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## Statewide Capital Punishment: The Case for Eliminating Counties' Role in the Death Penalty

Adam M. Gershowitz

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# Statewide Capital Punishment: The Case for Eliminating Counties' Role in the Death Penalty

*Adam M. Gershowitz\**

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## INTRODUCTION

The State of Texas is known as the capital of capital punishment.<sup>1</sup> But is that reputation deserved? In a way, yes. Texas sends more people to death row than any other state, and it executes them far faster.<sup>2</sup> However, in another way, it is incorrect to suggest that “the State” of Texas is a prolific user of capital punishment. Death penalty cases are prosecuted by counties, not the state, and a majority of Texas’s counties have never imposed the death penalty.<sup>3</sup> In fact, only a handful of Texas’s 254 counties regularly seek the death

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1. See Corinna Barrett Lain, *Deciding Death*, 57 DUKE L.J. 1, 45 (2007) (noting that, in 2000, “Texas was the undisputed capital of capital punishment among the states”).

2. See *id.* at 46 (noting that, in six years, Bush signed more death warrants than any other governor in the last twenty-five years); see also Adam Liptak, *At 60% of Total, Texas Is Bucking Execution Trend*, N.Y. TIMES, Dec. 26, 2007, at A1 (noting that, in 2007, over half of the nation’s executions took place in Texas, in part because prosecutors, courts, the pardon board, and the governor all pushed for expeditious executions).

3. See TEX. DEPT OF CRIMINAL JUSTICE, TOTAL NUMBER OF OFFENDERS SENTENCED TO DEATH FROM EACH COUNTY, <http://www.tdcj.state.tx.us/stat/countysentenced.htm> (last visited Jan. 31, 2010) [hereinafter TDCJ, TOTAL NUMBER OF OFFENDERS] (listing number of death sentences imposed by each county in Texas).

penalty.<sup>4</sup> Many other states have a similarly disproportionate utilization of capital punishment among their counties.<sup>5</sup>

The uneven use of the death penalty across the nation leads to serious problems. Perhaps most obviously, the counties<sup>6</sup> that often seek the death penalty sometimes choose borderline cases and try them very aggressively in order to win death sentences.<sup>7</sup> Subsequently, many of these cases are reversed on appeal or, worse yet, result in controversial executions that raise serious questions about the culpability of the inmate and provide fodder for critics of capital punishment.<sup>8</sup> This criticism tends to fall on the entire state, rather than on the county that prosecuted the case.<sup>9</sup>

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4. *Id.*; see also Stephen B. Bright, *The Death Penalty and the Society We Want*, 6 PIERCE L. REV. 369, 374 (2008) ("More people sentenced to death in Harris County have been executed than from any state except Texas itself.").

5. Examples abound. In Pennsylvania, the vast majority of death sentences come from Philadelphia County, while comparably sized Pittsburgh sends few people to death row. See Tina Rosenberg, *The Deadliest D.A.*, N.Y. TIMES MAG., July 16, 1995, at 22 (observing that of Pennsylvania's 194 death row inmates, 105, or 55 percent, were sentenced in Philadelphia, where prosecutors seek the death penalty far more frequently than in Pittsburgh). In Maryland, a study found that Baltimore County murderers were fourteen times more likely to be sentenced to death than those convicted in Montgomery County. See Ray Paternoster, *Misunderstandings Cloud Death Penalty Findings*, BALT. SUN, Dec. 20, 2005, at A19 ("Defendants who killed their victims in Baltimore County were . . . nearly 14 times more likely [to be sentenced to death] than if they lived in Montgomery county . . ."). See *infra* notes 51–60 and accompanying text (providing additional examples).

6. Not all states utilize a county-based death penalty system. In a handful of smaller states, the state attorney general's office, rather than individual counties, handles capital cases. See, e.g., Scott Sandlin, *Death Penalty Out in Guard Killing; Inmates' Defense Fund Fell Short*, ALBUQUERQUE J., Apr. 4, 2008, at C1 (noting that the State Supreme Court dismissed capital charges because the Attorney General's Office was unable to procure sufficient funding for capital defense lawyers).

7. See Adam M. Gershowitz, *Imposing a Cap on Capital Punishment*, 72 MO. L. REV. 73, 104–05 (2007) (arguing that the current system allows prosecutors to seek capital punishment in "borderline cases").

8. See JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM, PART II: WHY THERE IS SO MUCH ERROR IN CAPITAL CASES AND WHAT CAN BE DONE ABOUT IT iv (2002) ("The more often states succumb to pressures to inflict capital sentences in marginal cases, the higher is the risk of error and delay, the lower is the chance verdicts will be carried out, and the greater is the temptation to approve flawed verdicts on appeal."). Recently, consider the case of Troy Davis which caused international headlines due to questions of his innocence. Bill Rankin & Rhonda Cook, *Court Issues Stay, Lets Davis Make his Case*, ATLANTA J.-CONST., Oct. 25, 2008, at A1.

9. In Texas, at least, it is quite common to hear Texas executions referred to as "Texecutions." See, e.g., Thom Marshall, *Jury Room Camera Could Help System*, HOUSTON CHRON., Dec. 7, 2002, at A33 ("Harris County is widely known for handing down more death penalties than any other county, in the state that executes more people than any other state in the Union. Texas does about one-third the total number of executions carried out in the United States. I recently heard a fellow refer to them as 'Texecutions.'"). No one speaks of a "Houstonecution," or a "Dall-ecution."

On the other hand, the under-utilization of the death penalty in many counties is equally troubling. Because the death penalty is heavily regulated, it is very expensive to prosecute capital cases.<sup>10</sup> Many small counties faced with heinous crimes do not seek the death penalty because they simply cannot afford to do so.<sup>11</sup> And when infrequent users of the death penalty do try capital cases, they often lack the experience to comply with the highly technical rules that govern such cases.<sup>12</sup> This inexperience results in death sentences being overturned on appeal years later.<sup>13</sup> Those cases are often subsequently retried at great expense<sup>14</sup> to the counties that handle the trials and the states that typically handle the appeals.<sup>15</sup>

In sum, other than the value of regional autonomy, there is little to commend regarding county control of capital cases. This Article therefore offers a roadmap for cutting counties out of the death penalty system. All aspects of death penalty cases—charging, trial, appeal, and everything in between—can and should be handled at the state level by an elite group of prosecutors, defense lawyers, and judges whose sole responsibility is to deal with capital cases. These elite lawyers should be selected through a careful vetting process that considers experience, reversal rates, and clean ethics records.

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10. See, e.g., Shaila Dewan & Brenda Goodwin, *Capital Cases Stall as Costs Grow Daunting*, N.Y. TIMES, Nov. 4, 2007 (noting that the costs of prosecuting the Atlanta courthouse shooter had topped \$1.2 million before the trial even began); Kevin Landrigan, *Taxpayers Could Be Out \$2M for Capital Cases*, NASHUA TELEGRAPH, Mar. 27, 2008 (discussing the high cost of two pending capital murder cases). For a recent editorial suggesting that costs should never be a factor in deciding whether to seek the death penalty, see Editorial, *Money Has No Place in Death Penalty Debate*, STAR PRESS, Sept. 21, 2008, at 2D. For commentary asserting the foolishness of saying money has no place in such decisions, see Douglas A. Berman, *Does Money Have No Place In Any Life/Death Debate?*, SENTENCING L. & POL'Y, Sept. 21, 2008, [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2008/09/does-money-have.html#comments](http://sentencing.typepad.com/sentencing_law_and_policy/2008/09/does-money-have.html#comments) (quoting and criticizing the above editorial from The Star Press).

11. See discussion *infra* Part I.C.

12. See *infra* notes 91–93 and accompanying text.

13. There is an expression among prosecutors that they are “in the business of sales, not warranties.”

14. Consider the case of John Paul Penry who was sentenced to death three separate times, each of which was reversed on appeal. Penry was on death row in Texas for twenty-eight years before the district attorney agreed to a plea deal with a life sentence. Mike Tolson, *An End to a Legal Saga: Deal Keeps Penry Imprisoned for Life: Inmate Who Had Death Sentence Overturned Three Times Apologizes*, HOUSTON CHRON., Feb. 16, 2008, at B1. Experts speculate that the effort to execute Penry cost tens or perhaps even hundreds of millions of dollars. See Douglas A. Berman, *Wondering About Death and Dollars in Ohio*, SENTENCING L. & POL'Y, Feb. 18, 2008, [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2008/02/wondering-about.html](http://sentencing.typepad.com/sentencing_law_and_policy/2008/02/wondering-about.html) (estimating that Penry's defense may have cost as much as one billion dollars).

15. Although counties usually pay for trials, many states pick up the tab for appeals. Adam M. Gershowitz, *Pay Now, Execute Later: Why Counties Should Be Required to Post a Bond to Seek the Death Penalty*, 41 U. RICH. L. REV. 861, 891 (2007).

Although these lawyers and judges will be drawn from counties throughout the states, they should be paid by the states in order to reduce the pervasive funding problem that currently hinders the entire death penalty system.<sup>16</sup>

Such a statewide system will cost a substantial amount of money *ex ante*. In the long run, however, a statewide approach will cut costs by eliminating some of the appellate issues that are litigated at enormous expense for years after trial. For instance, the typical capital appeal almost always raises claims that prosecutors hid favorable evidence and that the defendant's lawyer was ineffective.<sup>17</sup> With an elite statewide unit of capital prosecutors and defense lawyers, appellate judges would likely face far fewer legitimate claims of this type and would be able to dispose of such frivolous claims much faster. An elite team of lawyers would be more likely to comply with the law, thus avoiding not only reversals but also the costly retrials and subsequent appeals following a second death sentence.

Moreover, a statewide approach would go a long way toward eliminating the geographic arbitrariness of the death penalty within death penalty states. Wealthy counties will find it hard to convince prosecutors based out of other jurisdictions to seek the death penalty in borderline cases. Poor counties that previously lacked the funds to seek death for heinous crimes will have a chance to have their cases considered on the merits and without regard to costs.

Finally, staffing the death penalty system with elite prosecutors, defense attorneys, and judges will help to restore confidence in both the overall system and individual verdicts. Critics of capital punishment will find it much harder to point their fingers at overzealous prosecutors or criticize the pervasive problem of underfunded or inadequate defense counsel that currently exists in numerous jurisdictions throughout the country.<sup>18</sup> Providing elite

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16. See David McCord, *Lightning Strikes: Evidence from the Popular Press that Death Sentencing Continues to be Unconstitutionally Arbitrary More than Three Decades After Furman*, 71 BROOK. L. REV. 797, 822–23 (2005) (“In only two jurisdictions does an official with jurisdiction-wide authority make death penalty decisions . . . These disparities are exacerbated by the fact that funding of prosecutors’ offices is also largely at the county level . . . Likewise, funding for indigent defense in death cases is also often at the county level . . .”).

17. See Sheri Lynn Johnson, *Wishing Petitioners to Death: Factual Misrepresentations in Capital Cases in the Fourth Circuit*, 91 CORNELL L. REV. 1105, 1108 n.5 (2006) (“The three most common species of claims in capital cases are ineffective assistance of counsel claims, *Batson* claims, and *Brady* claims.”); see also ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 131 (2007) (“*Brady* violations are among the most common forms of prosecutorial misconduct.”).

18. See, e.g., Stephen Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime, But for the Worst Lawyer*, 103 YALE L.J. 1835, 1836 (1994) (“Poor people accused of

defense lawyers also will lead to more accurate results at trial, thus reducing wrongful convictions that have remained all too common in the modern death penalty era.<sup>19</sup>

Part I of this Article reviews the serious defects present in county-centered death penalty systems. In particular, Part I focuses on the variations in capital charging between counties, the underfunding of county-based indigent defense systems, and the problems caused by inadequate judges. Part II then articulates how a statewide death penalty system could be created to eliminate counties' involvement. Part II describes a selection process that would ensure the best prosecutors, defense lawyers, and judges from around the state. Part II also explains how the formation of an elite prosecution unit would transform capital charging from a solitary and potentially arbitrary exercise into a more consistent committee-based decision. Part III then details how a statewide capital punishment framework would depoliticize the death penalty and provide for long-term cost savings.

## I. THE PROBLEMS WITH COUNTY-CONTROLLED CAPITAL CASES

### *A. Differentiating State Arbitrariness from County Arbitrariness*

Critics have long complained about the geographic arbitrariness of the death penalty. It is almost trite for observers to lament how Texas is the capital of capital punishment while other states either do not authorize the death penalty or have it in name only. At first blush, it is troubling that a defendant has a dramatically greater chance of receiving the death penalty in Texas or other southern states than he would in other parts of the country.<sup>20</sup> Yet variations between states can be explained as a matter of federalism.<sup>21</sup>

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capital crimes are often defended by lawyers who lack the skill, resources, and commitment to handle such serious matters.”).

19. There have been 133 exonerations of death row inmates since the Supreme Court reinstated capital punishment in 1976. See DEATH PENALTY INFO. CTR., INNOCENCE AND THE DEATH PENALTY, <http://www.deathpenaltyinfo.org/innocence-and-death-penalty> (last visited Jan. 31, 2010) (listing number of exonerations by year).

20. I have raised this argument previously. Gershowitz, *supra* note 7, at 90–91.

21. See Andrew Ditchfield, Note, *Challenging the Intrastate Disparities in the Application of Capital Punishment Statutes*, 95 GEO. L.J. 801, 805 (2007) (“Reference to sovereignty rights supports interstate variations in the application of the death penalty, but it does not support variations in the application of a capital punishment statute among different legal jurisdictions within the same state.”).

As a sovereign state, Texas has the prerogative to use the death penalty frequently<sup>22</sup> even though other states seek it rarely.<sup>23</sup>

Federalism, however, cannot explain the wide variations between counties in the same state.<sup>24</sup> After all, if a sovereign state has made the decision to authorize capital punishment and enact statutes designed to vigorously pursue the death penalty, what justification is there for the difference between life and death to depend on what side of the county line a criminal commits his offense?<sup>25</sup> While it is true that county citizens typically have the power to elect their own district attorneys rather than accept officials appointed by the state, those prosecutors act on behalf of the state, not the county, in criminal cases.

Moreover, all county prosecutors are obligated to enforce the same state law. While every criminal statute necessarily leaves some room for interpretation at the margins, the Supreme Court has been firm about the need for death penalty statutes to be clear and capable of consistent application.<sup>26</sup> For instance, the Court has demanded that the statutory aggravating factors making a defendant death eligible be narrowly tailored so as to separate death-worthy cases from ordinary murders.<sup>27</sup> Such a requirement is seemingly inconsistent with a framework that gives prosecutors in different parts of a state great discretion to utilize the same statute in opposite fashions.

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22. See Doron Teichman, *The Market for Criminal Justice: Federalism, Crime Control, and Jurisdictional Competition*, 103 MICH. L. REV. 1831, 1834 (2005) (observing and lamenting how decentralized criminal justice encourages jurisdictions to harshen their criminal laws in order to drive criminals to other jurisdictions).

23. For instance, Colorado has executed one person since 1976 and presently has only three people on death row awaiting execution. DEATH PENALTY INFO. CTR., STATE BY STATE DATABASE, [http://www.deathpenaltyinfo.org/state\\_by\\_state](http://www.deathpenaltyinfo.org/state_by_state) (click on Colorado using the map or drop-down menu) (last visited Jan. 31, 2010).

24. Ditchfield, *supra* note 21, at 805.

25. Counties are not treated as separate sovereigns for double jeopardy purposes. See *Waller v. Florida*, 397 U.S. 387, 392 (1970) (forbidding a second trial by state prosecutors after defendant was first prosecuted for the same offense by county prosecutors).

26. See Carol S. Steiker & Jordan M. Steiker, *Judicial Developments in Capital Punishment Law*, in *AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT* 47, 57–59 (James R. Acker et al. eds., 1998) (discussing the Court's "narrowing" doctrine). But see Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme*, 6 WM. & MARY BILL RTS. J. 345, 364–68 (1998) (arguing that the Court has not followed through on its demand for narrow aggravating factors).

27. See *Maynard v. Cartwright*, 486 U.S. 356, 359–60 (1988) (holding unconstitutionally vague under the Eighth Amendment the "especially heinous, atrocious, or cruel" aggravating circumstance of the Oklahoma death penalty statute because it did not provide sufficient guidance for the jury to impose the death penalty); *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980) (reversing the petitioner's death sentence because there was "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not").



Counties' autonomy to prosecute cases as they see fit is so tenuous that some states even have statutes authorizing state officials to wrestle cases away from county prosecutors.<sup>28</sup> For instance, when the Bronx County District Attorney declined to seek the death penalty in a high-profile case, the Governor of New York accused him of refusing to enforce state law.<sup>29</sup> The Governor turned the case over to the state attorney general, who subsequently filed a notice to seek the death penalty.<sup>30</sup> Some states have gone even further and abolished county prosecution units altogether.<sup>31</sup> Indeed, states actually have the authority to abolish the counties themselves if they so desire.<sup>32</sup> There seems little justification to tolerate arbitrariness in the application of the death penalty between counties of the same state. Yet that is exactly what happens throughout the United States.

### *B. Wide Disparities in Application of the Death Penalty Within States*

While state legislatures authorize capital punishment and draft the statutes under which it will be imposed, actual enforcement typically falls to county prosecutors. And within individual states, counties often have vastly different practices in determining whether to seek the death penalty.

The widest variations between counties' use of the death penalty appear to exist in Pennsylvania. Although Pennsylvania has only carried out three executions since it reenacted its death penalty

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28. See John A. Horowitz, Note, *Prosecutorial Discretion and the Death Penalty: Creating a Committee to Decide Whether to Seek the Death Penalty*, 65 *FORDHAM L. REV.* 2571, 2587–92 (1997) (discussing how local district attorneys in California and Colorado are supervised by their states' attorneys general and how the attorneys general have supersedure power to remove cases from the local prosecutors).

29. See *id.* at 2582–84 (recounting Governor Pataki's removal of District Attorney Johnson's discretion to seek the death penalty in the Diaz case).

30. *Id.*

31. In Delaware and Rhode Island, for instance, the state attorney general's office, rather than county prosecutors, handle all of the states' criminal cases. Delaware Attorney General, Divisions & Units: Criminal Division, <http://attorneygeneral.delaware.gov/office/criminal.shtml> (last visited Jan. 31, 2010); State of Rhode Island Office of the Attorney General, Civil and Criminal Division, <http://www.riag.state.ri.us/civilcriminal/> (last visited Jan. 31, 2010). Rhode Island does not authorize capital punishment. DEATH PENALTY INFO. CTR., STATE BY STATE DATABASE, [http://www.deathpenaltyinfo.org/state\\_by\\_state](http://www.deathpenaltyinfo.org/state_by_state) (click on Rhode Island using the map or drop-down menu) (last visited Jan. 31, 2010).

32. See Pamela S. Karlan, *Just Politics? Five Not So Easy Pieces of the 1995 Term*, 34 *HOUSTON L. REV.* 289, 302 (1997) (recounting how the State of Alabama adopted a constitutional amendment in the 1950s to abolish Macon County "if necessary" to prevent blacks from voting).

in 1974,<sup>33</sup> it presently has 223 inmates on death row.<sup>34</sup> Roughly half of those inmates—106—came from Philadelphia County,<sup>35</sup> where the longtime district attorney<sup>36</sup> has said that she seeks the death penalty as often as possible.<sup>37</sup> Although Philadelphia County accounts for about 10 percent of Pennsylvania's population, it is responsible for 48 percent of inmates on death row. By contrast, Allegheny County, which includes Pittsburgh and has a nearly identical population, has only eleven inmates on death row. The following table illustrates how Philadelphia County is a striking outlier in Pennsylvania in regards to capital punishment:

<u>Jurisdiction</u>	<u>People Sent to Death Row</u> <sup>38</sup>	<u>Population</u> <sup>39</sup>	<u>Percentage of Total State Population</u>	<u>Percentage of Death Row</u>
Entire State of Pennsylvania	223	12,448,279	100%	100%
Philadelphia County, PA	106	1,447,395	12%	48%
Allegheny County, PA	10	1,215,103	10%	4%

Texas likewise has wide variations in its counties' application of capital punishment. Between 1976, when the Supreme Court

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33. DEATH PENALTY INFO. CTR., STATE BY STATE DATABASE, [http://deathpenaltyinfo.org/state\\_by\\_state](http://deathpenaltyinfo.org/state_by_state) (click on Pennsylvania using the map or drop-down menu) (last visited Jan. 31, 2010).

34. See PA. DEPT OF CORR., PERSONS SENTENCED TO EXECUTION IN PENNSYLVANIA AS OF NOVEMBER 2, 2009, *available at* [http://www.cor.state.pa.us/portal/lib/portal/Execution\\_List.pdf](http://www.cor.state.pa.us/portal/lib/portal/Execution_List.pdf) [hereinafter PDC, PERSONS SENTENCED].

35. *Id.*

36. Lynne Abraham has served as Philadelphia County District Attorney since 1991. City of Philadelphia District Attorney's Office, Meet the District Attorney, <http://www.phila.gov/districtattorney/AboutUs/meetTheDA.html> (last visited Jan. 31, 2010).

37. See Rosenberg, *supra* note 5, at 22 ("Abraham's office seeks death virtually as often as the law will allow."); see also William C. Smith, *A Tale of Two Cities*, LEGAL INTELLIGENCER, Jan. 15, 1997, at 1 (explaining that the difference is due in part to the higher murder rate in Philadelphia but in greater part to the fact that the "Philadelphia D.A.'s office is much more aggressive in seeking the death penalty").

38. PDC, PERSONS SENTENCED, *supra* note 34.

39. All populations are taken from the estimated 2008 Census. See U.S. CENSUS BUREAU, STATE & COUNTY QUICKFACTS: PENNSYLVANIA, <http://quickfacts.census.gov/qfd/states/42000.html> (last visited Jan. 31, 2010) (follow "Allegheny" or "Philadelphia" hyperlink under "Pennsylvania counties").

reinstated capital punishment,<sup>40</sup> and December 2008, Texas sent over a thousand inmates to death row.<sup>41</sup> Remarkably, even though Texas has 254 counties, a single county accounted for 280 of the death-sentenced inmates.<sup>42</sup> Harris County, which is home to the nation's fourth-largest city (Houston), accounts for 16 percent of Texas's population, but 28 percent of its death sentences.<sup>43</sup> When three additional counties—Bexar, Dallas, and Tarrant—are added to Harris County, those four localities account for 51 percent of Texas's death sentences, but only 40 percent of its population.<sup>44</sup> Adding the death sentences from fourteen additional counties accounts for roughly 75 percent of Texas's total death sentences.<sup>45</sup> By contrast, there are more than 130 Texas counties that have never sent an inmate to death row in the last three decades.<sup>46</sup>

In Maryland, the city of Baltimore has a high crime rate but rarely seeks the death penalty.<sup>47</sup> By contrast, neighboring Baltimore County, which is a separate jurisdiction with dramatically fewer homicides, seeks the death penalty with much greater frequency.<sup>48</sup> One study found that murder defendants in Baltimore County were

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40. See *Gregg v. Georgia*, 428 U.S. 153, 169 (1976) (“We now hold that the punishment of death does not invariably violate the Constitution.”).

41. See TDCJ, TOTAL NUMBER OF OFFENDERS, *supra* note 3 (listing 1,004 offenders sentenced to death as of December 31, 2008). Of course, many of these death sentences were reversed and did not result in executions.

42. *Id.*

43. *Id.*; U.S. CENSUS BUREAU, STATE & COUNTY QUICKFACTS: HARRIS COUNTY, TEXAS, <http://quickfacts.census.gov/qfd/states/48/48201.html> (last visited Jan. 31, 2010). Although revealing, these numbers do not tell the full story. For many years, Harris County sought the death penalty so aggressively that it had a comparatively low success rate at trial. For instance, in 1999, prosecutors only won death sentences in 53 percent of the cases where they sought death. See Mary Flood, *What Price Justice?: Gary Graham Case Fuels Debate Over Appointed Attorneys*, HOUSTON CHRON., July 1, 2000, at A1. A Houston Chronicle study found that during the 1980s and 1990s, Dallas County prosecutors won death sentences in 94 percent of the cases in which it was sought compared with 75 percent in Harris County. See Mike Tolson, *A Deadly Distinction: Harris County Is a Pipeline to Death Row*, HOUSTON CHRON., Feb. 5, 2001, at A1. In 2008, for the first time in three decades, Harris County did not sentence a single defendant to death. Michael Graczyk, *Texas Sentences 9 To Die in '08, Fewest in Decades*, ASSOC. PRESS, Dec. 4, 2008.

44. U.S. CENSUS BUREAU, STATE & COUNTY QUICKFACTS: TEXAS, <http://quickfacts.census.gov/qfd/states/48000.html> (last visited Jan. 31, 2010) (follow “Bexar,” “Dallas,” “Harris,” or “Tarrant” hyperlink under “Texas counties”).

45. See TDCJ, TOTAL NUMBER OF OFFENDERS, *supra* note 3 (listing Texas death penalties by county). The fourteen additional counties are: Bowie, Brazos, Cameron, Collin, El Paso, Hidalgo, Jefferson, Lubbock, McLennan, Montgomery, Nueces, Potter, Smith, and Travis.

46. *Id.*

47. See Lori Montgomery, *Md. Questioning Local Extremes on Death Penalty*, WASH. POST, May 12, 2002, at C1 (indicating that Baltimore seeks the death penalty infrequently).

48. See *id.* (comparing Baltimore and Baltimore County).

twenty-three times more likely to be sentenced to death than in Baltimore City.<sup>49</sup> The same study also found that Baltimore County prosecutors sought the death penalty far more often than prosecutors in Montgomery County and Prince George's County, both of which are only a short drive from Baltimore.<sup>50</sup>

Before New York's highest court held that state's death penalty statute unconstitutional,<sup>51</sup> prosecutors from upstate counties sought the death penalty "aggressively."<sup>52</sup> Although upstate jurisdictions accounted for only 20 percent of New York's murders, they accounted for 65 percent of the state's capital prosecutions.<sup>53</sup> By contrast, prosecutors in New York City rarely sought the death penalty; the Bronx District Attorney refused to seek it at all.<sup>54</sup>

In Ohio, the Hamilton County District Attorney's Office (based out of Cincinnati) has pursued the death penalty more aggressively than the Franklin County District Attorney's Office (which includes the larger city of Columbus).<sup>55</sup> Even though Franklin County has 200,000 more residents than Hamilton County,<sup>56</sup> it had only one-third as many inmates on death row as of December 2008.<sup>57</sup>

In Tennessee, the Davidson County District Attorney's Office (which is home to Nashville) seeks the death penalty less often than the Shelby County District Attorney's Office (which includes the city of Memphis).<sup>58</sup> There are three times as many inmates on death row

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49. Paternoster, *supra* note 5, at A19.

50. *Id.*

51. See *People v. LaValle*, 817 N.E.2d 341, 361 (N.Y. 2004) (holding jury instruction unconstitutional).

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

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

54. See Nossiter, *supra* note 52 (noting the Bronx District Attorney's intention not to seek the death penalty after New York's 1995 statute took effect).

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

56. Compare U.S. CENSUS BUREAU, STATE & COUNTY QUICKFACTS: FRANKLIN COUNTY, OHIO (2009), <http://quickfacts.census.gov/qfd/states/39/39049.html> (listing the population of Franklin County), with U.S. CENSUS BUREAU, STATE & COUNTY QUICKFACTS: HAMILTON COUNTY, OHIO (2009), <http://quickfacts.census.gov/qfd/states/39/39061.html> (listing the population of Hamilton County).

57. See Ohio Department of Rehabilitation and Correction, Death Row Inmates, <http://www.drc.state.oh.us/Public/deathrow.htm> (last visited Jan. 31, 2010) (including a list of inmates indicating that there were thirty-six from Hamilton County and twelve from Franklin County).

58. See John M. Scheb II, William Lyons & Kristin A. Wagers, *Race, Prosecutors and Juries: The Death Penalty in Tennessee*, 29 JUST. SYST. J. 338, 345 (2008) ("In Shelby County, which contains Memphis, prosecutors sought the death penalty 52 percent of the time, while in

from Shelby County than there are from Davidson County,<sup>59</sup> despite the fact that the former has only a 44 percent greater general population than the latter.<sup>60</sup>

As these and other<sup>61</sup> examples indicate, throughout the country there are wide variations in the use of the death penalty between counties of the same state.

### *C. Explaining the Discrepancies between Counties*

At the outset, I should be clear that I do not mean to suggest that the district attorneys who frequently seek the death penalty are bloodthirsty, nor that those who use it sparingly are soft on crime. One county might use the death penalty more frequently because its chief prosecutor genuinely believes it is merited.<sup>62</sup> There are also obvious differences in crime rates between different counties of the same state, even if they are comparably sized.<sup>63</sup> In Pennsylvania, Allegheny County is nearly as populated as Philadelphia County, yet the latter has more than four times as many murders in an average year.<sup>64</sup>

Still, even when considering varying crime rates and legitimate differences of opinion as to which crimes are worthy of death, it is hard to explain the wide variations in counties' use of the death penalty. Are there really ten times as many death-eligible murders in Philadelphia County as there are in Allegheny County? Are there

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Davidson County (Nashville) prosecutors pursued capital punishment only 12 percent of the time.”).

59. See Tennessee Department of Corrections, Death Row Facts, <http://www.tennessee.gov/correction/deathfacts.html> (last visited Jan. 31, 2010) (indicating that there are thirty-six inmates on death row from Shelby County and eleven from Davidson County).

60. The most recent estimates were that Davidson County's population was 626,144 and Shelby County's population was 906,825. U.S. CENSUS BUREAU, STATE & COUNTY QUICKFACTS: DAVISON COUNTY, TENNESSEE (2009), <http://quickfacts.census.gov/qfd/states/47/47037.html>; U.S. CENSUS BUREAU, STATE & COUNTY QUICKFACTS: SHELBY COUNTY, TENNESSEE (2009), <http://quickfacts.census.gov/qfd/states/47/47157.html>.

61. See, e.g., Joseph R. McCarthy, Note, *Implications of County Variance in New Jersey Capital Murder Cases: Arbitrary Decision-Making by County Prosecutors*, 19 N.Y.L. SCH. J. HUM. RTS. 969, 980–83 (reviewing variations in New Jersey, Nebraska, and Virginia).

62. See Anthony Neddo, *Prosecutorial Discretion in Charging the Death Penalty: Opening the Doors to Arbitrary Decisionmaking in New York Capital Cases*, 60 ALB. L. REV. 1949, 1950 (1997) (“[C]harging the death penalty may depend on arbitrary decisionmaking processes reflective of an individual prosecutor's moral or ideological position on the death penalty, or on his or her notion of justice.”).

63. See *supra* notes 34–38 (detailing the difference between Philadelphia and Pittsburgh).

64. See U.S. DEP'T OF COMMERCE, COUNTY AND CITY DATA BOOK 374–75 (14th ed. 2007).

three times as many heinous murders committed in Houston as there are in Dallas?<sup>65</sup>

An alternate and more plausible explanation for much of the variation in some counties is money. While prosecutors regularly make public statements that they do not consider costs in deciding whether to seek the death penalty,<sup>66</sup> it is unlikely that they are completely blind to financial concerns.<sup>67</sup> Larger counties typically have larger budgets and can afford to prosecute more capital cases.<sup>68</sup> By contrast, prosecutors<sup>69</sup> in smaller counties, or counties facing very tight budgets, must look beyond the merits of the case to determine whether they can afford the enormous costs of capital litigation.<sup>70</sup>

For instance, prosecutors in Shelby County, Texas, which has a population of less than thirty thousand people,<sup>71</sup> recently decided not to seek the death penalty for a defendant who was accused of three

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65. Harris County has sent nearly three times as many defendants to death row as Dallas County. See TDCJ, TOTAL NUMBER OF OFFENDERS, *supra* note 3 (listing the number of murders committed in Houston and Dallas).

66. See, e.g., *Prosecutor: Death Penalty Hinges on Justice, Not Money*, SEATTLE TIMES, June 19, 2000, at B2 (“Spokane County Prosecutor Steve Tucker says money won’t be a factor in his decision whether to pursue the death penalty against Robert Yates Jr. in eight serial killings. ‘It’s about seeking justice. Money won’t or shouldn’t play into it at all,’ Tucker said last week.”).

67. See Amanda S. Hitchcock, Comment, *Using the Adversarial Process to Limit Arbitrariness in Capital Charging Decisions*, 85 N.C. L. REV. 931, 951 (2007) (“Prosecutors cannot simply ignore these [cost] realities”); see also Berman, *supra* note 14 (arguing that costs are a relevant consideration).

68. See Steve Brewer, *A Deadly Distinction; County Has Budget to Prosecute with a Vengeance; District Attorney’s Office Focuses on Capital Cases, and Commissioners Court Backs Up the Approach*, HOUSTON CHRON., Feb. 4, 2001 (quoting a state district judge as saying that “one of the reasons Harris County tries so many capital murder cases is simple economics – we can afford to”).

69. In one case, a judge actually forbade prosecutors from seeking the death penalty because the cost of providing an adequate defense would bankrupt the county which had a population of less than 13,000 people. Recognizing that such a ruling was impermissible, the judge quickly reversed course. See *Judge Changes Mind on Murder Costs*, N.Y. TIMES, Aug. 25, 2002, § 1, at 22 (discussing the judge’s reversal).

70. Factoring in financial considerations is not limited to capital cases. District attorneys are forced to take into account financial considerations every day in virtually every facet of their office policies. For example, as Dan Richman and Bill Stuntz have explained, state prosecutors rarely pursue high-end white-collar crime because the investigation necessary to win such cases is too expensive. See Daniel C. Richman & William J. Stuntz, *Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 601–02 (2005) (discussing why only federal district attorneys can afford the high cost of pursuing certain investigations). It would be surprising if it were any different with respect to capital cases.

71. See U.S. CENSUS BUREAU, POPULATION FINDER: SHELBY COUNTY, TEXAS, [http://www.factfinder.census.gov/servlet/SAFFPopulation?geo\\_id=05000US48419&\\_state=04000US48&pctxt=cr](http://www.factfinder.census.gov/servlet/SAFFPopulation?geo_id=05000US48419&_state=04000US48&pctxt=cr) (last visited Jan. 31, 2010) (listing the population for Shelby County, Texas in 2008 as 26,529).

separate murders and had already confessed to two of them.<sup>72</sup> Shelby County has sent only one person to death row in the last thirty years.<sup>73</sup> The County's elected district attorney said that the defendant deserved the death penalty, but she ultimately agreed to a punishment of three life sentences because of "limited resources for a death penalty prosecution."<sup>74</sup>

In Pike County, Indiana (population thirteen thousand),<sup>75</sup> prosecutors declined to seek the death penalty for three men who kidnapped a woman and drove over her body up to thirty times while she was still alive.<sup>76</sup> The victim's mother claimed that the prosecutor told her the county could not seek the death penalty because it was too expensive, though the prosecutor denies making this statement.<sup>77</sup> A similar allegation was made in Greene County, Indiana (population thirty-three thousand),<sup>78</sup> where the family of a mentally disabled woman who was raped, tortured, and murdered<sup>79</sup> claