the victim’s role and the circumstances of the crime, plea bargains were agreed upon. In another case involving related individuals, the prosecutor indicated that the surviving family members did not want a trial, and this factored into his decision to agree to a plea bargain.

Indeed, a majority of prosecutors referenced consideration for the wishes of the victim’s family in their inclination to pursue a plea bargain or a trial. Accordingly, it is important to note that prosecutors are legally required to consult with the victim or victim’s family before finalizing any decision regarding plea or sentence negotiations.

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100 Six prosecutors specifically mentioned the defendant’s prior record; five specifically mentioned the defendant’s age; two specifically mentioned the defendant’s mental health or mental capacity; and two specifically mentioned the defendant’s likelihood of re-offense.
(Michigan Criminal Procedure §780.756). Prosecutors are not bound by their wishes but they are required to provide the victim or victim’s family with the opportunity to express them.

Discussing his consideration of their wishes, one prosecutor said that in a lot of cases the victim and the offender know each other and may be related, and the family may have divided loyalties. He said that he does not extend a plea offer without first discussing it with the family. Echoing this, another prosecutor said that if the victim’s family does not want the case to go to trial, he would consider an alternative disposition:

Some families just don’t want to relive the whole thing through trial. Very often you’re calling family members as witnesses in your case, and if that’s something that I just don’t feel the family can go through or they won’t go through, then we’ll explore something else (MIP5).

One prosecutor discussed a particularly heinous murder where it would have been very difficult for the victim’s family to sit through a trial and hear the evidence and see the crime scene photographs. The family indicated that they did not want to go through a trial, and in consideration for their wishes, this prosecutor said that he reduced his plea offer in order to resolve the case. If not for the wishes of the victim’s family, this prosecutor indicated that he would not have reduced his offer, and the case may have gone to trial. He pointed to the evidence and to the heinous nature of the crime.

The nature or circumstances of the crime were in fact mentioned by a majority of prosecutors. Some said that although they consider the wishes of the victim’s family in their decisions, those wishes do not necessarily control their decisions; some cases are so heinous that they should be brought to trial: 101

101 This is not to imply that in most cases the victim’s family wants to see a case resolved with a plea bargain; in some cases the family may want to see a trial pursued (contrary to or in accordance with the prosecutor’s inclination).
There are certain cases that need to be tried. If a case is egregious enough, horrendous enough, so long as we have sufficient evidence to go forward with it, we’re less likely to plea bargain (MIP7).

In contrast, in some cases the nature and circumstances may influence the prosecutor to pursue a plea agreement, such as in the murders discussed earlier that were related to domestic disputes. In one of these cases the prosecutor mentioned an additional factor he considered in coming to a plea agreement, the defendant’s lack of a prior record.

A majority of prosecutors cited the characteristics of the defendant in their decision, particularly the defendant’s age and criminal record, or lack thereof. Depending on the circumstances of the crime, a defendant’s age may be viewed as a mitigating or an aggravating factor. For example, one prosecutor discussed a case involving a young defendant and a self-defense argument. In discussing his decision to resolve the case with a plea agreement, he said, “I really had to think about whether it was the right thing to lock up this kid for his entire life… Many folks that commit murder deserve life without parole, but maybe not this one” (MIP15). In contrast, another prosecutor discussed a case also involving a young defendant, but one who had committed multiple murders. Commenting that the defendant “had a lot of good killing years left” (MIP1), he said that he felt that it was important to pursue a trial for life without parole, and he was not willing to agree to any plea bargain.

The significance of life without parole for this prosecutor in this particular case is notable. When asked about the relative importance of securing a sentence of life without parole in their decision to pursue a trial,\(^\text{102}\) most prosecutors said that it is an influential

\(^{102}\) Apart from the more general question about the most important factors that they consider in their decision to pursue a plea bargain or a trial, prosecutors were asked about the relative influence of the importance of the possibility of securing a sentence of life without parole in this decision (see Appendix G: Questions for Prosecutors, Michigan).
factor, but only in tandem with the consideration of other factors, among them the characteristics of the defendant, the nature of the crime, and the strength of the evidence:

Sometimes you run across a case that is so bad, so horrific that you just make the determination from the start, I’m going to pursue this to the end and try and get a conviction for first-degree. You’re looking for the kind of aggravating circumstance that would make you say, ‘this person cannot get out. I’ve gotta do everything I can to keep him/her in forever.’ You look for stuff like if it’s a multiple homicide, if it’s done in a particularly heinous way (MIP5).

Some people are just so dangerous, the crime that they commit so heinous, that I think you have to do everything possible to make sure they never get out again (MIP10).

In contrast, there are some cases where a sentence of life without parole is of little importance, given the defendant’s age and the terms of the plea bargain he will accept:

When you look at the practicalities of it, if you’ve got a 30-year-old defendant and they’re willing to plead to 40 years, the possibility of him getting out is slim to none. Calling it life without parole or calling it the minimum of 40 years, often you’re ending up with the same result (MIP8).

Thus, the significance of pursuing a trial to secure a sentence of life without parole depends on the particular offender and the particular case. In some cases, it may be the goal, whereas in others, it does not weigh heavily.

Use of Life Without Parole as a Plea Bargaining Tool

One of the central questions being explored in this study is prosecutors’ use of the maximum sentence as a plea bargaining tool in murder cases. Of particular interest and importance is the possibility that prosecutors may charge an aggravated murder case capitally with the intention of inducing a defendant to plead guilty in order to avoid the possibility of the death penalty. In Chapter 2 it was suggested that the death penalty exerts greater leverage in inducing a guilty plea compared with lesser sentences, particularly life without the possibility of parole. In order to explore this question further,
prosecutors in Michigan were asked about their own and others’ use of life without parole as a plea bargaining tool.

All of the prosecutors said they do not use life without parole as leverage, and most indicated that they do not believe other prosecutors do either. The blanket denial may at first lead one to wonder if the prosecutors were not entirely candid. However, prosecutors’ discussion of the reason for this is notable and points to a unique feature of Michigan’s code of criminal procedure, the open murder charge. As discussed in Chapter 2, with this charge, prosecutors do not have to choose between first or second-degree murder when indicting an offender; they may charge “open murder,” which is an unspecified charge that includes both first and second-degree. Most prosecutors indicated that this is the charge that is often used, both by themselves and by other prosecutors.

Thus, when discussing the use of life without parole as leverage, prosecutors said they do not indict a case for first-degree murder with the intention of inducing the defendant to enter into a guilty plea. Most said there is no need to indict a case that way; they are far more likely to indict a case for open murder, which exposes the defendant to life without parole but also, should the case go to trial, gives the jury the option of convicting on second-degree murder rather than returning an acquittal:

I think that the open murder charge in Michigan negates some of that [over charging], because when you’re charging open murder, it could be second-degree murder (MIP8).

A lot of times we will charge open murder, which encompasses first and second-degree and gives the defense the same exposure. We will charge second-degree murder only in those instances where we have excluded the possibility that there really is evidence of first-degree murder. We don’t artificially charge up high where we don’t have the proof to back it up. We’ll at least charge open murder if we have an argument for that (MIP7).
A number of prosecutors said that when charging a case you may not know if a first or second-degree charge is appropriate, and if you have an argument for first-degree, you charge open murder, given that evidence may develop to support that argument. When asked if he charges open murder in second-degree murder cases for which there is really only a borderline argument for first-degree murder, one prosecutor said,

If I can make a legitimate argument for why it should be considered for first-degree murder, why wouldn’t I charge open murder? (MIP16).

He added that a jury may feel the defendant is guilty of first-degree murder and should therefore have the option of convicting on that charge. He and other prosecutors indicated that even though the open murder charge exposes the defense to life without parole, the charge is not used as leverage; it is primarily used in order to have flexibility at trial.

Some prosecutors acknowledged that the open murder charge exposes the defendant to life without parole and could theoretically be used to induce a guilty plea. However, they said the possibility of life without parole is not really leverage, given that the defense knows what the prosecutor’s evidence is, and both sides know the likelihood of a jury convicting on first-degree murder. Nevertheless, one prosecutor remarked that the open murder charge is “a very useful tool” (MIP11). Notably, one of the few prosecutors who said he does not like to charge open murder used the same language in his discussion:

There is a legal tool in Michigan called open murder that really allows you to get a first-degree on the books and use it for a plea (MIP15).

He said that prosecutors may use the open murder charge for leverage if they are looking to dispose of a case with a plea bargain because they do not have a lot of confidence in the case, and they feel that a perceived reduction will induce the defendant to plead
guilty. Although he pointed out that there is a risk that the defense will pursue a trial, another prosecutor noted that while providing the leverage of life without parole in bargaining, the open murder charge also gives the prosecutor the option of getting a conviction on a lesser charge at trial, if a plea agreement cannot be reached.

Part B. Defense Attorney Decision Making

Defense attorneys’ decisions in the disposition of first-degree or open murder cases are affected by factors such as the strength of the evidence, the terms of the plea bargain that the prosecutor will accept, and consideration of the customs or routine practices in the jurisdiction of a case. These and other factors are among those that influence who initiates a plea and when, and whether a case is resolved with a plea agreement or brought to trial.

The Plea Bargaining Process

There was a great deal of variability among the sample regarding who usually initiates plea discussions. One third of the defense attorneys said they usually initiate; about a third said discussions are raised mutually; about a third said it varies; and a couple of attorneys said discussions are usually initiated by the prosecutor. The reasons that account for how discussions begin vary, and only two reasons were mentioned by more than even a quarter of the sample.

One of these reasons, the custom or routine practice of a particular jurisdiction, was mentioned by almost all of those who indicated that plea discussions are mutually raised. One attorney said, “It’s kind of a mutual thing of how it works. In our county that’s the way the system is essentially set up” (MID17103). Similarly, another attorney said, “It’s just a dynamic that happens” (MID5). In some counties it may be the policy of

103 This abbreviation refers to Michigan Defense Attorney #17.
the prosecutor’s office to raise the possibility of a plea bargain, while in others it may be customary for the defense attorney to do so:

Usually the way it would work is, I would ask them, are they willing to work something out, and in all of the situations they [said] ‘yeah, we would be really interested in talking to you about that’ (MID9).

Although routine practice influences how discussions begin, consideration of the evidence is important at this stage of the disposition process as well. One attorney who said that the possibility of a plea bargain is usually mutually initiated nevertheless said,

The last couple of cases that I’ve tried, the plea hasn’t even been on the table because the government has been so convinced as to how strong their case is and the crime is so heinous that you had nothing to lose by going and trying the case. You certainly wouldn’t go in and plead to first-degree murder because you get mandatory life (MID6).

Similarly, a defense attorney who said that sometimes he initiates discussions and sometimes the prosecutor does, said “whoever has the weaker hand will make the opening volley. There are no hard and fast rules” (MID7). Accordingly, a few attorneys indicated that the prosecutor would come to them in cases involving multiple defendants where the prosecutor sought the testimony of one defendant against another.

Other reasons that attorneys cited for who initiates a plea discussion included the respective interests or obligations of themselves and the prosecutor to their client and to the victim’s family. A few attorneys said they feel it is their job and they want to know where the prosecutor is coming from and going with a case so they can inform their client about the possibility of a resolution short of a trial. On the other hand, prosecutors may initiate such a discussion with the defense attorney if the victim’s family seeks a resolution. One attorney, who also noted the circumstances of the crime as a factor,
referred to a case involving a domestic situation in which the family did not want to see a trial pursued against the offender, a family member.

While the sample was split regarding how discussions are initiated, there was a fair amount of consensus regarding when discussions are initiated; a majority (13/18) said they begin relatively early, at or around the time of the preliminary exam. Most said this is due to the evidence, and the preliminary exam is the first opportunity to really see the strengths and/or weaknesses of the prosecutor’s case:

[The possibility of a plea is raised] after the preliminary exam because it gives you at least an idea…they’ve [the prosecution] got to put on enough people to convince the judge that there is probable cause that your guy did it, and you usually can get a pretty good read on what kind of a case they’ve got (MID3).

Similarly, another attorney said that defense attorneys use the preliminary exam “as a vehicle to either concede that the prosecutor has a strong case or to argue that they’ve got a weak case and they ought to deal” (MID18).

The evidence was also referenced by a few attorneys who said there was some variability in when plea discussions are initiated. For example, one attorney said that it depends on whether or not there are any legal and/or evidentiary problems with the prosecutor’s case. Others indicated that if there are co-defendants involved the discussion may begin very early in the case, if the prosecutor needs the testimony of one co-defendant against another.

In some jurisdictions the possibility of a plea bargain is always raised at a particular point in the disposition process of a case, whether that is at the preliminary exam or shortly before or after. Discussing the routine practice of the jurisdictions where they do most of their work, two attorneys mentioned the involvement of the judge. One
said that the judge holds a conference a few days prior to the exam and asks if a plea has been discussed. Similarly, another said that at the first pre-trial conference after the preliminary exam the judge will ask if the prosecutor has made an offer and what the defense attorney’s response to it is.

Once discussions begin, they tend to continue throughout the disposition process; most defense attorneys said that discussions are ongoing. One attorney said, “you keep talking about it” as evidentiary hearings continue, adding that he has had cases where the prosecutor has come to him when they “see the case is going in the toilet” (MID3).

Similarly, another attorney indicated that discussions continue as both sides are assessing the strengths and weaknesses of their case.

Among the few who indicated that discussions are not always ongoing, some referred to jurisdictional differences. They pointed out that some counties have scheduled status conferences for the defense attorney, the prosecutor, and the judge to meet and discuss the case and the possibility for a plea resolution, and discussions may be confined to these conferences. Similarly, one attorney spoke of differences between counties when talking about the amount of negotiation and bargaining involved in plea discussions:

In our county it goes back and forth… In [name of county] county they’re a bunch of idiots, and they got the idea that they can say take it or leave it and they get stung quite frequently (MID16).

Only a couple of attorneys indicated that discussions involve offers of ‘take it or leave it’ by the prosecutor. While a few said that it varies, most attorneys said that discussions often involve negotiation and bargaining:

104 In the interest of protecting this individual’s identity, the name of the county he mentioned is omitted.
105 Close examination of the data revealed few patterns regarding who initiates a plea and the tenor of the discussions. For example, although both attorneys who indicated that the prosecutor usually initiates the
One of the things that I’ve always found to be important is keeping a line of communication with opposing counsel open. I can’t think of a case where it’s been take it or leave it; things change as the case gets prepared for trial (MID10).

Echoing this comment, another attorney said that the prosecutor may say ‘take it or leave it’ but then laboratory results come back differently than the prosecutor expected, and he is subsequently willing to negotiate his offer.

The evidence is consistently a significant factor in decision making throughout the disposition process of a case, and it is one of the most important factors that influences defense attorneys’ inclinations to pursue a trial or a plea bargain (see Table 5.2). Nearly all of the attorneys cited their consideration of the strengths and weaknesses of the evidence. Emphasizing the importance of this factor in his decision to enter into a plea discussion, one attorney said:

The strength of the prosecutor’s case is 85% of the discussion. The other factors are things that enter into it, but the strength of the case is what controls it, in any case, not just murder, but obviously any case where the consequence of losing is a huge sentence, life, 20 years, whatever it is, that’s what causes you to negotiate (MID3).

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<th>Factor</th>
<th># of Defense Attorneys Citing It</th>
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<td>The evidence</td>
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<td>The plea offer</td>
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<td>The wishes of the defendant</td>
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<td>The likely outcome at trial</td>
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Plea discussion also said that discussions involve negotiation, among those who said they usually initiate, a few said the discussion involves negotiation and bargaining, and a few said it varies.

106 Five attorneys specifically mentioned the defendant’s age; one attorney specifically mentioned the defendant’s prior record.
Discussing their consideration of the evidence and the strengths and weaknesses of the prosecutor’s case, a number of attorneys also pointed to the strengths and weaknesses of their own case and the plausibility of the defense argument in the case, including any self-defense claims. One attorney said that you look at what your client’s version is of what happened. He said that while sometimes your client’s version is clearly not believable and can easily be discredited, other times it makes sense and points to questions in the police report of how things happened. Similarly, another attorney said,

You look at how good is this defense; I’ve got a really credible guy, his defense pans out, but is it strong enough to overcome some of the inherent prejudices that juries have (MID7).

This attorney’s remark about the jury is notable in that it reflects his and most others’ consideration for the likely outcome of the case at trial. One attorney indicated that he considers not only the likelihood that his client would be acquitted or found guilty, but also the likelihood of his client being found guilty of first or a lesser degree of murder. He said that he has brought cases to trial where the prosecutor would not agree to a plea to second-degree murder. In such cases, he does not argue that the jury should acquit, but he argues that they should find his client not guilty of first-degree murder, conceding that his client is guilty of second-degree murder.\(^\text{107}\)

Accordingly, a number of defense attorneys pointed to the plea offer as a factor influencing their inclination to pursue a trial or a plea bargain. One attorney said that a plea offer from the prosecutor to second-degree murder might essentially be a non-offer if your client falls at the high end of the sentencing guidelines.\(^\text{108}\)

\(^{107}\) Recall that Michigan has a charge of open murder (see Chapter 3, p. 65 and this chapter, p. 145)

\(^{108}\) See Chapter 3, fn 49.
The sentencing guidelines on second-degree murder are so wide ranging. For some clients, they might as well get a mandatory life without parole if they’re gonna end up doing 40 or 50 years as a minimum term. So you’re really not getting anything for a plea. It’s kind of illusory, and if it’s illusory in that respect, my recommendation typically would be, let’s go to trial, ‘cause at least then you can have the potential for a mistrial, maybe something will happen to a witness, or the judge might screw up, who knows, and then you may be in a better position to negotiate down the road (MID8).

Notably, nearly half of those who referenced this factor discussed the relevance of the defendant’s age in accordance with it:

When the prosecutor says… ‘I got you charged with murder 1, it’s probably a murder 2. I’ll give him murder 2, with guidelines he’ll get 10-20, plus 2 for the gun.’ I’ll say to the defendant then…depending on the strength of the case and the age of client, if he’s a 22 year old kid, and I think they’ve got a decent chance of convicting him of something and they tell me 10 plus 2, I can say to him, ‘look, you’ll be 35 years old, you’ll be out, you’ll have a whole life in front of you.’ Now, if you’re my age and you’re gonna be 60 and you’re [the prosecutor] giving me 10 plus 2, I’m telling you if I’ve got a chance, I’m going to trial, cause I don’t want to die in prison, and that’s what’s gonna happen (MID3).

The importance of the plea offer was reiterated by a number of attorneys when asked about the relative influence of a sentence of life without parole, should a trial be pursued and their client convicted of first-degree murder. Although most attorneys said it is or can be an important factor, many said that it is only important given other considerations, such as the plea offer (and relatedly, the age of the defendant), the strength of the prosecutor’s evidence, and the likelihood of conviction:

109 Apart from the more general question about the most important factors that they consider in their decision to pursue a plea bargain or a trial, defense attorneys were asked about the relative influence a sentence of life without parole in this decision (see Appendix H: Questions for Defense Attorneys, Michigan).
If the downside is life without parole and the likelihood is of conviction, then the incentive is big to come up with something to come off of mandatory life... The last couple of cases that I’ve tried, the plea hasn’t even been on the table because the government has been so convinced as to how strong their case is and the crime is so heinous that you had nothing to lose by going and trying the case... Those are the easy ones from my perspective for the defense lawyer, when the prosecutor says, ‘there’s no options for you,’ because then you know you have to have a trial. The tough ones are when you have perhaps a chance of getting an acquittal but you know that there is also maybe equally as good a chance that you’ll have a conviction, and if your client loses, he’s locked up for the rest of his life. Those are the real hard cases to handle (MID5).

The comments of Defense Attorney 5 are notable in that they point to the significance of life without parole specifically as a mandatory sentence upon conviction for first-degree murder. Although most attorneys discussed the importance of life without parole in tandem with the consideration of other factors, many also emphasized that it is mandatory upon conviction, and they feel a tremendous pressure because of that:

You know that if you don’t win the case, if you don’t exonerate the client or get him a reduced verdict, that he’s effectively gonna die. You’re gonna put him in prison, and he’s coming out in a pine box. It’s a protracted death sentence, we call it (MID7).

If you had parolable life or any sentence less than that, then you can always hope that even if you lose and are convicted as charged, you’ve got room to argue the sentencing. But if you get convicted of first-degree, the case is over, there’s nothing you can do at sentencing; the sentence is predetermined, so it is a huge factor. And I think for some lawyers the fear factor comes in on that sentence. They don’t want to lose a case where their client goes away for the rest of their life, so if a plea is offered, they may exert pressure on their clients. And sometimes that’s appropriate, because if the case is pretty bad, and you think your client is gonna be convicted, no matter who the jury is, and a plea offer comes down the pike, you have to spend a lot of time talking to your client about the risks and give them your professional advice on what you’re worried may happen at trial (MID4).

Mandatory life without parole upon conviction for first-degree murder may influence some attorneys to exert pressure on their clients to accept a plea bargain to a lesser charge. However, that being said, most attorneys pointed to their consideration of the
client’s wishes and indicated that ultimately, “the decision of whether to go to trial or plead absolutely has to be the client’s decision” (MID10).

Use of Life Without Parole as a Plea Bargaining Tool

As discussed earlier, one of the central questions being explored in this study is prosecutors’ use of the maximum sentence as a plea bargaining tool in murder cases. This question takes on greatest importance in capital cases where the defendant’s life is at stake if a trial is pursued but is nevertheless significant in first-degree or open murder cases as well where the defendant’s freedom is at stake. It has been argued that the possibility of the death penalty exerts greater leverage in inducing a guilty plea compared with life without the possibility of parole. However, given Michigan defense attorneys’ discussions of the pressures of this sentence, particularly this mandatory sentence, it is important to further examine prosecutors’ use of it as a plea bargaining tool.

Nearly all of the defense attorneys said that prosecutors use life without parole as leverage in plea bargaining. One attorney said that he thinks that in the prosecutor’s view, charging first-degree murder “is a legitimate tool in their arsenal” for subsequent plea discussions, enabling them to negotiate a case “back to what it really is in the first place, which is a second-degree murder” (MID3).

Although a few attorneys indicated that prosecutors charge first-degree murder for leverage, about half those who said that prosecutors use life without parole as a plea bargaining tool specified that they do so through the open murder charge:

Overcharging is done on a routine basis to provide for negotiation leverage, and in Michigan it’s kind of done automatically with open murder. The prosecutor doesn’t have to do anything. It’s like, ‘hey, you’re exposed. Maybe my proofs will add up to murder 1, maybe not’ (MID2).
They do it all the time…What we have in Michigan is the charge of course of open murder, which means they’re just trying to scare the guy and are going for first (MID17).

As reflected in these passages, many defense attorneys expressed a view of the open murder charge as built in leverage for plea bargaining, leverage that prosecutors take advantage of in order to garner a plea to a higher sentence than the defense might otherwise accept, if not for the risk of life without parole at trial.

However, it is important to note that not all attorneys shared this general view of prosecutors. Some said the use of the open murder charge depends on the particular county, prosecutor, and case. For example, one attorney who said that homicides are generally charged as open murder also said that, with some exception, he does not feel they are charged that way for leverage. He said that prosecutors charge open murder “to kind of keep you in the dark as to what their actual theory is going to be” (MID8). Nevertheless, he added that prosecutors might charge open murder for leverage in certain types of homicides, such as those resulting from a domestic alteration:

As a defense lawyer, I see this as clearly a second-degree murder, unless there is adequate provocation, then maybe we’re looking at potential manslaughter issues, heat of passion etc. In those cases where they’re pushing for first-degree it might seem like they’re just trying to make sure that they end up with a second instead of manslaughter. In those cases, I think they’re using it as leverage.

Another attorney gave a hypothetical example of a bar fight where the homicide is clearly a second-degree offense but where an argument can be made for first-degree murder. He pointed out that while a prosecutor may charge such a case to have leverage in negotiating a plea bargain, he takes a risk in doing so “because if a plea can’t be agreed upon and the case goes to trial, the prosecutor will look pretty stupid when he loses” (MID12). He added that prosecutors will think about “the expense of the trial in terms of
what it takes out of you and the preparation and the actual stress of the trial itself and the
uncertainty of the trial… The prosecutors know that sometimes it doesn’t go the way they
figure it’s gonna go.” Thus, while the open murder charge may in and of itself provide
prosecutors with leverage in plea bargaining, there is nevertheless a risk in charging open
murder or first-degree murder for this purpose. However, while both sides take a risk in
pursuing a trial if a plea agreement cannot be worked out, most defense attorneys
indicated that the open murder charge serves to mitigate the risk for the prosecution.

Summary and Conclusions

Generally speaking, prosecutors and defense attorneys describe the plea
bargaining process as one that begins relatively early and involves continuous
discussions. These discussions may be initiated by either the defense attorney or the
prosecutor, depending on such factors as the strengths and weaknesses of the evidence,
which also influence whether or not discussions involve negotiation and bargaining.

Prosecutors and defense attorneys similarly cited the evidence as a factor
influencing their inclinations to pursue a plea bargain or a trial. While a number of
prosecutors also pointed to their consideration for the victim’s family, the characteristics
of the defendant, and the nature or circumstances of the crime, a number of defense
attorneys cited the importance of the plea offer, the wishes of the defendant, the likely
outcome at trial, and the defense in the case. Both prosecutors and defense attorneys
discussed the importance of securing or avoiding a sentence of life without parole relative
to their consideration of these other factors.

Prosecutors’ discussed the use of life without parole as a plea bargaining tool
largely in terms of the open murder charge. Nearly all of the prosecutors indicated that
life without parole is not used as leverage. In contrast, nearly all of the defense attorneys
indicated that it is. The different views of prosecutors and defense attorneys regarding the
open murder charge were particularly striking and are further discussed in the following
chapter.
Chapter 6: The Decision Making Process Among Prosecutors and Defense Attorneys

Thus far, the plea bargaining process and the factors that influence decision making have been discussed separately for prosecutors and defense attorneys in Ohio and in Michigan. The parallel discussions have provided a description of the process in Ohio in capital and non-capital cases and in first-degree or open murder cases in Michigan and have facilitated a discussion of the relative influence of the maximum sentence in this process. However, a more refined analyses in which decisions and practices in the two states are compared and contrasted is needed. Accordingly, in Part A of this chapter a discussion of decision making in Michigan compared with Ohio is presented. Part A is divided into two sections: in Section 1 prosecutorial decision making in Michigan will be compared and contrasted with that in capital and non-capital cases in Ohio; in Section 2 defense attorney decision making in Michigan will be compared and contrasted with that in capital and non-capital cases in Ohio.

Importantly, while prosecutors and defense attorneys in each of the three types of cases are describing the same stages and decision points in the process, whether or not they are describing them in the same way has yet to be explored; this chapter provides an opportunity to do so. The remaining three sections of this chapter thus focus on comparisons of prosecutors and defense attorneys. Part B involves a comparison of prosecutors’ and defense attorneys’ descriptions of the plea bargaining process and the factors influencing their decisions in Ohio in capital cases; Part C involves a comparison of prosecutors and defense attorneys in Ohio in non-capital cases; and Part D involves a comparison of prosecutors and defense attorneys in Michigan.
Part A. Comparing and Contrasting Decision Making in Michigan with Decision Making in Capital and Non-Capital Murder Cases in Ohio

Section 1: Prosecutorial Decision Making

The effect of the maximum sentence of life without parole on the disposition process and its influence on prosecutors’ decisions in Michigan in some ways seems akin to that of the maximum sentence of the death penalty in Ohio. However, in other ways it more closely resembles the process and decision making involved in non-capital cases in Ohio. An examination of the ways in which Michigan prosecutors’ descriptions of the disposition process and the factors that influence their decisions do or do not reflect those of Ohio prosecutors in capital and non-capital cases is useful in that it may provide further insight into the role of the maximum sentence, and the unique influence (or lack thereof) of the death penalty in the disposition and decision making process in murder cases.

About half the prosecutors in Michigan said that it is usually the defense attorney who raises the possibility of a plea; about a quarter said they usually raise the possibility; and about a quarter said it varies. Although the spread of responses is greater than that found among prosecutors in Ohio when discussing capital and non-capital cases, the differences are not substantial.

As discussed earlier, there were some notable differences in the factors that Ohio prosecutors cited to explain why they or the defense attorney would initiate a discussion about a plea bargain. The two most common factors cited by prosecutors in Michigan, the evidence and the custom or routine practice in a county, were among the most common reasons cited by prosecutors in Ohio when discussing non-capital cases. The latter finding may speak to the relative infrequency with which capital cases are encountered
and suggests a unique effect of the death penalty on prosecutor’s decisions at this stage of the disposition process, for which no routines may have developed.

Notably, one factor that was mentioned by a few prosecutors in Michigan and by a few prosecutors in Ohio when discussing capital but not non-capital cases was the prosecutor’s indictment of a case with the intention of pursuing it to trial. Two of the three prosecutors in Michigan who said this indicated that they were speaking about the most serious charge of first-degree murder as opposed to the unspecified charge of open murder. Thus, in both states, some prosecutors may only indict the most serious charge carrying the most severe penalty if they intend to pursue that penalty. Accordingly, a few prosecutors in Michigan and in capital cases in Ohio indicated that that there would not be any plea offer in some cases.

Thus, particular reasons for who initiates a plea in Michigan were reflected in either Ohio capital or non-capital cases. In contrast, the most oft cited reason by Michigan prosecutors accounting for when a plea discussion is initiated was reflected in Ohio in both types of cases. The strengths and weaknesses of the evidence was the only factor cited by a majority of prosecutors, regardless of the maximum sentence involved, and was also the only factor cited by more than even a quarter of the prosecutors in any of the three groups.

However, while the evidence impacts whether plea discussions begin sooner or later in capital and non-capital cases in Ohio, in Michigan it explains why plea discussions usually happen at a particular time, the preliminary examination. As discussed earlier, most prosecutors in Michigan said that discussions begin around this time because it provides an opportunity for them to see how witnesses will testify, and it
provides an opportunity for the defense attorney to get a sense of the strengths and weaknesses of the prosecutor’s case. Thus, the lack of variability in the usual timing of plea discussions in Michigan relative to that found in capital and non-capital cases in Ohio may be due to the procedures in place for the disposition of cases in Michigan rather than to any differences reflecting the impact of the maximum sentence on plea discussions.

Although Michigan prosecutors did not share the variability found among Ohio prosecutors pertaining to when plea discussions usually begin, they did share it pertaining to the tenor of those discussions. In Michigan, almost equal numbers of prosecutors said that discussions usually involve negotiation and bargaining or that offers are usually presented as ‘take it or leave it’ or that it varies; this dispersion was mirrored among prosecutors in Ohio capital and non-capital cases. Prosecutors indicated that developments and changes in the evidence that either strengthen or weaken their case impact the extent of negotiation in plea discussions.

Regardless of the amount of bargaining involved, most prosecutors in Michigan said that plea discussions are usually ongoing, continuing throughout the disposition process. This characterization reflects that of Ohio prosecutors’, most of whom similarly described the nature of plea discussions in non-capital cases (but not in capital cases, where there was greater variation among the responses). While the level of bargaining may be influenced by changes in the evidence, the nature of discussions may be influenced by factors that change as well as by those that do not, i.e. custom.

Recall that the custom or routine practice in a county was one of the most oft cited factors accounting for who initiates a plea discussion in Michigan and in non-capital
cases in Ohio. In Michigan, a few prosecutors also cited this factor to explain why discussions usually begin around the time of the preliminary exam. Thus, it may be routine practice in Michigan and in non-capital cases in Ohio for plea discussions to continue as the case proceeds to trial. The similarity in the nature of discussions, which was not shared with capital cases, suggests that the death penalty may have a unique effect on the nature of discussions, perhaps because capital cases are relatively infrequent, and routines governing their disposition undeveloped.

Whether discussions continue or are confined may be impacted by prosecutors’ inclinations to pursue a case to trial or to pursue a plea bargain. As discussed earlier, this inclination is influenced by numerous factors, including the evidence, consideration for the wishes of the victim’s family, the nature or circumstances of the crime, and the characteristics of the defendant. These four factors were those most oft cited by Michigan prosecutors and were among the five factors most oft cited by Ohio prosecutors in non-capital cases; three of these factors were cited by a majority of Ohio prosecutors in capital cases.\(^{110}\) This finding reveals little difference in the factors considered by most prosecutors in murder cases, regardless of the maximum sentence.

One notable exception to this however, is the finding regarding prosecutors’ consideration of the likely outcome at trial. Only about a third of the prosecutors in Michigan mentioned this factor, a finding comparable to that among prosecutors in Ohio in non-capital cases. In contrast, over half the prosecutors in Ohio mentioned this factor when discussing capital cases. In Chapter 4 it was suggested that prosecutors seem more

\(^{110}\) A fewer number of Ohio prosecutors cited consideration for the characteristics of the defendant (see Chapter 4, pp. 94 and 106)
willing to take the risk of a trial in cases where the death penalty and associated costs are not at stake, a postulation supported by the finding in Michigan.

The number of prosecutors in non-capital compared with capital cases who cited the plea offer the defense will accept was interpreted (in Chapter 4) as further evidence in support of this conclusion in Ohio, where prosecutors indicated that in non-capital cases they might as well bring a case to trial if the defense would not accept their offer. It is therefore interesting to note that only a few prosecutors in Michigan mentioned this factor, a finding comparable to that among prosecutors in capital cases. Perhaps prosecutors are less inclined to consider the plea offer in the most serious cases, a postulation supported by the earlier finding that prosecutors in Michigan and in capital cases in Ohio may indict an aggravated/first-degree murder case with the intention of pursuing it to trial. This finding suggests that while the death penalty may exert a unique influence on prosecutors’ consideration of the likely outcome at trial, there are nevertheless some cases (i.e. those involving a particularly heinous killing) that prosecutors believe need to be pursued to a trial for the maximum possible sentence.

Indeed, this sentiment was expressed by a number of prosecutors in Michigan in their discussion of the relative importance of securing a sentence of life without parole in their inclination to pursue a case to trial. As discussed earlier, most prosecutors said that it is an important factor, but only in tandem with the consideration of other, case and defendant specific factors. Notably, far fewer numbers of prosecutors in Ohio in either capital or non-capital cases indicated that securing the maximum sentence was an important consideration.
Recall that in their discussion of capital cases some prosecutors spoke about their personal feelings of capital punishment and the value of life without parole as an alternative sentence. The comments of one Michigan prosecutor are particularly striking in this respect:

We’re not a state with death as an option. I think if we were a state where death was an option, then we would have the moral and the religious views that we might have to look at and say, ‘oh my god, we’re gonna kill somebody because they killed somebody.’ We don’t have that, and life in prison, if you’ve taken somebody’s life, is a tradeoff. We don’t look that often at that penalty as being so heavy handed and so out of character for the crime that was committed that it actually has any role whatsoever in the negotiating process. It does in the cases I talked about earlier [those involving a particularly heinous crime and/or a particularly dangerous offender], but as professionals, do we look at that penalty and say, ‘gosh we have a real heavy burden for this defendant’? I don’t think that comes into play very often; you kill somebody, you’re gonna pay (MIP4).

Prosecutors’ pursuit of the maximum possible sentence for the highest degree of murder in Michigan does not carry the inherent moral issues attached to the pursuit of the maximum sentence of death in Ohio. This is not to imply that such issues or concerns affect the decisions of all prosecutors in capital cases or that these concerns are irrelevant where life without parole is at stake, but merely to suggest that the pursuit of the death penalty may be a decision that affects prosecutors in ways that the pursuit of life without parole does not.

The meaning of the maximum sentence seems to be different for prosecutors in Michigan and in Ohio. Relatedly, their use of it is also different. An overwhelming majority of prosecutors in Michigan indicated that the maximum sentence is not used as leverage to induce the defense to enter into a plea bargain. Such a dramatic consensus was lacking in Ohio in both capital and non-capital cases (see Chapter 4). However, as discussed earlier, many prosecutors in Michigan pointed to the charging option of open
murder. They indicated that most prosecutors charge open murder, which, like first-degree murder, exposes the defendant to life without parole, but unlike first-degree alone, also gives the jury the option of convicting on second-degree murder rather than acquitting the defendant altogether, should the case go to trial.

Generally speaking, prosecutors did not perceive this charging option or their use of it as a plea bargaining tool, although a few acknowledged that it could be used as leverage to induce a guilty plea. Given this option, compared with prosecutors in Ohio in capital cases, prosecutors in Michigan have less to lose in pursuing a trial; while they risk an acquittal on first-degree murder, they may still obtain a conviction on second-degree murder. Furthermore, the costs of pursuing a trial for the maximum possible sentence are far less in Michigan compared with those for capital cases in Ohio. Thus, arguably, prosecutors have less reason or incentive to use the maximum sentence as leverage to induce a guilty plea and avoid a trial.

Section 2: Defense Attorney Decision Making

In some ways the decisions that Michigan defense attorneys make and the factors that influence their decisions throughout the disposition process more closely resemble those of Ohio defense attorneys in capital cases and in some ways they more closely resemble those of Ohio defense attorneys in non-capital cases. No one general statement about the role of life without parole in this process compared with the role of the death penalty or a life sentence can accurately be made. However, an examination of the ways in which Michigan defense attorneys’ descriptions of the disposition process are similar to and different from those of defense attorneys in Ohio capital and non-capital cases is

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111 It is notable that not one Michigan prosecutor cited financial considerations as a factor influencing their decisions in the disposition process.
important in that it aids in a greater understanding of the role of the maximum sentence in the disposition and decision making process in murder cases.

In Michigan, there was a great deal of variability regarding who usually initiates a discussion about the possibility of a plea bargain. This variability mirrored that found in non-capital cases in Ohio. In both types of cases about a third of the defense attorneys said they usually initiate the discussion, and about a third said that who initiates it varies. In all three types of cases only a couple or a few attorneys indicated that the prosecutor usually initiates it.

Unique among the Michigan sample were a number of attorneys who indicated that the discussion is one that is raised mutually. Most of these attorneys said that it is just routine practice in some counties for the two sides to jointly broach the possibility of resolving a case through a plea bargain. Other attorneys in Michigan also pointed to the custom or routine practice in a county when discussing the factors that explain why they or the prosecutor usually initiate plea discussions. This factor was one of the two most commonly cited, and notably was also one of the two most commonly cited by Ohio defense attorneys when discussing non-capital cases. As mentioned in the earlier discussion of prosecutors in Michigan and in Ohio, this finding suggests that customs and routines may be undeveloped in capital cases, which are encountered relatively infrequently. The other most commonly cited factor was the same in both groups as well, the strengths and weakness of the evidence.

It is notable that not one Michigan defense attorney mentioned the desire to avoid a sentence of life without parole as a factor, but half the defense attorneys in Ohio mentioned the desire to avoid the death penalty as a factor. Similarly, while a number of
Ohio attorneys said that the prosecutor would not initiate a discussion in a capital case because he indicts the case with the intention of purging it to trial, only one Michigan attorney cited the prosecutor’s intent as a factor. These differences, and the similarities between the groups of attorneys in Michigan and in Ohio in non-capital cases, suggest that the death penalty has a unique effect on the disposition process. However, the distinctions are less pronounced and even reversed for other stages and decisions in the process, including the point at which discussions are raised and why.

A majority of attorneys in Michigan said that discussions begin relatively early, and a few said it varies. This spread of responses more closely resembles that among Ohio attorneys in capital than in non-capital cases. However, the relative majority was distinctly higher in Michigan. Although there was comparatively greater variability in non-capital cases, the most oft cited reason accounting for when plea discussions begin was the same in all three types of cases, the strengths and weaknesses of the evidence. Notably, not one attorney in Michigan indicated that plea discussions begin early because of any urgency exerted by the sentence of life without parole. In contrast, a few defense attorneys in Ohio pointed to the pressure exerted by the death penalty in prompting early plea discussions.

Michigan attorneys’ descriptions of the character of the discussions themselves were remarkably similar to Ohio attorneys’ descriptions in both capital and non-capital cases. In all three groups, a majority said that discussions involve actual negotiation and bargaining and that such discussions are ongoing, continuing throughout the disposition process. Smaller numbers indicated that any offers from prosecutors are presented as “take it or leave it” or that discussions are confined to a particular point or points in the
process. Most attorneys in Michigan and also in Ohio indicated that discussions continue, and the agreements each side are willing to accept may change as evidence develops and as a case unfolds, including such elements as the results of lab tests, witness issues, and judges’ rulings on motions.

The evidence is a key factor impacting the decisions defense attorneys in both states make throughout the disposition process. When discussing the most important factors they consider in their inclination to pursue a plea bargain or a trial, the evidence was the only factor cited by a majority of attorneys in all three types of cases. As discussed earlier, there were some notable differences in the factors that Ohio attorneys referenced in capital and non-capital cases, particularly the likely outcome of the case at trial and the plea offer. In Michigan, a majority of attorneys cited each of these factors, reflecting a similarity to attorneys’ decisions in capital cases in Ohio with respect to the former, and a similarity to attorneys’ decisions in non-capital cases with respect to the latter.

The likely outcome at trial is an important consideration for most attorneys where the consequences of losing are a potential death sentence in Ohio and a mandatory sentence of life without parole in Michigan. In both cases, the defendant will not get out of prison alive. Speculating on the relative influence of the death penalty compared with life without parole, one attorney in Michigan said that both punishments are pretty strong incentives not to take the risk of a trial. However, in Michigan, many attorneys said that consideration for the likelihood of conviction is weighed against the parameters of the plea offer from the prosecutor, a factor that was not cited by one attorney in Ohio when discussing capital cases but by a majority when discussing non-capital cases.
Where the maximum penalty is life without parole or a parolable life sentence, there may be little difference between the punishment received upon a plea of guilty or a trial verdict of guilty. Attorneys in Michigan and in Ohio in non-capital cases indicated that there is little incentive for the defense to accept a plea offer from the prosecutor that does not give the defendant a realistic chance of being released from prison. In such situations, the defendant is likely to spend the rest of his life in prison whether he pleads guilty or is found guilty. Thus, attorneys indicated that they might as well take such a case to trial because you never what is going to happen, i.e. unexpected problems with the prosecutor’s witness/es may arise.

Thus, while the likely outcome at trial is an important consideration where the risk of going to trial is a death sentence or a mandatory sentence of life without parole, the significance of this risk is different with respect to what is gained by entering into a plea agreement. In capital cases, a plea offer that gives the defendant little or no chance of being released from prison nevertheless guarantees his right to life. In contrast, in Michigan and in non-capital cases in Ohio, the difference between a plea offer and the sentence upon conviction may be of little value.

This finding suggests that Michigan defense attorneys’ consideration of life without parole, should their client be convicted of first-degree murder at trial, is an important factor in their inclination to pursue a plea agreement, but it is not the most important factor. Indeed, as discussed earlier, most attorneys indicated that it was important in tandem with the consideration of other factors, such as the plea offer and the likely outcome of a trial. The relative weight most attorneys attribute to the role of the maximum sentence reflects that of attorneys in Ohio in non-capital cases, most of whom
also said that the weight of the maximum sentence is only important relative to the plea offer.

It is notable however, that many attorneys in Michigan spoke about the intensity and the pressure inherent in trying a case where their client will be sentenced to life without parole if convicted of first-degree murder. One attorney said,

It puts a tremendous weight on the defense attorney’s shoulders, to have that responsibility, to know that if you don’t get either a conviction of a lesser offense or an acquittal at the trial, your client is dying in prison (MID4).

Similar sentiments were expressed by a number of attorneys in Ohio when discussing capital cases. For example, one attorney said,

They gnaw at you. I don’t know that you ever become, as an attorney, desensitized and think of it as another case, cause it’s not. It really isn’t; the stakes are as high as they can be (OHD13).

Thus, in both Michigan and in Ohio the maximum sentence for the highest degree of murder is a significant factor considered by attorneys in the decisions they make in the disposition of a case. However, as discussed above, the risks of pursuing a trial relative to the benefits of coming to a plea agreement take on different value.

Given this, one might conclude that, compared with life without parole, the death penalty is a greater incentive for the defense to enter into a plea agreement and is also therefore more likely to be used by prosecutors as leverage for inducing the defense to do so. However, attorneys’ discussion of this in Michigan and in Ohio indicated that the picture is more complicated than it may at first seem.

A cursory examination of defense attorneys’ responses to the question of prosecutors’ use of the maximum sentence as leverage in plea bargaining showed that nearly all of the attorneys in Michigan said prosecutors use life without parole in this
way. In contrast, only about half the attorneys in Ohio said as much about prosecutors’
use of the death penalty. This finding is counter intuitive. However, a closer examination
of attorneys’ responses points to the role of alternative charging options and prosecutors’
considerations of the relative costs and benefits of charging for leverage.

As discussed earlier, while a few attorneys in Michigan indicated that prosecutors
charge first-degree murder for leverage, about half discussed prosecutors’ use of the open
murder charge, saying that it is built in leverage for plea bargaining. They indicated that
prosecutors, either routinely or in particular types of cases, charge open murder to have
the option of first-degree as a bargaining chip. Although in doing so prosecutors risk the
possibility that the defense will choose to pursue a trial and win, unlike first-degree
murder, open murder also carries the option of a conviction on the lesser charge of
second-degree. Thus, prosecutors have little to lose in charging open murder with the
intention of avoiding a trial and inducing a guilty plea to a higher sentence than the
defense might otherwise accept, were life without parole not a possibility if a trial is
pursued.

In Ohio, prosecutors also have an alternative charging option, albeit one that does
not carry the death penalty. As discussed in Chapter 4, a number of defense attorneys
pointed to a recent change in the Ohio statute that increased the penalty for non-capital
aggravated murder to life without parole. While indicting for this lesser charge in lieu of
capital murder does not carry the leverage of the death penalty, it also does not carry the
additional financial costs of a capital charge, such as the appointment of two defense
attorneys instead of one.
Thus, even if a guilty plea were to be induced, and one entailing a higher sentence than the defense might otherwise agree to, the expense of a capital trial, let alone any trial, may be avoided, but the additional expenses of a capital indictment remain. Furthermore, there is the risk that the defense will not accept a plea bargain and will instead force the prosecutor to try the case. In such a situation, the county incurs the expense of a capital trial, and perhaps for little return; even if the defendant is convicted, a jury may not sentence him to death. Given these considerations, prosecutors may be more inclined to charge non-capital aggravated murder and pursue a trial for life without parole rather than charge capital murder to induce a guilty plea to life without parole (or its equivalent). Thus, in both states, defense attorneys indicted that while charging the highest degree of murder available may give the prosecutor leverage in plea bargaining, there are costs involved and inducements to utilize alternative charging options.

**Part B: Comparing Decision Making Among Prosecutors and Defense Attorneys in Capital Cases in Ohio**

Most prosecutors and defense attorneys indicated that the defense attorney usually initiates plea discussions. The two most oft cited reasons by defense attorneys accounting for this were among the three most oft cited reasons by prosecutors, the defense’s interest in avoiding the possibility of the death penalty, and the prosecutor’s indictment of a capital case with the intention of pursuing it to trial. A number of prosecutors also cited consideration for the wishes of the victim’s family, a factor acknowledged by a couple of defense attorneys as well. Attorneys indicated that the prosecutor may initiate a plea discussion if asked to do so by the victim’s family but otherwise may not be inclined to do so. Both prosecutors and defense attorneys also said that the prosecutor may initiate a
plea discussion in a case involving multiple defendants where the prosecutor seeks the testimony of one defendant against another.

While there was a fair amount of consensus among the groups regarding who usually initiates any plea discussions and why, there was some variability pertaining to when those discussions usually begin. Most defense attorneys said they begin relatively early, but a sizeable minority said they do not begin until later or that when they begin varies. Prosecutors were largely split in their descriptions of this stage of the process; similar numbers indicated that discussions usually begin early, that they usually begin later, or that it is variable.

A majority of attorneys in both groups cited the evidence to explain when discussions begin. Although a number of defense attorneys indicated that the evidence against the defendant is often overwhelming, prosecutors and defense attorneys nevertheless said they need time to review any changes in the evidence and to assess the strengths and weaknesses of the case. While other factors come into play, the evidence was the only factor cited by more than a third of the attorneys in either group. It is notable however, that a few prosecutors said that when plea discussions begin depends on the style of the defense attorney. Given that the defense attorney often initiates discussions, this factor may account for the greater variability found among the prosecutors pertaining to when discussions are usually initiated.

Compared with defense attorneys, there was also greater variability among the prosecutors regarding the tenor and nature of plea discussions. While most defense attorneys said that plea discussions involve negotiation and bargaining, less than a third of the prosecutors said as much. However, as discussed in Chapter 4, a number of
prosecutors who said that any plea offers are usually presented as ‘take it or leave it’
nevertheless indicated that the extent of plea bargaining is case specific, and that counter
offers would be considered if the evidence changes such that their case is weaker than
originally thought. Thus, the greater variability found among prosecutors in describing
the tenor of negotiations may be due to differences in the ways in which prosecutors and
defense attorneys define “negotiation” or “bargaining.” Defense attorneys may interpret
prosecutors’ consideration of a counter offer as bargaining, whereas prosecutors may
interpret it as a reconsideration of an initial offer that was intended to be ‘take it or leave
it.’

Differing interpretations may also explain the greater variability found among
prosecutors regarding the ongoing or confined nature of plea discussions. While a
sizeable majority of defense attorneys said that discussions continue throughout the
disposition process, only slightly more than half the prosecutors said as much; a few said
discussions are confined, and a few said it varies. Recall that some defense attorneys said
they are perpetually filing motions, constantly looking for some leverage to negotiate a
plea, and continually prodding the prosecutor about working out an agreement. Defense
attorneys may have been thinking about this when describing the discussion process as
one that is continuous and ongoing. Prosecutors, on the other hand, may not have
interpreted the defense attorney’s efforts and prodding as continuous discussion,
particularly if such efforts were not met with reciprocal interest in revisiting the
possibility of working out a plea agreement.

It should be understood however, that these explanations are speculative. The
findings may also or instead reflect attorneys’ individual experiences. Accordingly, it is
important to keep in mind that all prosecutors and defense attorneys were not matched by county, and the differences between the two groups may reflect differences in jurisdictional practices and/or case specific experiences in addition to or as opposed to differences in perceptions. However, there was considerable overlap in the counties represented by each group (see Chapter 3), which suggests that the incongruities found among prosecutors’ and defense attorneys’ may have as much or more to do with their perceptions of “bargaining” as they do with their experiences in different jurisdictions.

Parallels and variations in prosecutors’ and defense attorneys’ descriptions of the disposition process and the considerations that affect their decisions were also found in their discussion of the factors that influence their inclinations to pursue a plea or a trial. The evidence was the most oft cited factor by attorneys in both groups. Consideration for the likely outcome at trial was similarly cited by a number of attorneys. Defense attorneys’ consideration of the jury’s involvement in sentencing and prosecutors’ consideration of resources are also indicative of attorneys’ concerns over the likelihood of a conviction and particularly the likelihood of a death sentence.

Both prosecutors and defense attorneys discussed the influence of resources and county differences in prosecutors’ use of the death penalty. As noted earlier, one prosecutor said that while he does not like to think of himself as a “bean counter,” he cannot ignore the cost factor, especially in a rural county. Correspondingly, one defense attorney remarked that “sometimes money drives the train” (OHD3). Attorneys indicated that prosecutors in some counties are wary of pursuing and even indicting a capital case, given the expense of doing so, and especially if the likelihood of a death sentence is not high. Accordingly, defense attorneys pointed to differences in the liberal and
conservative orientations of some counties, indicating that juries in some counties are more likely to return a verdict of death than those in others. For many defense attorneys, this is a factor they consider in their decision to pursue a plea bargain or a trial.

Defense attorneys’ consideration of the jury may also reflect a concern with community sentiment, a concern that was similarly expressed by a number of prosecutors who referenced their consideration of the wishes of the community. A prosecutor may be inclined to pursue a case to trial for the same reason a defense attorney may not be, i.e. the community’s desire to see the offender sentenced to death.

In addition to the wishes of the community, prosecutors and defense attorneys’ consider the wishes of their respective parties, the victim’s family and the defendant. Attorneys said they discuss the case and the likely outcome with those whose interests they represent. However, although the wishes of the victim’s family may influence the prosecutor’s decision to pursue a plea bargain or a trial, prosecutors indicated that their wishes do not control the decision. While the prosecutor has a duty to keep the victim’s family informed and receive their input, ultimately, he represents the community and works on behalf of the state. In contrast, defense attorneys indicated that the wishes of the client prevail over all other considerations; the defense attorney’s duty is to represent the defendant, and if the defendant wants to plead guilty or he wants to go to trial, that is what you do.

It is interesting to note that twice as many prosecutors mentioned their consideration of the wishes of the victim’s family, compared with the number of defense attorneys who mentioned their consideration of the wishes of the defendant. This incongruity may be explained by the different degrees of influence exerted by the
respective parties. Unlike prosecutors, defense attorneys are bound by the wishes of the involved party they represent. Thus, more defense attorneys may not have cited this factor because they do not view it as one that influences their decision so much as one that dictates it, regardless of their own considerations of the evidence, the likely outcome at trial and other factors.

Of course, in pursuing a trial the defense takes the risk that the jury will convict the defendant and sentence him to death. When asked about the relative weight of this possibility in their inclination to resolve a case with a plea bargain or a trial, almost all of the defense attorneys said it was important. In contrast, less than a third of the prosecutors said that pursuing a trial to secure a death sentence is a relatively important factor, and over two thirds said it is not an important factor. Thus, avoiding a trial because of the possibility of a death sentence is an important consideration for most defense attorneys, but pursuing a trial to secure a death sentence is not important for most prosecutors. However, recall that about half the defense attorneys indicated that the possibility of a death sentence is significant only in accordance with the consideration of other factors, such as the likelihood of a conviction and a death sentence (see Chapter 4).

Discussing the relatively minimal weight given to pursuing a trial to secure a death sentence, a number of prosecutors indicated that juries are not likely to sentence a defendant to death, preferring the option of life without parole. A couple of defense attorneys echoed this sentiment; one attorney said that he thinks the life without parole option has “increased the viability of pleas substantially” (OHD9). Indeed, aside from the likelihood of a jury choosing a sentence that the prosecutor might otherwise be able to attain without the time and expense of a capital trial (i.e. through a plea agreement), a
number of prosecutors themselves questioned the importance of the death penalty, given the alternative option of life without parole. This is particularly interesting in light of the split among defense attorneys regarding the influence of their personal beliefs on the decisions they make. For example, while one attorney emphasized that even “life in prison is life” another emphasized that he represents clients, not causes.

Considerations of the likelihood of a death sentence not only influence attorneys’ inclinations to pursue a plea bargain or a trial but they also point to the viability of the death penalty as a plea bargaining tool. One defense attorney remarked that “the threat of it [the death penalty] has become kind of hollow.” Similarly, a prosecutor expressed his belief that the death penalty may be even less leverage than other sentences because the defendant may not get the death penalty if he is convicted, and even if he is sentenced to death, it will be years before or if he is executed.

Although a number of prosecutors nevertheless indicated that the death penalty is used by some as a plea bargaining tool, they expressed concerns about the costs of doing so. These costs not only included those pertaining to economics but also those pertaining to ethics, reputation, and the effect on the victim’s family. A number of defense attorneys who indicated that prosecutors had not used the death penalty as leverage in their experience pointed to prosecutors’ concerns over resources, noting that the additional costs begin once the case is indicted capitally.

Furthermore, given the increasing reluctance of juries to sentence a defendant to death, in indicting a case for leverage the prosecutor risks the possibility that the defense will not accept the desired (or any) plea agreement. Recall a case discussed earlier (see Chapter 4) in which the defense refused a plea bargain from the prosecutor, preferring to
take their chances at trial. Thus, while prosecutors and defense attorneys similarly
indicated that some prosecutors use the death penalty as leverage in plea bargaining,
many openly questioned the costs and the risks inherent in doing so.

Part C: Comparing Decision Making Among Prosecutors and Defense Attorneys
in Non-Capital Cases in Ohio

Very few prosecutors or defense attorneys indicated that the prosecutor usually
initiates plea discussions. While most prosecutors said the defense attorney usually
initiates discussions, equal numbers of defense attorneys said they usually initiate or that
it varies. There was little consensus among either group regarding the reasons that
account for this. However, it is notable that the two most oft cited reasons by the defense
attorneys, the strength of the evidence and the routine practice or custom of a jurisdiction,
were among the three most oft cited reasons by prosecutors.

A number of prosecutors also cited the defendant’s desire to avoid the maximum
sentence, a factor that was not mentioned by one defense attorney. This finding suggests
that prosecutors may overestimate the importance of the maximum sentence for the
defense at this stage of the disposition process. Recall the earlier discussion of the
relative importance of the maximum sentence for defense attorneys in their inclination to
pursue a plea bargain or a trial; a number of attorneys indicated that it is important, but
only relative to other factors, particularly the plea offer.

At this early stage, during which the evidence may be continually developing and
being assessed, defense attorneys may be less inclined to initiate a plea discussion in the
interest of avoiding the maximum sentence; they may want to wait and see if any changes
in the evidence will affect the strengths and weaknesses of the case and of the plea
agreement the prosecutor might accept. While defense attorneys may indeed be more
likely than prosecutors to initiate discussions, according to the defense attorneys, this not necessarily because of the desire to avoid the maximum sentence but because of other factors, such as the evidence and as a matter of routine practice.

The developing nature of the evidence not only influences who initiates plea discussions but also when they are initiated. There was considerable variability in both groups pertaining to whether plea discussions usually begin earlier or later in the disposition process. A number of prosecutors and defense attorneys indicated that the point at which discussions begin depends on the strengths and weaknesses of the evidence, when it comes to light, and the time needed to review it. Generally speaking, there was considerable variability in the factors mentioned by both groups; the evidence was the only factor cited by at least half the prosecutors and defense attorneys. Notably, a few prosecutors said that when plea discussions begin depends on the defense attorney; correspondingly, some defense attorneys indicated that when discussions begin depends on the amount of time needed to investigate any possible defenses in the case.

Regardless of when they are initiated, once plea discussions commence, they are often ongoing. Most prosecutors and defense attorneys said discussions continue throughout the disposition process. However, while most defense attorneys indicated that these discussions usually involve negotiation and bargaining, only about a third of the prosecutors indicated as much. The greater variability found among prosecutors may be explained by differences in experience and/or perception. Not all prosecutors and defense attorneys in the sample necessarily practice in the same jurisdictions or worked on the same cases, so there may be some variability in their experiences. However, given that there was considerable overlap in the counties represented by each group, the
incongruities found between them may have to do with differences in the ways they define or perceive “negotiation” or “bargaining.” This postulation was suggested earlier in the discussion of capital cases, where similar incongruities among the groups were found.

In contrast to the variations in their descriptions of plea discussions, prosecutors and defense attorneys similarly cited the importance of the evidence throughout the disposition process. The significance of the evidence is especially pronounced as it pertains to the factors that influence attorneys’ inclinations to pursue a plea bargain or a trial. When asked about the most important factors that influence this decision, nearly all of the attorneys in both groups mentioned the evidence. There was remarkable similarity among other factors mentioned as well, including the consideration of the plea offer, the characteristics of the defendant, the likely outcome at trial, and the facts in the case.

Although attorneys in both groups cited consideration of the nature or circumstances of the crime, it is interesting to note that whereas a majority of prosecutors cited this factor, only a couple of defense attorneys did. For the prosecutor, the nature or circumstances of the crime may influence the sentence he feels is appropriate in a case and his inclination to pursue a case to trial, if such sentence cannot be attained through a plea agreement. This factor may also speak to the prosecutor’s concern with achieving what he feels is justice in a particular case and his sense of the importance of a case being heard by the community. Accordingly, one prosecutor said that he considers whether or not a case “calls for a public trial.” In contrast, defense attorneys’ concern with this factor may be encompassed under their consideration of the likely outcome of the case at
Defense attorneys may be thinking about the nature or circumstances of the crime within their larger concern for the likely outcome of the case, as jurors’ decisions may be affected by graphic crime scene photos and other depictions of a particularly heinous crime.

A similar incongruity was found among prosecutors and defense attorneys regarding the number who mentioned their consideration of the wishes of their respective parties, the victim’s family and the defendant. Recall that this incongruity was also found in attorneys’ discussion of capital cases. The explanation posited earlier applies here as well; more defense attorneys may not have mentioned their consideration of the defendant’s wishes because it is not a factor that influences their decision to pursue a plea bargain or a trial so much as it is one that determines it, regardless of their own inclinations given their evaluation of the evidence, the plea offer, and other factors.

These other factors include the possibility of the life tail, should the defendant be convicted at trial. However, as discussed earlier, for most defense attorneys, this possibility is only an important consideration relative to other factors, particularly the parameters of the plea offer the prosecutor is willing to accept. Similarly, most prosecutors indicated that the possibility of securing a life sentence at trial is only an important consideration relative to other factors such as the nature or circumstances of the crime, the characteristics of the defendant, and the strength of the evidence. In and of itself, for most attorneys, the life tail is not something that is determinedly avoided or pursued.

112 Compared with prosecutors, fewer defense attorneys mentioned this factor when discussing capital cases as well, but the difference was not as great. This may have to do with prosecutors’ consideration of this factor at earlier stages of the disposition process (see Chapter 4).
Part D: Comparing Decision Making Among Prosecutors and Defense Attorneys in Michigan

Generally speaking, the responses of prosecutors and defense attorneys regarding who usually initiates a plea were quite varied. Although half the prosecutors indicated that the defense attorney usually initiates the discussion, others indicated that they usually do or that it varies. Interestingly, only one prosecutor said that discussions are mutually initiated, whereas about a third of the defense attorneys said as much. Compared with prosecutors, fewer defense attorneys indicated that discussions often begin with the prosecutor.

These incongruities may be explained by the fact that not all prosecutors and defense attorneys in the sample practice in the same jurisdictions, a postulation supported by the findings regarding why one side or the other usually initiates the discussion. The most oft cited factor by attorneys in both groups was simply that that is just how it works. Thus, in the counties represented by some prosecutors in the sample, it may be routine practice for them to begin any plea discussion, while in other counties represented by the defense attorneys in the sample, it may be customary for discussions to be mutually initiated. The only other factor that was commonly referenced by either prosecutors or defense attorneys was the evidence. Attorneys in both groups indicated that the strengths and weaknesses of the evidence influence whether the prosecutor or the defense attorney would initiate a plea discussion.

The evidence also influences when those discussions begin. A majority of both prosecutors and defense attorneys said that discussions usually commence at or around the time of the preliminary exam, and a majority indicated that this has to do with the evidence. At the preliminary exam the prosecutor has to show probable cause to support
the charge/s. Thus, the preliminary exam gives the defense attorney an opportunity to see
the strengths and weaknesses of the prosecutor’s case and provides both sides with a
sense of how the prosecutor’s witnesses will testify in court. Notably, a few attorneys in
both groups indicated that plea discussions usually begin around this time as a matter of
routine practice, but the evidence was the only factor cited by more than even a quarter of
either prosecutors or defense attorneys.

The similarities between the descriptions of the two groups pertaining to when
plea discussions begin were also evident regarding the nature of the discussions. A
majority of prosecutors and defense attorneys characterized discussions as ongoing,
continuing throughout the disposition process; smaller numbers within each group
indicated that discussions are usually confined to one or more points or that it varies.
Interestingly, the similarity between the two groups did not extend to their
characterization of the tenor of the discussions. While a majority of defense attorneys
indicated that there is negotiation and bargaining over plea offers, only about a third of
the prosecutors said as much; about a third of the prosecutors indicated that plea offers
are usually presented as ‘take it or leave it,’ a characterization shared by only two defense
attorneys.\footnote{As discussed in Chapter 5, some attorneys in both groups indicated that it varies.}

These incongruities may be due to differences in the practices of the counties
from which prosecutors and defense attorneys were interviewed and/or to differences in
their experiences with particular cases. Indeed, recall that one defense attorney said that
in his county the discussions go back and forth, but in another county the prosecutors do
not engage in bargaining. However, given attorneys’ similar descriptions of the nature of
the discussions, these incongruities may not only be the result of jurisdictional

differences; an alternative explanation should also be considered. It may be that prosecutors and defense attorneys have different conceptions of “negotiation” and “bargaining.”

Indeed, a couple of defense attorneys who said that discussions involve bargaining indicated that things change as trial approaches, particularly with respect to the evidence, a sentiment echoed by a couple of prosecutors. However, it is notable that these same prosecutors said that while changes in the evidence might cause them to change their offer, discussions do not usually involve bargaining. Thus, defense attorneys may define prosecutors’ consideration of a counter offer as negotiation, whereas prosecutors may define it as nothing more than the “tweaking” of their original offer, which the defense attorney can take or leave. While this postulation is merely suggestive and not conclusive, it is nevertheless notable that similar incongruities were found in Ohio among prosecutors and defense attorneys in both capital and non-capital cases.

Differences among prosecutors and defense attorneys in Michigan were also found with respect to the factors they consider in their inclination to pursue a plea bargain or a trial. However, there are a number of notable similarities as well. Nearly every attorney in each group cited the evidence, an important factor throughout the disposition process. A majority of prosecutors and defense attorneys also cited their consideration of the wishes of their respective parties, the victim’s family and the defendant. However, one factor that was mentioned by most prosecutors was only cited by one defense attorney, the nature or circumstances of the crime. Recall that a similar discrepancy was found among attorneys in Ohio in non-capital cases. The explanation postulated earlier for that discrepancy applies here as well. Whereas the nature or circumstances of the
crime may influence a prosecutor to pursue a case to trial for the sentence he believes is appropriate or to have a case heard before the community, defense attorneys’ consideration of this factor may be encompassed by the consideration of the likely outcome at trial.

Notably, the likely outcome at trial and also the plea offer are factors that most defense attorneys but only a few prosecutors cited. These discrepancies may have to do with the open murder charge. As discussed earlier, attorneys indicated that this is the charge most often used by prosecutors in murder cases. For defense attorneys, going to trial on this charge means that the defendant may be convicted of first-degree murder and sentenced to life without parole. This is a substantial risk, and the likelihood of such an outcome is, accordingly, an important consideration for many. It is also a consideration that is weighed against the plea offer the prosecutor is willing to accept. Recall that a number of defense attorneys indicated that if there is little difference between the plea offer and the likely sentence upon conviction at trial (whether that be a sentence of life without parole for first-degree murder or an essentially equivalent sentence for second-degree murder), there is little incentive to accept the offer.

The open murder charge may also explain the lack of importance of the likely outcome at trial and the plea offer for many prosecutors. If a trial is pursued, the prosecutor risks losing on first-degree murder but he does not necessarily risk a complete acquittal, given that the jury may convict on second-degree murder. Thus, if the prosecutor questions the likelihood of a conviction on first-degree but is confident of one on second-degree, he may not be particularly concerned with whether or not the defendant accepts his plea offer. The prosecutor may prefer to take the case to trial and
retain the chance that the jury will convict on the higher degree of murder, a possibility that represents a risk for the defense.

However, again, it is a risk that the defense may be willing to take, pending the consideration of other factors. Most prosecutors and defense attorneys indicated that securing or avoiding a conviction on first-degree murder and a subsequent sentence of life without parole is an important factor in their decision to pursue a trial or a plea bargain. However, they indicated that it is important only relative to the consideration of other factors. These factors included the strength of the evidence (for both prosecutors and defense attorneys), the nature or circumstances of the crime (for prosecutors), and the plea offer (for defense attorneys).

The relative significance of the possibility of life without parole in the decision to pursue a trial or a plea bargain speaks to its use by prosecutors as a tool in plea bargaining. As discussed earlier, almost all of the defense attorneys said that prosecutors use the possibility of life without parole as leverage in plea bargaining. In contrast, almost all of the prosecutors said they do not do this. While this discrepancy may be due to differences in the counties in which attorneys practice and the cases they have handled, a close examination of attorneys’ responses suggests otherwise. In discussing the use of life without parole as leverage, many prosecutors and defense attorneys talked about the open murder charge, and the ways in which they talked about it are particularly interesting.

Many prosecutors indicated that there is no need to charge a case for first-degree murder for leverage because they have the open murder charge, and that is the charge they most often use. While some prosecutors indicated that the open murder charge could
theoretically be used to induce the defendant to plead guilty in order to avoid a possible conviction on first-degree murder and sentence of life without parole, most did not view the charge or their use of it in this way. They simply seemed to view it as the most logical choice, given the different charging options.

In contrast, defense attorneys expressed a view of the open murder charge and prosecutors’ use of it as providing leverage in plea bargaining. While a few attorneys said that prosecutors charge first-degree murder for leverage, about half pointed to the open murder charge. They indicated that it is a built-in bargaining tool, and one that prosecutors take advantage of in plea discussions. Thus, while prosecutors and defense attorneys both spoke about the open murder charge, their views regarding its use as leverage were quite different.

Summary and Conclusions

Prosecutors’ and defense attorneys’ descriptions of the plea bargaining process and the factors that influence decision making in Michigan in some ways mirrors that of Ohio prosecutors and defense attorneys in capital cases and in some ways mirrors that of Ohio prosecutors and defense attorneys in non-capital cases; no one general statement can accurately be made. Notably, the relative significance of securing the maximum possible sentence was discussed by a greater number of prosecutors in Michigan than in Ohio in either capital or non-capital cases. However, it is important to emphasize that prosecutors in all three groups indicated that the importance of this factor is considered in tandem with the consideration of other factors in their decision to pursue a plea bargain or a trial. Nevertheless, the finding is noteworthy and may speak to the influence of
factors relatively unique to the pursuit of capital cases, such as resources and moral concerns.

Defense attorneys’ discussion of the relative influence of the maximum sentence suggests a similarity between life without parole in Michigan and a life sentence in Ohio and points to a unique significance of the death penalty. However, it is notable that many attorneys in Michigan spoke of the pressure involved in trying a case where their client could receive a mandatory sentence of life without parole, a pressure similarly expressed by a number of attorneys in Ohio when discussing the influence of the death penalty.

Prosecutors’ and defense attorneys use of life without parole as a plea bargaining tool in Michigan was largely discussed in terms of the open murder charge. As noted in Chapter 5, nearly all of the prosecutors indicated that life without parole is not used as leverage; nearly all of the defense attorneys indicated that it is. Such a dramatic consensus among each group was not found among any groups in Ohio and may reflect Michigan’s unique charging option more so than any differences in the role and use of the maximum sentence in plea bargaining.

In all three types of cases there were similarities and differences between prosecutors’ and defense attorneys’ respective descriptions of the plea bargaining process and the factors that influence their decisions. In capital cases, both prosecutors and defense attorneys indicated that the defense attorney usually initiates plea discussions, but there was some variability pertaining to when those discussions begin. This variability was also found between the two groups in non-capital cases. While in Michigan, both prosecutors and defense attorneys indicated that plea discussions begin early, there was considerable variability regarding who initiates them.
These discrepancies may be due to differences in case experience and in the counties from which prosecutors and defense attorneys were drawn. However, it is notable that prosecutors in all three groups characterized discussions as involving little negotiation, compared with defense attorneys in all three groups who indicated that discussions usually involve negotiation and bargaining. This consistent finding across capital, non-capital, and life without parole cases suggests that prosecutors and defense attorneys may perceive or define “bargaining” differently.

Prosecutors and defense attorneys may also consider the wishes of their respective parties differently. In all three types of cases, most prosecutors cited their consideration of the wishes of the victims’ family in their inclinations to pursue a plea bargain or a trial; a comparatively smaller number of defense attorneys cited their consideration of the wishes of the defendant. As discussed earlier, this may be due to the fact that defense attorneys’ decisions regarding the pursuit of a plea bargain or a trial are not so much influenced by the defendant’s wishes as they are bound by them. One factor that was consistently cited by both groups of attorneys in all three types of cases was the evidence. It is one of a many factors that influences attorneys’ decisions, and it speaks to the relative significance of the maximum sentence in their decisions. In all three types of cases prosecutors and defense attorneys indicated that the attainment or avoidance of the maximum sentence in pursuing a trial is important, but only relative to the consideration of other factors, including the evidence.
Chapter 7: What it Means, Why it Matters, and Where it Leads

I’ve gotta give you credit. This is a very tough area to write a dissertation on… because everybody has their own personal experience. You’re dealing with people, and everybody walks into it with a different mindset, everybody walks into it with a different theory as to what is just or is not just and every judge is going to run his or her courtroom different and every prosecutor is going to think about his or her next election differently. This is a very difficult area to come up with any rules. I haven’t found any in the [#]\textsuperscript{114} years that I’ve been doing it to be perfectly honest with you (OHP9).

Prosecutor 9 speaks for most of the attorneys in this sample when he says that everybody brings their own mindset to the disposition of murder cases and has their own definition of what is or is not just. Throughout the discussion of the plea bargaining process and the factors that influence decision making, particularly the role of the maximum sentence, many attorneys said that decisions are very much case and defendant specific. Many provided examples of cases they have handled and drew on their personal experience as they described how the process works and why. The different experiences of the attorneys is both a strength and a weakness of this study. Any patterns across attorneys’ discussions can be said to be representative of a spectrum of aggravated and non-aggravated murder cases, but it cannot be known whether any incongruities are due to the factual absence of similarities or rules in the plea bargaining process of aggravated and non-aggravated murder cases or are the result of differences among the cases attorneys have handled and the counties in which they practice.

Nevertheless, this study has shed light on the plea bargaining process an attorneys’ decisions throughout this process in capital and non-capital cases, finding that:

\textsuperscript{114} The specific numbers of years stated by this individual are omitted in the interest of protecting his anonymity.
• Prosecutors’ decisions in charging and plea bargaining in capital cases is influenced by factors including the strength of their case, the likelihood that a jury would impose the death penalty, consideration for the wishes of the victim’s family, and concerns over resources; only a few prosecutors in Michigan cited the influence of the likely outcome at trial, and not one cited concerns over resources.

• Prosecutors in Ohio and in Michigan consider the wishes of the victim’s family throughout the disposition process. A number of prosecutors indicated that the wishes of the victim’s family had all but determined their decisions in a particular case/s.

• The additional expenses of a capital, compared with a non-capital, murder case begin as soon as the case is indicted; prosecutors indicated that a capital case that is subsequently resolved with a plea agreement is not necessarily a cost effective disposition of an aggravated murder case.

• The alternative option of life without parole for juries has affected the number of death sentences prosecutors get as well as their own evaluation of the importance of pursuing a capital trial.

• Many prosecutors expressed concerns with the costs of using the death penalty as leverage, and a few questioned the significance of the threat of the death penalty in plea bargaining given that jurors may not return a death sentence.

• Most prosecutors and defense attorneys in Michigan indicated that prosecutors do not charge first-degree murder for leverage, but many said that prosecutors often charge open murder. Prosecutors and defense attorneys differed on their perceptions of the meaning and use of this charge in plea bargaining.
• Most defense attorneys in Michigan indicated that the possibility of life without parole is not a motivating factor in resolving a case with a plea bargain but is one among many factors that are considered. Among those factors is the plea offer, which was also cited by most attorneys in Ohio when discussing non-capital cases.

• Defense attorneys were split in their approach to capital cases; about half indicated that the possibility of the death penalty in and of itself induces them to try and resolve a case with a plea bargain, and about half indicated that it is not necessarily the most important factor in their decision of how best to resolve a case.

• The use and effectiveness of the death penalty as a plea bargaining tool depends on a number of factors, including prosecutors’ concern for resources, and prosecutors’ and defense attorneys’ concern for the likely outcome at trial, particularly that of a death sentence. The use and effectiveness of life without parole and parolable life as plea bargaining tools depends on a number of factors as well, including the terms of the plea offer, which represents what is to be lost or gained by the defense in pleading guilty.

Over thirty years ago in his concurring judgment in *Gregg v. Georgia* (1976), Justice White denied *Gregg’s* argument that prosecutor’s decisions in charging and plea bargaining are “standardless” and will result in the “wanton or freakish imposition of the death penalty.” He added that the assumption cannot be made that prosecutors’ decisions in charging will be motivated by factors other than “the strength of their case and the likelihood that a jury would impose the death penalty if it convicts.” This study revealed
that prosecutors’ decisions in charging and plea bargaining in capital cases, while influenced by these two factors, are also influenced by other factors, including consideration for the wishes of the victim’s family, concerns over resources, and who the victim is and the victim’s role in the crime. While some prosecutors emphasized the importance of adhering to considerations of the evidence and the statutory requirements for death eligibility alone in deciding whether or not to indict a death eligible case capitally, others pointed to the consideration of these additional factors.

Resource concerns were discussed in the context of the likelihood of a death sentence, which is influenced by who the victim is. Prosecutors questioned the expense of indicting and pursuing the death penalty, particularly in rural counties and in cases where they are not confident that a jury would return a verdict of death. The finding of the role of resources in prosecutors’ decisions in capital cases is particularly significant given the argument made at the outset of this study that there is a potential cost savings in indicting cases capitally if such indictments serve to elicit guilty pleas, thereby avoiding the cost of capital, let alone non-capital, murder trials. Although other studies have acknowledged the potential cost savings of the death penalty, it has not been empirically examined. This study sheds light on the cost savings argument, in fact, calling it into question.

Discussing their consideration of resources, prosecutors emphasized that the additional expenses of a capital, compared with a non-capital, murder case begin as soon as the case is indicted, with the appointment of two death qualified defense attorneys. Additionally, prosecutors said that plea agreements are not often made right away, as the defense needs time to examine the evidence and do their own investigation, comments that were echoed by a number of defense attorneys. Thus, a capital case that is
subsequently resolved with a plea agreement is not necessarily a cost effective disposition of an aggravated murder case. These findings suggest that it is more cost effective not to seek a capital indictment at all than it is to seek and later dismiss one as part of a plea agreement.

Importantly, however, the potential benefit for the prosecution of a plea agreement in a capital case is not limited to an argument of cost savings. In indicted a death-eligible case capitally, prosecutors may elicit a plea bargain to a higher sentence than the defense might otherwise accept, were it not for the possibility of a death sentence upon conviction at trial. However, this does not seem to be a factor in prosecutors’ decisions in charging. A number of prosecutors said they do not seek a capital indictment lightly, and when they do, they do so with the intention of pursuing the case to trial. While changes in the evidence or in the wishes of the victim’s family may subsequently influence them to seek a plea agreement, that is not necessarily their intention from the beginning. In this vein, it is notable that very few prosecutors even mentioned consideration for the plea offer the defense would accept as a factor in their inclination to pursue a trial or a plea bargain in a capital case.

Arguments for the death penalty as a cost savings mechanism and as an instrument to elicit plea agreements to sentences the defense might otherwise deem unacceptably high, point to the possibility that prosecutors may use the death penalty as leverage to induce a guilty plea. While many prosecutors indicated that the death penalty is leverage and is used as leverage by some, they also expressed concerns with the costs of using the death penalty in this way. These costs included those pertaining to financial expense (noting that the additional costs of a capital case begin as soon as it is indicted),
ethics, personal reputation, and the effect on the victim’s family. Notably, a few prosecutors even questioned the significance of the threat of the death penalty in plea bargaining given that the defendant may not be sentenced to death if he is convicted, a comment echoed by a defense attorney who remarked that the threat of the death penalty had become “kind of hollow” because so few death sentences have been imposed in recent years.

Other defense attorneys similarly questioned the value of the death penalty as a plea bargaining tool. While some indicated that prosecutors use the death penalty as leverage to elicit “high end” plea bargains, others pointed to the costs of doing so. Their comments spoke to prosecutors’ concerns about resources and to the significance of alternative options in charging, particularly that of non-capital aggravated murder which carries a sentence of life without parole. Supporting the postulation asserted earlier based on prosecutors’ discussions of financial cost, a couple of defense attorneys commented that prosecutors would rather indict for non-death aggravated murder and pursue a trial for life without parole, given the costs of a capital indictment and the increasingly questionable likelihood of a death sentence. In this vein, it is important to recognize that in indicting a case for leverage, the prosecutor risks that the defense will not plead guilty, forcing him to prove the case at trial. Given that, according to defense attorneys, prosecutors who use the death penalty as leverage do so in cases where their evidence is weak and/or where the likelihood of a death sentence is questionable, this would seem to be a significant risk.

The types of cases in which prosecutors use the death penalty as a tool to elicit a plea bargain are notable, as they speak to the concern that the death penalty may be used
to induce guilty pleas in cases that are not representative of those in which the death penalty is typically imposed. In such cases, defendants who are not “deathworthy” may nevertheless plead guilty in order to avoid the possibility of a death sentence. A couple of defense attorneys gave examples of murders related to drug dealing. One attorney said that he does not think prosecutors really believe that a jury is likely to return a death sentence in such a case, but they indict it capitally so that the stakes are higher and the sentences in plea agreements are harsher. The use of the death penalty in this way puts the defense in the difficult position of plea bargaining down from an arguably inappropriate charge or taking the risk of a death sentence at trial. Accordingly, discussing the influence of the possibility of a death sentence in their inclinations to pursue a plea bargain or a trial, about half the attorneys indicated that the very possibility of a death sentence motivates them to try and resolve a case with a plea bargain; about half indicated that they would not automatically seek a plea bargain because of the death penalty.

The first group would seem to be among those attorneys from whom prosecutors may elicit “high end” plea bargains in capital cases, regardless of the appropriateness of the capital charge. One of these attorneys said that he believes that even life in prison is life. In contrast, another defense attorney said that if you are perceived as someone who just wants to stop the death penalty, you might miss an opportunity to give your client the hope of getting out someday. He and others indicated that they consider other factors in tandem with the death penalty in their decision of how best to resolve a capital case, including the legitimacy of the capital charge and the likely outcome of the case at trial.
The approach of this latter group of attorneys points to the risk that prosecutors take in indicting a case with the intention of inducing a plea bargain. Should the defense refuse, the prosecutor is forced to either lower his offer (thus defeating the purpose of the capital indictment) or expend the resources of a capital trial, with a questionable return on his investment. Accordingly, one defense attorney who said that prosecutors used to indict for leverage all of the time said that he has not seen this practice as much since the availability of the alternative option of pursuing a trial for life without parole on non-death aggravated murder, the pursuit of which does not entail the expenditure of resources incurred with a capital indictment.

The likely outcome of the case at trial was a factor cited both by prosecutors and defense attorneys in their inclinations to pursue a trial or a plea bargain in a capital case. Relatedly, defense attorneys cited their consideration for the involvement of the jury in sentencing, a factor that, as discussed in Chapter 4, reflects an awareness and consideration of differences in the liberal and conservative orientations of urban and rural counties. Much research has revealed county differences in the use of the death penalty by prosecutors (see Chapter 2). The findings of this study expand on this research by showing that defense attorneys consider the characteristics of a county and the jury pool in that county in their determination of the likelihood of a death sentence and the decision to pursue a plea bargain or a trial. Prosecutors’ consideration of the likely outcome of the case at trial also reflects a consideration of the involvement of the jury and may correspond with their concern for the wishes of the community in their inclinations to pursue a plea bargain or a trial. It also points to the types of cases in which prosecutors will expend the resources to pursue capitaly.
Prosecutors and defense attorneys alike indicated that juries are more likely to return a death sentence in cases where the victim is a child or a police officer. Cases that involve such victims are those that garner the public’s attention and elicit outrage from the community. In contrast, cases where the victim is a drug dealer for example, do not provoke the same reaction; attorneys indicated the citizens who sit on juries are unlikely to be much concerned with the murder of someone who him/herself is not entirely innocent of any wrongdoing or illegal activity.

Given the expenditure of resources involved in indicting and especially in pursuing a death sentence, attorneys (both prosecutors and defense attorneys) indicated that prosecutors want to be confident that the murder is one for which a jury is likely to return a verdict of death, and those are the murders with a sympathetic victim. Attorneys’ discussions indicated that the influence of the victim is driven by prosecutors’ consideration for how this factor impacts the likelihood of a death sentence. This finding is significant in that it sheds light on the path through which the characteristics of the victim influence the pursuit of a death sentence.

The likely outcome of a trial, particularly the likelihood of a death sentence, is indeed an important consideration for prosecutors. Many highlighted the importance of the alternative option of life without parole for juries, saying that is has affected the number of death sentences they get and their own evaluation of the importance of pursuing a capital trial. This finding is particularly interesting given the national declines in death sentences in recent years and the reasons postulated for those declines, including the availability of life without parole for juries, and prosecutors pursuing fewer capital trials.
One prosecutor said that given that juries are not likely to return a death sentence, pursuing a trial for it is not as important to him as it used to be. Discussing the influence of the possibility of securing a death sentence in their inclination to pursue a plea agreement or a trial, a number of prosecutors openly questioned whether a plea bargain to life without parole or an equivalent sentence is not the better option. They pointed out that with a plea bargain the defendant is put away, and the case is closed. In contrast, should a trial be pursued and a death sentence returned, the appeals would continue for years, and the defendant might not even be executed. A couple of prosecutors spoke of defendants they tried well over a decade ago who are still on death row. In this vein, prosecutors pointed to the effect of the death penalty on victims’ families and questioned whether a plea bargain that puts the defendant away for life and ends the case might not be better for everyone involved.

The influence of the victim’s family in prosecutors’ decisions is notable, particularly in that it reflects neither the strength of the prosecution’s case nor the likelihood of a death sentence, the two factors Justice White suggested motivate prosecutor’s decisions. Consideration for the wishes of the victim’s family were cited at every step of the disposition process, from the decision to indict a death-eligible case capitally, to the decision of whether and when to initiate a plea discussion, through to the decision to pursue a case to trial, where nearly every prosecutor mentioned it. Perhaps reflecting their legal requirement to confer with the victim’s family, generally speaking, prosecutors said that the wishes of the victim’s family influence but do not determine their decisions. Nevertheless, prosecutors and defense attorneys alike indicated that even
where the likelihood of a death sentence is high, a case may not be brought to trial if the victim’s family does not want to see a death sentence pursued.

This finding is significant as it reveals the influence of a factor that is largely independent of those more typically thought to affect prosecutors’ decisions, factors pertaining to the strength of the evidence, the nature or circumstances of the crime, and the characteristics of the offender and the victim. Although this study, like others before it (see Chapter 2), found these factors to be influential, the finding of the role of the victim’s family is particularly notable, as it is the only factor that does not speak to the likelihood of a conviction and death sentence. It is also a factor that introduces an element of arbitrariness into the pursuit of the death penalty. Recall a case discussed earlier (see Chapter 4) involving an especially heinous crime and multiple victims; if not for the wishes of the victims’ family, the defense attorney indicated that the prosecutor would not have agreed to a plea bargain.

This suggests that the worst offenders in the worst cases are not always those subjected to the worst punishment, and it speaks to the oft-cited argument that the death penalty may be applied in cases where it would seem “excessive or disproportionate.” In other words, just as the wishes of the victim’s family may influence prosecutors to pursue a plea bargain in cases that are otherwise ripe for a death sentence, they may influence prosecutors to pursue a trial in cases that are otherwise not “deathworthy.” However, prosecutors indicated that the wishes of the victim’s family carry greater weight in their decision not to pursue a trial than in their decision to pursue a trial. This is largely due to the consideration of other factors, including those pertaining to the likelihood of conviction and a death sentence, and that pertaining to the expenditure of resources.
While prosecutors may be inclined to pursue a plea agreement at the urging of the victim’s family, pursuing a trial at their request carries significant risk, especially if the prosecutor is not confident that the likely outcome will be worth the investment of time and money.

The influence of the victim’s family was found in Michigan as well. Again, their influence was found throughout the disposition process and was mentioned by most prosecutors as a factor in their decision to pursue a plea bargain or a trial. While prosecutors are required by law to confer with the victim’s family, a number of prosecutors gave examples of cases in which the wishes of the victim’s family had essentially determined and not just influenced their decisions.

While a significant factor, the wishes of the victim’s family is one among many factors prosecutors consider in their inclinations to pursue a plea bargain or a trial. As discussed in Chapter 5, the factors that influence decision making among Michigan prosecutors in some ways reflect those that influence decision making among Ohio prosecutors in capital cases and in some ways reflect those that influence decision making among Ohio prosecutors in non-capital cases. No one general conclusion about the unique effect of the death penalty or the maximum sentence on prosecutorial decision making can accurately be drawn.

However, it is interesting to note that only a few Michigan prosecutors cited consideration for the likely outcome at trial, and not one cited concerns over resources, two factors that were found to influence the decisions of prosecutors in capital cases. This finding is particularly significant as it speaks to prosecutors’ use of the maximum sentence as leverage in inducing a guilty plea. These factors were among the concerns
expressed by Ohio prosecutors regarding the use of the death penalty as leverage, concerns that were not expressed by any prosecutors in Michigan.

Although most prosecutors and defense attorneys in Michigan indicated that prosecutors do not charge first-degree murder for leverage, many said that prosecutors often charge open murder. Defense attorneys indicated that open murder inherently provides the prosecutor with leverage and is intentionally used by some for that purpose. In contrast, prosecutors indicated that it provides flexibility and is primarily used to give the jury options in reaching a verdict.

These options are important as they serve to minimize the risk the prosecutor takes in pursuing a case to trial if the defense does not agree to any proposed plea offer. If the jury does not convict the defendant of first-degree murder, they need not necessarily acquit; they may convict the defendant of second-degree murder. Thus, the likely outcome of the case seems to be less of a concern for prosecutors in Michigan compared with prosecutors in Ohio in capital cases. Jurors in capital cases also have options other than returning a verdict of the maximum possible sentence on the most serious charge (see Chapter 3). However, such a verdict is a risk for prosecutors given the expenditure of resources required to try a capital case, resources that are neither required nor seemingly of concern in cases involving the maximum sentence of life without parole in Michigan.

While a number of defense attorneys in Michigan felt there is leverage in the open murder charge, it is not necessarily leverage that induces them to accept plea bargains they would otherwise be inclined to reject, were it not for the possibility of life without parole at trial. Whereas about half the attorneys in Ohio indicated that the possibility of the death penalty in and of itself induces them to try and resolve a case with a plea
bargain, most attorneys in Michigan indicated that the possibility of life without parole is one among many factors that are considered. Although it is a significant factor, it is one that is considered in tandem with others, including the evidence and the plea offer.

This latter factor is particularly notable in that it was cited by a number of defense attorneys in Ohio when discussing non-capital cases and has also been discussed in previous research. Mather (1979) and Ehrhard (2008) found that in non-capital cases, plea offers from the prosecution were sometimes not worth accepting. The defendant faced a stiff sentence whether he pled guilty or was convicted at trial, so there was little incentive to forgo the right to trial and the possibility of an acquittal or grounds for appellate reversal if convicted (see Chapter 2). However, in capital cases, any plea offer from the prosecution necessarily provides the defense with the guarantee that the defendant will retain his right to live. Accordingly, the findings of Ehrhard (2008) and the current study reveal that consideration for the plea offer is not a factor that influences defense attorneys’ inclinations to pursue a plea bargain or a trial in most capital cases.

These studies indicate that prosecutors’ leverage in plea bargaining only goes so far, ceasing at the point where the defense has little to lose by going to trial. There may be minimal difference between the sentence involved in a plea agreement and a sentence of life without parole (in Michigan) or life (in Ohio) upon conviction at trial; if a plea offer does not provide the defense with the certainty, or at the very least, the realistic hope, that the defendant will be released from prison, there is little to gain by entering into a plea agreement. In contrast, in capital cases, the difference between the sentence imposed as a result of a plea agreement, no matter how severe the sentence may be, and that imposed upon a trial verdict of guilt, could be the difference between life and death.
These studies suggest that the death penalty exerts a unique and significant influence in plea bargaining. However, it is important to emphasize that the present study found that the use and effectiveness of the death penalty as a plea bargaining tool depends on a number of factors, including prosecutors’ concern for resources and the likely outcome at trial, particularly that of a death sentence. Juries’ growing preference for non-death sentences calls into question the value of the death penalty as leverage in inducing a plea bargain. Accordingly, while defense attorneys indicated that the possibility of the death penalty heightens the significance of plea discussions, not all indicated that it impels them to enter into plea agreements.

Limitations

The present study has provided valuable insight into the plea bargaining process and the factors that influence the decisions of prosecutors and defense attorneys in the highest level murder cases. This study has contributed to an understanding of the role of the death penalty, life without parole, and a life sentence in this process and in the decisions that attorneys make throughout the process. While much was learned from this research, the picture is far from complete, and the one presented here is not without imperfections.

Although the sample size goals were met or exceeded among each of the four groups of attorneys, these goals were necessarily relatively modest. Small samples are common in qualitative studies, given the level of depth and detail required for a thorough exploration of the research topic. However, the benefit of depth comes at the cost of width. Although the attorneys in each of the four groups represented a number of different counties, including those in rural and urban areas throughout Ohio and
Michigan, the size of the sample and limitations imposed by non-response and refusals precluded the representation of additional counties. Nevertheless, there was substantial diversity among the counties included and little reason to believe the findings would not hold were this study to be replicated in these two states. The narrow width of this study is of greater concern as it was limited to one state with the death penalty and one state without the death penalty.

Confining the study to two states enabled the in-depth exploration sought by this research but limited the generalizability of the results. The findings and the conclusions drawn from them may not apply to other states. For example, the process of plea bargaining and the role of the death penalty in decision making may be different in a state where death sentences are more or less frequent, and in a state where executions are more or less frequent and therefore more or less of a likely and realistic possibility.

Additionally, the findings regarding the influence of life without parole may be unique to Michigan, given the unusual charging option of open murder in that state. Ideally, additional states could have been included, but the importance of an in-depth exploration combined with concerns of time and resources required the imposition of the two state restriction.

While further research is needed to determine the generalizability of the findings, as discussed earlier, in many ways they reflected those of the pilot study (Ehrhard 2008) that prompted the more discrete exploration undertaken here. Thus, there is reason to believe that the findings of the current research may, at the very least, provide a sketch of plea bargaining and decision making in the highest level murder cases beyond the
confines of Ohio and Michigan, and they can guide the study of more detailed explorations in other states.

An additional limitation of this study is that attorneys within Ohio and Michigan were not matched on a case by case basis, nor did they necessarily practice in the same counties. Ideally the two groups in each state would have been mirror images of each other in order to allow for the most refined exploration of the plea bargaining process and the factors that influence attorneys’ decisions. Although there was some overlap in the counties in which prosecutors and defense attorneys practiced, non-response and refusals precluded a complete matching of the groups.

In recognition of this possibility, the interviews were designed to be supplemented with vignettes in which attorneys would answer questions similar to those in the interview, but the questions would be centered on the same three hypothetical cases. While the vignettes would not address county differences, they would at least provide an element of consistency to the study in that each attorney would be answering questions about the same cases. With the attorneys’ consent, the vignettes and follow-up questions were mailed. However, too few attorneys returned responses to allow for any meaningful analysis.

An additional strength of the vignettes is that they desensitize difficult topics for the participants. Although this study did not ask respondents about particularly sensitive issues, an argument could be made that prosecutors may have felt uncomfortable discussing the use of the maximum sentence as leverage, particularly the death penalty, and may not have been entirely candid. As discussed earlier, prosecutors expressed ethical concerns about the use of the death penalty in this way, and as such, some may
have been reluctant or unwilling to say that they engaged in this practice. While this possibility is acknowledged as a limitation of the study, it is not believed that it should call into question the findings. Prosecutors were asked the questions about leverage well into the interview, after a rapport had been established. This diminished the likelihood of a less than honest answer and allowed the interviewer (myself) to detect and explore any inconsistencies between a prosecutor’s responses to these and other questions.

Although not necessarily a limitation, it is important to keep in mind that the interviews occurred throughout the year 2008, as the country was falling further into a recession and counties and states were becoming increasingly concerned with their budgets and financial situations. Prosecutors’ discussions of cost considerations in indicting and pursuing a capital case may reflect this.

Prosecutors also discussed the influence of the alternative option of life without parole for juries and jurors’ increasing reluctance to return a death sentence. These are all factors that have been postulated as explanations for the decline in death sentences over the past decade or more (see Bowers & Sundby 2009; Sundby 2006). As discussed in Chapter 2, the death penalty does not seem to be the politically and socially volatile animal that it once was. It is thus important view the findings of this study in the larger context in which the interviews took place. The findings may be a product of time and space and might be very different were the interviews conducted prior to the downturn in death sentences and prior to the current recession (see White 1991).

**Policy Implications**

The findings of this study suggest that there is little reason to be concerned with the possibility that prosecutors use the death penalty as leverage to induce guilty pleas, at
least in Ohio. The postulated benefit of a savings in cost through the avoidance of a murder trial was not supported, given the additional expenses incurred with a capital, compared with a non-capital indictment. It was also suggested that prosecutors may indict a case capitally in order to induce a plea agreement to a higher sentence than the defense would otherwise accept if not for the possibility of the death penalty.

Although some defense attorneys indicated that plea agreements involving severe sentences are accepted in capital cases because of the possibility of a death sentence at trial, there was little indication from prosecutors that this was a motivating factor or an intended consequence of a capital indictment. Given the expense of a capital indictment, and given the alternative charging option of non-death aggravated murder, which carries a maximum sentence of life without parole, the goal of indicting a case capitally with the intention of inducing a severe plea bargain does not appear to be part of many prosecutors’ repertoires. According to defense attorneys, the one exception to this may be cases where the prosecutor’s evidence is weak and/or where the likelihood of a jury voting for death is low; such as cases involving drug related murders.

Although this exception is significant, given concerns over the use of the death penalty to induce guilty pleas by non deathworthy defendants, it seems to be a practice that is not engaged in frequently, especially since life without parole became an option in non-capital cases, and one that is not necessarily engaged in successfully. As discussed earlier, many attorneys said they consider the likely outcome at trial, and about half said the possibility of the death penalty, in and of itself, does not impel them to enter into plea bargains.
Accordingly, the split found among defense attorneys regarding their approach to capital cases is notable and points to the costs and benefits of approaching a case with the intention of resolving it with a plea agreement, regardless of the parameters of that agreement. Some attorneys indicated that if you approach a case with the intention of resolving it with a plea bargain from day one (and you convey this to the prosecutor), you may end up with a plea bargain to a higher sentence than might be appropriate and than might otherwise have been achieved had you showed the prosecutor that you were willing to pursue the case to trial if a more desirable plea agreement could not be reached. Accordingly, these attorneys indicated that they did not agree with the rule of thumb that victory is defined solely by avoiding the death penalty, an approach they indicated is embraced in their training seminars. The findings of this study raise questions about whether such an approach is the most effective strategy in arriving at the best possible disposition in a capital case.

The finding of the role of resources in prosecutorial decision making in indicting and pursuing capital cases is particularly timely given the current economic situation of the country. Legislators in a number of states have cited the savings in cost that could be achieved by abolishing the death penalty. For example, prior to its repeal of the death penalty earlier this year, the New Mexico legislature received a report discussing the financial expense of capital punishment and assessing the costs that would be saved as a result of its abolition (Death Penalty Information Center 2009). In an era of fiscal concerns and budget crises, discussions about the reductions in government spending that could be achieved by the abolition of capital punishment have been raised in other states.
as well, including California, Colorado,\textsuperscript{115} and Kansas (Death Penalty Information Center 2009).

The findings of the current study indicate that those on the front lines of the use of the death penalty are most certainly cognizant of and influenced by concerns over resources, and given the current economic situation, suggests that a debate centered on cost might be a most effective one for those seeking to not only avoid capital trials but to eliminate capital punishment. It also suggests that defense attorneys might be wise to emphasize the financial impact of pursuing a capital case in their efforts to arrive at what they feel is an appropriate resolution of a case with a prosecutor.

Defense attorneys might also strongly consider the influence of the wishes of the victim’s family on the prosecutor’s decisions and explore how they might be able to affect that influence, an approach also discussed by White (2009). Accordingly, a few defense attorneys said they try to meet with the victim’s family to educate them about the trial process and to inquire about their needs and wants in any possible plea agreement. This was crucial in the one case discussed earlier where a plea agreement was reached in a particularly heinous murder involving multiple victims, a case that was otherwise ripe for the death penalty and in which the prosecutor intended to pursue a capital trial. Attorneys in both Ohio and in Michigan gave examples of cases in which the wishes of the victim’s family not only influenced but largely determined the prosecutor’s decision to accept a plea bargain.

\textsuperscript{115} Earlier this year, a bill to abolish the death penalty in Colorado was narrowly approved by the House and subsequently narrowly defeated by the Senate. The bill was heavily debated and included discussion of a number of issues, among them cost; lawmakers had proposed that funds currently devoted to the death penalty could be redirected to investigate unsolved crimes.
The findings suggest that defense attorneys might try to speak with the victim’s family as part of any attempt to resolve a case short of trial. As representatives of the individual accused of murdering a family’s loved one, defense attorneys may be wary of initiating such contact. However, whether they do so themselves or with the help of a victim outreach specialist (see Krause 2006), the results can have a significant impact on the outcome of a case and the lives of the affected parties on both sides. The benefits to the defendant include greater involvement in the disposition of his case and a possible plea agreement. The benefits to the victim’s family also include involvement in the disposition of the case as well as having their needs addressed and the avoidance of a lengthy appeals process (Krause 2006).

The role of the victim’s family in prosecutorial decision making not only raises implications for defense strategies but it raises implications for the consistent or arbitrary pursuit of the maximum sentence by prosecutors. Furthermore, their influence presents a concern that “the public prosecution apparatus has been hijacked by a private party, inducing a result not necessarily consistent with the prosecutorial mandate of ‘doing justice’” (Logan 2006:172). Indeed, although prosecutors may consider the wishes of the victim’s family, prosecutors are representatives of the state, not the individual victim/s in a case. The finding of the pivotal role victims sometimes play in prosecutors’ decisions suggests that the individual interests of the victim may supersede the even handed application of the law and the state’s provision of justice in all cases. Given that different victims in different cases seek different outcomes, the influence of their wishes on the disposition of cases is indiscriminate and may not reflect what is in the best interests of justice. That consideration of their wishes may result in the unequal application of the
law, particularly the death penalty but also life without parole, suggests the need to reexamine the consequences of the weight accorded to the victim’s wishes in prosecutorial decision making. Further guidelines, and arguably limitations, on their influence may be needed if the state’s goal of an evenhanded application of the law is to be achieved, assuming that is the goal.

Importantly, implications of this research study are not limited to concerns having to do with the disposition of capital cases. The findings pertaining to the influence of life without parole in plea bargaining and decision making point to what may be a distinct influence of the open murder charge in Michigan. As discussed earlier, prosecutors and defense attorneys said this charge is used more frequently than first or second-degree murder. While prosecutors viewed it as the most logical choice in most cases, defense attorneys indicated that it provides prosecutors with built in leverage in plea bargaining.

The findings revealed remarkable discrepancies in prosecutors’ and defense attorneys’ perceptions of this charging option and raise concerns that it may serve as a unique plea bargaining tool for prosecutors. It was suggested by a number of attorneys that in some cases prosecutors indict what is clearly a second-degree murder as an open murder in order to have the option of first-degree in plea bargaining and at trial. The use of the open murder charge in this way is of concern if it induces defendants to plead guilty out of fear of being convicted of first-degree murder at trial, a charge that may be inappropriate in the particular case (a concern that parallels that regarding the use of the death penalty to induce pleas by non deathworthy defendants). That being said, it may be argued that a charge of open murder is little different than a charge of first-degree with
the lesser-included offense of second-degree murder. Further research is needed to explore whether this unique charge in fact has a unique effect on plea bargaining.

**Future Directions**

The findings of the current study raise a number of questions about the influence of various factors, not just the maximum possible sentence, on the decisions of prosecutors and defense attorneys in the highest-level murder cases. Attorneys spoke about consideration for the likely outcome at trial in capital cases, particularly given juries’ option of life without parole, and prosecutors expressed concerns over the expenditure of resources required to indict and try a capital case, one that may end with a sentence that could have been achieved through a less costly non-capital trial. These findings shed light on the reasons behind the observed decline in death sentences over the past decade. Additional research is needed to further explore the role of alternative sentencing options for juries and alternative charging options for prosecutors in accounting for the decline.

The influence of the wishes of the victim’s family on prosecutorial decision making necessitates further research as well. Although there is a growing body of research on the role of victim impact statements on judicial and juror decision making (see for ex. Eisenberg, Garvey, & Wells 2003, 2006; Greene 1999; Karp & Warshaw 2006; Roberts and Edgar 2006), systematic research on the influence of the wishes of the victim’s family on prosecutorial decision making is lacking. Anecdotal evidence supports the findings of the present study that the wishes of the victim’s family influence prosecutors’ charging decisions in capital cases (see Karamanian 1998; Logan 1999), but
more research is needed to further understand the degree and direction of this influence, both in prosecutors’ charging and plea bargaining decisions.

The role of resources in capital cases and the influence of the wishes of the victim’s family have been discussed here and throughout the research literature primarily in terms of how they impact prosecutorial decision making; little is known about how, if at all, defense attorneys’ awareness of the influence of these factors impacts their own decision making. As discussed earlier, defense attorneys might be able to exploit these factors to their advantage, for example by speaking with the victims’ families to inquire about their needs and wants in reaching any possible plea agreement. Other defense attorneys similarly discussed strategies not only in trying to resolve a case with a plea agreement but importantly, in trying to resolve a case with the best possible plea agreement. In this respect, the split found among defense attorneys in their approach to capital cases is notable and points to the need for further research examining the rationale and implications of each approach.

Accordingly, although much research has examined the qualifications required of attorneys to defend capital cases, including specialized training, research on the substance of the training they receive and the strategies they are taught is lacking. Further research on the content of the training and the rationale behind the approaches that are taught is needed. The training attorneys receive and the strategies they embody in their approach to capital litigation may significantly impact the outcomes of capital cases, including not only the outcomes of trials but also the outcomes of plea bargains.

This study has focused on an exploration of the plea bargaining process and on the factors that influence the decisions of prosecutors and defense attorneys throughout
this process, with particular attention to the role of the maximum sentence. One of the questions driving this research centered around the postulation that the statutory availability of the death penalty for aggravated murder might serve as an inducement in plea bargaining, exerting greater pressure on the defense to plead guilty, compared to circumstances where the maximum sentence authorized is life without parole or life imprisonment. In keeping with a focus on the decision making of attorneys, this study did not address this question with respect to defendants. However, it is important to do so given that it is the defendant whose future is at stake in any case.

Accordingly, future research should explore the factors that influence defendants’ inclinations to pursue a plea bargain or a trial and the weight of the possibility of a death sentence compared with the possibility of life without parole or a life sentence in their decisions. Such research would speak to the leverage (or lack thereof) of the maximum sentence, particularly the death penalty and life without parole, in inducing defendants to plead guilty. To a limited extent, data from the interviews conducted for the present research study can shed light on this.

Attorneys in both states were asked about defendants’ inclinations to pursue a plea bargain or a trial. These questions elicited a discussion of the factors, including the weight of the maximum sentence, that influence defendants’ inclinations to take the risk of a trial or to pursue the certainty of a sentence less than the maximum with a plea bargain. Given their more frequent and intimate contact with their clients, defense attorneys were in a better position to discuss this. However, prosecutors were engaged in this discussion as well, as their perception of how defendants view a possible death sentence in comparison with a sentence of less than death may further an understanding
of prosecutors’ belief in the power of the death penalty and life without parole in inducing a defendant to plead guilty.

An examination of the information generated from these discussions would inform an understanding of the factors that influence defendants’ plea versus trial inclinations and would further shed light on the role of the maximum sentence in plea bargaining in aggravated murder cases. While this is an avenue to be pursued in further research with this data, the data nevertheless rely on information generated from attorneys, not from defendants themselves. Research involving discussions with defendants who have pled guilty and with those who have pursued a trial in capital and non-capital aggravated murder cases would be valuable in further understanding the role of the death penalty and life without parole in inducing guilty pleas.

This dissertation has provided a significant first step in exploring the process of plea bargaining and decision making in murder cases where the maximum sentence is the death penalty or life imprisonment or life imprisonment without parole. While this study has addressed many of the questions that inspired it, it has perhaps raised just as many. Further research is needed to build upon the foundation that this study has laid.
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United States Constitution, Amendments V, VI, and XIV.


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Appendix A: Letter to Prosecutors, Ohio

Susan Ehrhard
School of Criminal Justice
University at Albany, SUNY
135 Western Ave.
Albany, New York 12222

Name           [Insert Date]
Address

Dear Mr./Ms. XXXX,

I am a PhD candidate in the School of Criminal Justice at the University at Albany. I am currently working on my dissertation, which entails an exploration of the role of the maximum possible punishment in the plea bargaining process in murder cases. I am particularly interested in the role of the death penalty in this process as compared with the role of a sentence of life or life without parole. The most important component of my research involves speaking with attorneys who have experience with capitally indicted cases and who can therefore provide insight into this process.

I am interested in interviewing prosecutors about their experiences with plea bargaining in criminal homicide cases. I am writing to ask your permission to speak with the prosecutors in your office who worked on the cases involving [insert name/s of defendant/s]. Participants will be asked to discuss their experiences and to share their perspectives. The interviews are entirely confidential, and the identity of all participants will be protected. I will not be asking about the specific details of cases that could be construed as betraying confidentiality. I am interested in the process of plea bargaining itself, not in individual defendants.

Participation is entirely voluntary, with no anticipated risks or benefits to taking part in this study. I will begin interviewing [insert time frame]. If you have any questions, please do not hesitate to contact me at (518) 442-5482 or se8501@albany.edu or to contact the chair of my committee, Dr. James Acker, at (518) 442-5317 or acker@albany.edu. I will be calling you within the next couple of weeks to follow up. I hope you will consider aiding me in this research.

Sincerely,

Susan Ehrhard
Appendix B: Letter to Defense Attorneys, Ohio

Susan Ehrhard
School of Criminal Justice
University at Albany, SUNY
135 Western Ave.
Albany, New York 12222

Name                                    [Insert Date]
Address

Dear Mr./Ms. XXXX,

I am a PhD candidate in the School of Criminal Justice at the University at Albany. I am currently working on my dissertation, which entails an exploration of the role of the maximum possible punishment in the plea bargaining process in murder cases. I am particularly interested in the role of the death penalty in this process as compared with the role of a sentence of life or life without parole. The most important component of my research involves speaking with attorneys who have experience with capitally indicted cases and who can therefore provide insight into this process.

I am interested in interviewing defense attorneys about their experiences with plea bargaining in criminal homicide cases. I am writing to ask that you be interviewed as part of this research. Participants will be asked to discuss their experiences and to share their perspectives. The interviews are entirely confidential, and the identity of all participants will be protected. I will not be asking about the specific details of cases that could be construed as betraying confidentiality. I am interested in the process of plea bargaining itself, not in individual clients.

Participation is entirely voluntary, with no anticipated risks or benefits to taking part in this study. I will begin interviewing [insert time frame]. If you have any questions, please do not hesitate to contact me at (518) 442-5482 or se8501@albany.edu or to contact the chair of my committee, Dr. James Acker, at (518) 442-5317 or acker@albany.edu. I will be calling you within the next couple of weeks to follow up. I hope you will consider being a part of this research, and I look forward to speaking with you.

Sincerely,

Susan Ehrhard
Appendix C: Letter to Prosecutors, Michigan

Susan Ehrhard
School of Criminal Justice
University at Albany, SUNY
135 Western Ave.
Albany, New York 12222

Name [Insert Date]
Address

Dear Mr./Ms. XXXX,

I am a PhD candidate in the School of Criminal Justice at the University at Albany. I am currently working on my dissertation, which entails an exploration of the role of the maximum possible punishment in the plea bargaining process in murder cases. An important component of my research involves speaking with attorneys who have experience with first-degree murder cases and who can therefore provide insight into this process.

I am interested in interviewing prosecutors about their experiences with plea bargaining in criminal homicide cases. I am writing to ask your permission to speak with the prosecutors in your office who have prosecuted first-degree murder cases. Participants will be asked to discuss their experiences and to share their perspectives. The interviews are entirely confidential, and the identity of all participants will be protected. I will not be asking about the specific details of cases that could be construed as betraying confidentiality. I am interested in the process of plea bargaining itself, not in individual defendants.

Participation is entirely voluntary, with no anticipated risks or benefits to taking part in this study. I will begin interviewing [insert time frame]. If you have any questions, please do not hesitate to contact me at (518) 442-5482 or se8501@albany.edu or to contact the chair of my committee, Dr. James Acker, at (518) 442-5317 or acker@albany.edu. I will be calling you within the next couple of weeks to follow up. I hope you will consider aiding me in this research.

Sincerely,

Susan Ehrhard
Appendix D: Letter to Defense Attorneys, Michigan

Susan Ehrhard
School of Criminal Justice
University at Albany, SUNY
135 Western Ave.
Albany, New York 12222

Name           [Insert Date]
Address

Dear Mr./Ms. XXXX,

I am a PhD candidate in the School of Criminal Justice at the University at Albany. I am currently working on my dissertation, which entails an exploration of the role of the maximum possible punishment in the plea bargaining process in murder cases. An important component of my research involves speaking with attorneys who have experience with first-degree murder cases and who can therefore provide insight into this process. I spoke with Frank Reynolds, and he suggested I contact you.

I am interested in interviewing defense attorneys about their experiences with plea bargaining in criminal homicide cases. I am writing to ask that you be interviewed as part of this research. Participants will be asked to discuss their experiences and to share their perspectives. The interviews are entirely confidential, and the identity of all participants will be protected. I will not be asking about the specific details of cases that could be construed as betraying confidentiality. I am interested in the process of plea bargaining itself, not in individual clients.

Participation is entirely voluntary, with no anticipated risks or benefits to taking part in this study. I will begin interviewing [insert time frame]. If you have any questions, please do not hesitate to contact me at (518) 596-4828 or se8501@albany.edu or to contact the chair of my committee, Dr. James Acker, at (518) 442-5317 or acker@albany.edu. I will be calling you within the next couple of weeks to follow-up. I hope you will consider being a part of this research, and I look forward to speaking with you.

Sincerely,

Susan Ehrhard
Appendix E: Questions for Prosecutors, Ohio

ID#:
Male or Female (circle one)
Date:
Time:

Introductory Statement

Thank you for taking part in this study. The interview will focus on your experiences with plea-bargaining, life sentences, and the death penalty. I will be asking you to discuss your involvement with these issues and to share your perspectives. The interviews are entirely confidential, and as indicated in the consent form that was mailed to you, your anonymity is assured. You may decline to answer any specific questions or terminate the interview at any time. With your permission, I would like to record the interview so that I can capture as much information as possible.

[TURN ON RECORDER]
Section A: Introductory Questions

I’d like to begin by asking a few background questions about your experience.

1. How many years of experience with criminal cases do you have as a prosecuting attorney?

2. Have you practiced law in states other than Ohio?

3. Have you ever worked as a defense attorney?

4. How many years of experience do you have with prosecuting murder cases?
   [If respondent has practiced in a state other than Ohio, ask Q. 3.a.; if not, skip to Q. 4.]
   
   a. Total and specifically in Ohio?

5. Approximately what percentage of all felony cases that you have prosecuted, not just murder cases, have resulted in plea bargains? In trials?
   [If respondent has practiced in a state other than Ohio, ask Q. 5.a.; if not, skip to Section B.]
   
   a. Total and specifically in Ohio?
**Section B: Murder Cases Where the Maximum Sentence Is Death**

Now I’d like to discuss your experience with murder cases where the maximum sentence was death. Here we are talking only about cases that are death-eligible, cases that meet the statutory requirements to be indicted for aggravated murder. Although I will not be asking about particular cases or the identities of defendants, in answering these questions it would be helpful if you could think about the case/s you have worked on and provide examples from your experience.

1. How many death-eligible cases have you prosecuted?
   [IF RESPONDENT HAS PRACTICED IN A STATE OTHER THAN OHIO, ASK Q 1.a.; IF NOT, SKIP TO Q. 2.]
   a. Total and specifically in Ohio?
   b. Were you lead counsel or co-counsel in this case/these cases?

   [IF RESPONDENT HAS PRACTICED IN A STATE OTHER THAN OHIO, SAY, “THINKING ABOUT JUST OHIO NOW”]

2. Did the case/s result in a plea/s or trial/s?
   [GET SPECIFIC BREAKDOWN]
   2.1. While I want to focus primarily on the process of plea bargaining in these cases, first I want to ask you about the decision to charge a case as capital. What are some of the most important factors that influence your decision to or not to seek a capital indictment in a death-eligible case?

3. In your experience, at what point in the process (from the time of arrest to the final disposition of the case) is the possibility of a plea bargain raised?
   [IF RESPONDENT DID NOT HAVE ANY CASES PLED OUT REPHRASE THE QUESTION TO ASK IF THE POSSIBILITY OF A PLEA WAS EVER DISCUSSED. IF YES, FRAME SUBSEQUENT QUESTIONS IN THAT WAY. IF NO, ASK IF HE/SHE CAN SPECULATE ON THE PROCESS.]
   a. What factor or factors explain why a plea might be raised earlier or later in the process?
   b. In your experience is the prosecutor or the defense attorney more likely to initiate the possibility of a plea?
[IF NECESSARY, ASK:]  
c. Why is this? What accounts for one side initiating a plea more often than the other?

d. Does the process involve negotiation and bargaining, or are plea offers presented and either accepted or rejected as presented?

e. In cases where discussions do take place, do they continue throughout the disposition process or are they confined to a specific point or points in the process?

4. What are some of the most important factors that influence your desire to pursue a plea or pursue a trial?

a. Other than the possibility of a death sentence, what factors, if any, influence your desire to pursue a plea or pursue a trial in death-eligible cases compared with cases that are not death-eligible?  
(IF NECESSARY, CLARIFY WITH EXAMPLES: THE WISHES OF THE VICTIM'S FAMILY, EVIDENCE OF AGGRAVATING/MITIGATING FACTORS, ECONOMIC FACTORS ETC.)

[IF NECESSARY, ASK:]  
b. Compared with other factors, how influential is the possibility of securing a death sentence in your desire to pursue a plea or pursue a trial?

c. Is it ever the most important factor?

d. Does the weight of any of these factors, not just the possibility of a death sentence, change as the negotiation and/or trial process continues?  
[IF YES, ASK] How so?

[e. In cases where you may not be inclined to pursue a trial on a capital charge/s, what influences your desire to pursue a plea as opposed to pursuing a trial on a reduced charge/s?

5. In your experience, do you think defendants prefer to plead or pursue a trial?
6. What do you think are some of the most important factors that influence defendants’ desires to pursue a plea or pursue a trial?

   a. Compared with other factors, how influential do you think the possibility of a death sentence is in defendants’ desires to plead?

   b. Do you think it is ever the most important factor?

   c. For defendants, do you think the weight of these factors, not just the possibility of a death sentence, changes as the negotiation and/or trial process continues? [IF YES, ASK:] How so?

   d. In your experience, do you think defendants plead to a lesser sentence specifically to avoid the possibility of death? [IF NECESSARY, ASK RESPONDENT TO ELABORATE]

   e. Do you think defense attorneys and their clients disagree over whether to plead or go to trial? [IF NECESSSARY, ASK, HOW SO?/IN WHAT WAY/S?]

7. Some people suggest that the possibility of a death sentence can be used as leverage by prosecutors in plea bargaining situations. How often, if at all, do you believe prosecutors do this? (That is, use the possibility of a death sentence as leverage for obtaining a plea from a defendant and thereby avoiding a trial?)

   [IF RESPONDANT BELIEVES PROSECUTORS DO THIS, ASK:] a. Can you provide any examples?

   [IF RESPONDANT IS RECEPTIVE, MAY WANT TO PROBE FURTHER:] b. Have you ever done this? Under what circumstances?

8. What was/were the top charge and sentence reduction/s to which the defendants in this case/these cases pled?

9. How, if at all, is the process of plea-bargaining different in cases where the death penalty is an option compared with cases where the death penalty is not an option?
a. Are defense attorneys more willing to enter into plea negotiations where the death penalty is an option?

b. Does the process in death-eligible cases involve more or less “negotiation” than the process in non-death-eligible cases?

c. Is coming to a plea agreement easier when the death penalty is an option? Why or Why not?

d. How, if at all, do you think the plea bargaining process would be different if the maximum possible sentence a defendant could face in an aggravated murder case were life without parole, if Ohio did not have the death penalty?
Section C: Murder Cases Where the Maximum Sentence Is Fifteen Years to Life

Next I’d like to discuss your experience with murder cases where the maximum sentence was fifteen years to life, cases that were not death-eligible. I am interested here only in cases that met the requirements of a murder charge but not an aggravated murder charge. Again, although I will not be asking about particular cases or the identities of defendants, in answering these questions it would be helpful if you could think about the case/s you have worked on and provide examples from your experience.

1. Approximately how many non-death-eligible murder cases have you prosecuted?
   [IF RESPONDENT HAS PRACTICED IN A STATE OTHER THAN OHIO, ASK Q 1.a.; IF NOT, SKIP TO Q 2.]
   a. Total and specifically in Ohio?

   [IF RESPONDENT HAS PRACTICED IN A STATE OTHER THAN OHIO, SAY, “THINKING ABOUT JUST OHIO NOW”]

2. Approximately how many of these cases have resulted in plea bargains? In trials?

3. In your experience, at what point in the process (from the time of arrest to the final disposition of the case) is the possibility of a plea bargain raised?
   a. What factor or factors explain why a plea might be raised earlier or later in the process?
   b. In your experience, is the prosecutor or the defense attorney more likely to initiate the possibility of a plea?
   c. Why is this? What accounts for one side initiating a plea more often than the other?
   d. Does the process involve negotiation and bargaining, or are plea offers presented and either accepted or rejected as presented?
      [IF NECESSARY, ASK:] Why is this?
   e. In cases where discussions do take place, do they continue throughout the disposition process or are they confined to a specific point or points in the process?
4. What are some of the most important factors that influence your desire to pursue a plea or pursue a trial?

   a. Compared with other factors, how influential is the possibility of securing a life sentence in your desire to pursue a plea or pursue a trial?

   b. Is it ever the most important factor?

   c. Does the weight of any of these factors (not just the possibility of a life sentence) change as the negotiation and/or trial process continues? [IF YES, ASK:] How so?

Please remember that these questions refer to your experience with murder cases where the maximum sentence is life, cases that are not death-eligible.

5. In your experience, do you think that defendants prefer to plead or pursue a trial?

6. What do you think are some of the most important factors that influence defendants’ desires to pursue a plea or pursue a trial?

   a. Compared with other factors, how influential do you think the possibility of a life sentence is in defendants’ desires to plead?

   b. Do you think it is ever the most important factor?

   c. For defendants, do you think the weight of these factors, not just the possibility of a life sentence, changes as the negotiation and/or trial process continues? [IF YES, ASK:] How so?

   d. In your experience, do you think defendants plead to a lesser sentence specifically to avoid the possibility of a life sentence? [IF NECESSARY, ASK RESPONDENT TO DISCUSS THIS FURTHER]

   e. Do you think defense attorneys and their clients disagree over whether to plead or go to trial? [IF NECESSSARY, ASK, HOW SO?/IN WHAT WAY/S?]
7. How often, if at all, do you believe prosecutors use the possibility of a life sentence as leverage for obtaining a plea from a defendant?

[IF RESPONDANT BELIEVES PROSECUTORS DO THIS, ASK:] a. Can you provide any examples?

[IF RESPONDANT IS RECEPTIVE, MAY WANT TO PROBE FURTHER:] b. Have you ever done this? Under what circumstances?

8. What is the going rate for pleas in murder cases where life is the maximum sentence? Meaning, most commonly, what is the top charge pled to by defendants and what is the typical sentence received?
**Section D: Concluding Questions**

Finally, I’d just like to ask a few questions to conclude the interview.

1. Do you think your approach to murder cases, either death-eligible or not, has changed as a result of your work on a death penalty case/on death penalty cases?  
   [IF YES, ASK:] How so?

2. Is there anything else I missed, specifically regarding the influence of the death penalty on plea negotiations or more generally, that you would like to address or that you think is important to be aware of?

   [ASK Q. 3 ONLY IF THE INTERVIEW HAS GONE WELL]

3. Finally, would it be all right if I mailed you a set of three hypothetical aggravated murder cases with a list of questions for you to complete and return to me at your convenience? I would like to learn as much as possible about the disposition process of death-eligible cases, and this additional piece of my study may help in this endeavor.

**Notes:**
Appendix F: Questions for Defense Attorneys, Ohio

ID#:  Male or Female (circle one)  
Date:  
Time:  

Introductory Statement

Thank you for taking part in this study. The interview will focus on your experiences with plea-bargaining, life sentences, and the death penalty. I will be asking you to discuss your involvement with these issues and to share your perspectives. The interviews are entirely confidential, and as indicated in the consent form that was mailed to you, your anonymity is assured. You may decline to answer any specific questions or terminate the interview at any time. With your permission, I would like to record the interview so that I can capture as much information as possible.

[TURN ON RECORDER]
Section A: Introductory Questions

I’d like to begin by asking a few background questions about your experience.

1. How many years of experience with criminal cases do you have as a defense attorney?

2. Have you practiced law in states other than Ohio?

3. Have you ever worked as a prosecutor?

4. How many years of experience do you have with defending murder cases?  
   [IF RESPONDENT HAS PRACTICED IN A STATE OTHER THAN OHIO,  
   ASK Q. 4.a.; IF NOT, SKIP TO Q. 5.]

   a. Total and specifically in Ohio?

5. Approximately what percentage of all felony cases that you have defended, not just  
   murder cases, have resulted in plea bargains? In trials?  
   [IF RESPONDENT HAS PRACTICED IN A STATE OTHER THAN OHIO,  
   ASK Q. 5.a.; IF NOT, SKIP TO SECTION B.]

   a. Total and specifically in Ohio?
Section B: Murder Cases Where the Maximum Sentence Is Death

Now I’d like to discuss your experience with murder cases where the maximum sentence was death. Here we are talking only about cases that are death-eligible, cases that meet the statutory requirements to be indicted for aggravated murder. Although I will not be asking about specific details regarding particular cases or defendants, in answering these questions, it would be helpful if you could think about the case/s you have worked on and provide examples from your experience.

1. How many death-eligible cases have you defended?
   [IF RESPONDENT HAS PRACTICED IN A STATE OTHER THAN OHIO, ASK Q 1.a.; IF NOT, SKIP TO Q. 2.]
   a. Total and specifically in Ohio?

   b. Were you lead counsel or co-counsel in this case/these cases?

   [IF RESPONDENT HAS PRACTICED IN A STATE OTHER THAN OHIO, SAY, “THINKING ABOUT JUST OHIO NOW”]

2. Did the case/the cases result in a plea/s or trial/s?
   [GET SPECIFIC BREAKDOWN]

3. In your experience, at what point in the process (from the time of arrest to the final disposition of the case) is the possibility of a plea bargain raised?

   [IF RESPONDENT DID NOT HAVE ANY CASES PLED OUT REPHRASE THE QUESTION TO ASK IF THE POSSIBILITY OF A PLEA WAS EVER DISCUSSED. IF YES, FRAME SUBSEQUENT QUESTIONS IN THAT WAY. IF NO, ASK IF HE/SHE CAN SPECULATE ON THE PROCESS.]

   a. What factor or factors explain why a plea might be raised earlier or later in the process?

   b. In your experience, is the prosecutor or the defense attorney more likely to initiate the possibility of a plea?

   [IF NECESSARY, ASK:]

   c. Why is this? What accounts for one side initiating a plea more often than the other?
d. Does the process involve negotiation and bargaining, or are plea offers presented and either accepted or rejected as presented?

e. In cases where discussions do take place, do they continue throughout the disposition process or are they confined to a specific point or points in the process?

4. What are some of the most important factors that influence your desire to pursue a plea or pursue a trial?

a. Other than the possibility of a death sentence, what factors, if any, influence your desire to pursue a plea or pursue a trial in death-eligible cases compared with cases that are not death-eligible?
   (IF NECESSARY, CLARIFY WITH EXAMPLES: EVIDENCE OF AGGRAVATING/ MITIGATING FACTORS, ECONOMIC FACTORS ETC.)

b. Compared with other factors, how influential is the possibility of a death sentence in your desire to pursue a plea or pursue a trial?

c. Is it ever the most important factor?

d. Does the weight of any of these factors, not just the possibility of a death sentence, change as the negotiation and/or trial process continues?
   [IF YES, ASK:] How so?

e. Some people suggest that the possibility of a death sentence can be used as leverage by prosecutors in plea bargaining situations. How often, if at all, do you believe prosecutors do this? (That is, use the possibility of a death sentence as leverage for obtaining a plea from a defendant and thereby avoiding a trial?)

   [IF RESPONDANT BELIEVES PROSECUTORS DO THIS, ASK:] Can you provide any examples?

   [IF RESPONDANT IS RECEPTIVE, MAY WANT TO PROBE FURTHER:] Has this been done in your experience? Under what circumstances?
5. In your experience, do defendants prefer to plead or pursue a trial?

6. What do you think are some of the most important factors that influence defendants’ desires to pursue a plea or pursue a trial?

   a. Compared with other factors, how influential do you think the possibility of a death sentence is in defendants’ desires to plead?

   b. Do you think it is ever the most important factor?

   c. For defendants, do you think the weight of these factors, not just the possibility of a death sentence, changes as the negotiation and/or trial process continues? [IF YES, ASK:] How so?

   d. In your experience, do defendants plead to a lesser sentence specifically to avoid the possibility of death? [IF NECESSARY, ASK RESPONDENT TO ELABORATE]

7. Were there times where you felt that a plea should be accepted or a trial should be pursued but where the client felt differently?

   [If YES, CONTINUE TO Q. 7.a.; IF NO, SKIP TO Q. 8]

   a. When the inclinations of attorney and client differ, how are they resolved?

   b. In your experience, do defendants first suggest the possibility of a plea or do attorneys?

8. What was/were the top charge and sentence reduction/s to which your client/s pled?

9. How, if at all, is the process of plea-bargaining different in death-eligible cases compared with cases where the death penalty is not an option?

   a. Are prosecutors more willing to enter into plea negotiations where the death penalty is an option?
b. Does the process in death-eligible cases involve more or less “negotiation” than the process in non death-eligible cases?

c. Is coming to a plea agreement easier when the death penalty is an option? Why or Why not?

d. How, if at all, do you think the plea bargaining process would be different if the maximum possible sentence a defendant could face in an aggravated murder case was life without parole, if Ohio did not have the death penalty?
Section C: Murder Cases Where the Maximum Sentence Is Fifteen Years to Life

Next I’d like to discuss your experience with murder cases where the maximum sentence was fifteen years to life, cases that were not death-eligible. I am interested here only in cases that met the requirements of a murder charge but not an aggravated murder charge. Again, although I will not be asking about specific details regarding particular cases or defendants, in answering these questions, it would be helpful if you could think about the cases you have worked on and provide examples from your experience.

1. Approximately how many non-death-eligible murder cases have you defended? [IF RESPONDENT HAS PRACTICED IN A STATE OTHER THAN OHIO, ASK Q 1.a.; IF NOT, SKIP TO Q 2.]
   a. Total and specifically in Ohio?

[IF RESPONDENT HAS PRACTICED IN A STATE OTHER THAN OHIO, SAY, “THINKING ABOUT JUST OHIO NOW”]

2. Approximately how many of these cases have resulted in plea bargains? In trials?

3. In your experience, most often, at what point in the process (from the time of arrest to the final disposition of the case) is the possibility of a plea bargain raised?
   a. What factor or factors explain why a plea might be raised earlier or later in the process?
   b. In your experience, is the prosecutor or the defense attorney more likely to initiate the possibility of a plea?

   [IF NECESSARY, ASK:]
   c. Why is this? What accounts for one side initiating a plea more often than the other?

   d. Does the process involve negotiation and bargaining, or are plea offers presented and either accepted or rejected as presented? [IF NECESSARY, ASK:] Why is this?
e. In cases where discussions do take place, do they continue throughout the
disposition process or are they confined to a specific point or points in the process?

4. What are some of the most important factors that influence your desire to pursue a plea
or pursue a trial?

a. Compared with other factors, how influential is the possibility of a life sentence in
your desire to pursue a plea or pursue a trial?

b. Is it ever the most important factor?

c. Does the weight of any of these factors (not just the possibility of a life sentence)
change as the negotiation and/or trial process continues?
[IF YES, ASK:] How so?

d. How often, if at all, do you believe prosecutors use the possibility of a life sentence
as leverage for obtaining a plea from a defendant?

[IF RESPONDANT BELIEVES PROSECUTORS DO THIS, ASK:]
e. Can you provide any examples?

[IF RESPONDANT IS RECEPTIVE, MAY WANT TO PROBE FURTHER:]
f. Has this been done in your experience? Under what circumstances?

Please remember that these questions refer to your experience with murder cases where
the maximum sentence is life, cases that are not death-eligible.

5. In your experience, do defendants prefer to plead or pursue a trial?

6. What do you think are some of the most important factors that influence defendants’
desires to pursue a plea or pursue a trial?

a. Compared with other factors, how influential do you think the possibility of a life
sentence is in defendants’ desires to plead?
b. Do you think it is ever the most important factor?

c. For defendants’, do you think the weight of these factors, not just the possibility of a life sentence, changes as the negotiation and/or trial process continues? [IF YES, ASK:] How so?

d. In your experience, do defendants plead to a lesser sentence specifically to avoid the possibility of a life sentence? [IF NECESSARY, ASK RESPONDENT TO DISCUSS THIS FURTHER]

7. Were there times where you felt that a plea should be accepted or that a trial should be pursued but where the client felt differently?

[IF YES, CONTINUE TO Q. 7.a.; IF NO, SKIP TO Q. 8.]

a. When the inclinations of attorney and client differ, how are they resolved?

b. In your experience, do defendants first suggest the possibility of a plea or do attorneys?

8. What is the going rate for pleas in murder cases where life is the maximum sentence? Meaning, most commonly, what is the top charge pled to by defendants and what is the typical sentence received?
Section D: Concluding Questions

Finally, I’d just like to ask a few questions to conclude the interview.

1. Do you think your approach to murder cases, either death-eligible or not, has changed as a result of your work on a death penalty case/on death penalty cases? [IF YES, ASK:] How so?

2. Is there anything else I missed, specifically regarding the influence of the death penalty on plea negotiations or more generally, that you would like to address or that you think is important to be aware of?

[ASK Q. 3 ONLY IF THE INTERVIEW HAS GONE WELL]

3. Finally, would it be all right if I mailed you a set of three hypothetical aggravated murder cases with a list of questions for you to complete and return to me at your convenience? I would like to learn as much as possible about the disposition process of death-eligible cases, and this additional piece of my study may help in this endeavor.

Notes:
Appendix G: Questions for Prosecutors, Michigan
Questions for Prosecutors, Michigan

ID#:  
Male or Female (circle one)  
Date:  
Time:

**Introductory Statement**

Thank you for taking part in this study. The interview will focus on your experiences with plea-bargaining and life sentences. I will be asking you to discuss your experiences and to share your perspectives. The interviews are entirely confidential, and as indicated in this consent form that was mailed to you, your anonymity is assured. You may decline to answer any specific questions or terminate the interview at any time. With your permission, I would like to record the interview so that I can capture as much information as possible.  
[TURN ON RECORDER]
Section A: Introductory Questions

I’d like to begin by asking a few background questions about your experience.

1. How many years of experience with criminal cases do you have as a prosecuting attorney?

2. Have you practiced law in states other than Michigan?

3. Have you ever worked as a defense attorney?

4. How many years of experience do you have with prosecuting murder cases?  
   [IF RESPONDENT HAS PRACTICED IN A STATE OTHER THAN MICHIGAN,  
   ASK Q. 4.a.; IF NOT, SKIP TO Q. 5.]

   a. Total and specifically in Michigan?

5. Approximately what percentage of all felony cases that you have prosecuted, not just murder cases, have resulted in plea bargains? In trials?  
   [IF RESPONDENT HAS PRACTICED IN A STATE OTHER THAN MICHIGAN,  
   ASK Q. 5.a.; IF NOT, SKIP TO SECTION B.]

   a. Total and specifically in Michigan?
Section B: Murder Cases Where the Maximum Sentence Is Life Without Parole

Now I’d like to discuss your experience with murder cases where the maximum sentence is life without parole. I am interested here only in cases that met the requirements of a first-degree murder charge. Although I will not be asking about particular cases or the identities of defendants, in answering these questions it would be helpful if you could think about the case/s you have worked on and provide examples from your experience.

1. Approximately how many first-degree murder cases have you prosecuted?
   [IF RESPONDENT HAS PRACTICED IN A STATE OTHER THAN MICHIGAN, ASK Q 1.a.; IF NOT, SKIP TO Q 2.]

   a. Total and specifically in Michigan?

   b. Were you lead counsel or co-counsel in this case/these cases?

   [IF RESPONDENT HAS PRACTICED IN A STATE OTHER THAN MICHIGAN, SAY, “THINKING ABOUT JUST MICHIGAN NOW”]

2. Approximately how many of the murder cases that you have prosecuted resulted in plea bargains? In trials?

3. In your experience, at what point in the process (from the time of arrest to the final disposition of the case) is the possibility of a plea bargain raised?

   a. What factor or factors explain why a plea might be raised earlier or later in the process?

   b. In your experience, is the prosecutor or the defense attorney typically more likely to initiate the possibility of a plea?

   [IF NECESSARY, ASK:] c. Why is this? What accounts for one side initiating a plea more often than the other?

   d. Does the process involve negotiation and bargaining, or are plea offers presented and either accepted or rejected as presented?
   [IF NECESSARY, ASK:] Why is this?
e. In cases where discussions do take place, do they continue throughout the disposition process or are they confined to a specific point in the process?

4. What are some of the most important factors that influence your desire to pursue a plea or pursue a trial?

a. Compared with other factors, how influential is the possibility of securing a sentence of LWOP in your desire to pursue a plea or pursue a trial?

b. Is it ever the most important factor?

c. Does the weight of any of these factors (not just the possibility of a life sentence or LWOP) change as the negotiation and/or trial process continues? [IF YES, ASK:] How so?

Please remember that these questions refer to your experience with murder cases where the maximum sentence is life without parole.

5. In your experience, do you think that defendants most often prefer to plea or pursue a trial?

6. What do you think are some of the most important factors that influence defendants’ desires to pursue a plea or pursue a trial?

a. Compared with other factors, how influential do you think the possibility of a sentence of life without parole is in defendants’ desires to plea?

b. Do you think it is ever the most important factor?

c. For defendants, do you think the weight of these factors, not just the possibility of a sentence of life without parole, changes as the negotiation and/or trial process continues? [IF YES, ASK:] How so?

d. In your experience, do you think defendants plead to a lesser sentence specifically to avoid the possibility of a sentence of life without parole? [IF NECESSARY, ASK RESPONDENT TO DISCUSS THIS FURTHER]
6. Do you think defense attorneys and their clients disagree over whether to plead or go to trial?
   [IF NECESSSARY, ASK, HOW SO?/IN WHAT WAY/S?]

7. How often, if at all, do you believe prosecutors use the possibility of a life sentence as leverage for obtaining a plea from a defendant?

   [IF RESPONDANT BELIEVES PROSECUTORS DO THIS, ASK:]  
   a. Can you provide any examples?

   [IF RESPONDANT IS RECEPTIVE, MAY WANT TO PROBE FURTHER:]  
   b. Have you ever done this? Under what circumstances?

8. What is the going rate for pleas in murder cases where life without parole is the maximum sentence? Meaning, most commonly, what is the top charge pled to by defendants and what is the typical sentence received?
Section D: Concluding Questions

Finally, I’d just like to ask a couple of questions to conclude the interview.

01. How, if at all, do you think the plea bargaining process in first-degree murder cases would be different if Michigan had a death penalty?

1. Is there anything else I missed, specifically regarding the influence of the maximum sentence on plea negotiations or more generally, that you would like to address or that you think is important to be aware of?

[ASK Q. 3 ONLY IF THE INTERVIEW HAS GONE WELL]
2. Finally, would it be all right if I mailed you a set of three hypothetical aggravated murder cases with a list of questions for you to complete and return to me at your convenience? I would like to learn as much as possible about the disposition process of death-eligible cases, and this additional piece of my study may help in this endeavor.

Notes:
Appendix H: Questions for Defense Attorneys, Michigan

Questions for Defense Attorneys, Michigan

ID#:
Male or Female (circle one)
Date:
Time:

Introductory Statement

Thank you for taking part in this study. The interview will focus on your experiences with plea-bargaining and life sentences. I will be asking you to discuss your experiences and to share your perspectives. The interviews are entirely confidential, and as indicated in this consent form that was mailed to you, your anonymity is assured. You may decline to answer any specific questions or terminate the interview at any time. With your permission, I would like to record the interview so that I can capture as much information as possible.

[TURN ON RECORDER]
Section A: Introductory Questions

I’d like to begin by asking a few background questions about your experience.

1. How many years of experience with criminal cases do you have as a defense attorney?

2. Have you practiced law in states other than Michigan?

3. Have you ever worked as a prosecutor?

4. How many years of experience do you have with defending murder cases?
   [IF RESPONDENT HAS PRACTICED IN A STATE OTHER THAN MICHIGAN, ASK Q. 4.a.; IF NOT, SKIP TO Q. 5.]
   
   a. Total and specifically in Michigan?

5. Approximately what percentage of all felony cases that you have defended, not just murder cases, have resulted in plea bargains? In trials?
   [IF RESPONDENT HAS PRACTICED IN A STATE OTHER THAN MICHIGAN, ASK Q. 5.a.; IF NOT, SKIP TO SECTION B.]

   a. Total and specifically in Michigan?
Section B: Murder Cases Where the Maximum Sentence Is Life Without Parole

Now I’d like to discuss your experience with murder cases where the maximum sentence is life. I am interested here only in cases that met the requirements of a second-degree murder charge. Although I will not be asking about particular cases or the identities of defendants, in answering these questions it would be helpful if you could think about the case/s you have worked on and provide examples from your experience.

1. Approximately how many first-degree murder cases have you defended?
[IF RESPONDENT HAS PRACTICED IN A STATE OTHER THAN MICHIGAN, ASK Q 1.a.; IF NOT, SKIP TO Q 2.]

   a. Total and specifically in Michigan?

   b. Were you lead counsel or co-counsel in this case/these cases?

[IF RESPONDENT HAS PRACTICED IN A STATE OTHER THAN MICHIGAN, SAY, “THINKING ABOUT JUST MICHIGAN NOW”]
2. Approximately how many of the murder cases that you have defended resulted in plea bargains? In trials?

3. In your experience, most often, at what point in the process (from the time of arrest to the final disposition of the case) is the possibility of a plea bargain raised?

   a. What factor or factors explain why a plea might be raised earlier or later in the process?

   b. In your experience, is the prosecutor or the defense attorney typically more likely to initiate the possibility of a plea?

   [IF NECESSARY, ASK:]
   c. Why is this? What accounts for one side initiating a plea more often than the other?

   d. Does the process involve negotiation and bargaining, or are plea offers presented and either accepted or rejected as presented?  
   [IF NECESSARY, ASK:] Why is this?
e. In cases where discussions do take place, do they continue throughout the disposition process or are they confined to a specific point in the process?

4. What are some of the most important factors that influence your desire to pursue a plea or pursue a trial?

a. Compared with other factors, how influential is the possibility of a sentence of life without parole in your desire to pursue a plea or pursue a trial?

b. Is it ever the most important factor?

c. Does the weight of any of these factors (not just the possibility of a life sentence without parole) change as the negotiation and/or trial process continues? If YES, ASK: How so?

d. How often, if at all, do you believe prosecutors use the possibility of a life sentence without parole as leverage for obtaining a plea from a defendant?

[IF RESPONDANT BELIEVES PROSECUTORS DO THIS, ASK:] In your experience, do defendants prefer to plea or pursue a trial?

[IF RESPONDANT IS RECEPTIVE, MAY WANT TO PROBE FURTHER:] Can you provide any examples?

[IF RESPONDANT IS RECEPTIVE, MAY WANT TO PROBE FURTHER:] Has this been done in your experience? Under what circumstances?

Please remember that these questions refer to your experience only with murder cases where the maximum sentence is life without parole.

5. In your experience, do defendants prefer to plea or pursue a trial?

6. What do you think are some of the most important factors that influence defendants’ desires to pursue a plea or pursue a trial?

a. Compared with other factors, how influential do you think the possibility of a sentence of life without parole in defendants’ desires to plea?
b. Do you think it is ever the most important factor?

c. For defendants, do you think the weight of these factors, not just the possibility of a sentence of life without parole, change as the negotiation and/or trial process continues? [IF YES, ASK:] How so?

d. In your experience, do defendants plead to a lesser sentence specifically to avoid the possibility of a sentence of life without parole? [IF NECESSARY, ASK RESPONDENT TO DISCUSS THIS FURTHER]

7. Were there times where you felt that a plea should be accepted or that a trial should be pursued but where the client felt differently?

[IF YES, CONTINUE TO Q. 7.a.; IF NO, SKIP TO Q. 8.]
a. When the inclinations of attorney and client differ, how are they resolved?

b. In your experience, do defendants first suggest the possibility of a plea or do attorneys?

8. What is the going rate for pleas in murder cases where life without parole is the maximum sentence? Meaning, most commonly, what is the top charge pled to by defendants and what is the typical sentence received?
Section C: Murder Cases Where the Maximum Sentence Was Death, Omitted

Section D: Concluding Questions

Finally, I’d just like to ask a couple of questions to conclude the interview.

01. How, if at all, do you think the plea bargaining process in first-degree murder cases would be different if Michigan had a death penalty?

1. Is there anything else I missed, specifically regarding the influence of the maximum sentence on plea negotiations or more generally, that you would like to address or that you think is important to be aware of?

[ASK Q. 3 ONLY IF THE INTERVIEW HAS GONE WELL]

2. Finally, would it be all right if I mailed you a set of three hypothetical aggravated murder cases with a list of questions for you to complete and return to me at your convenience? I would like to learn as much as possible about the disposition process of death-eligible cases, and this additional piece of my study may help in this endeavor.

Notes: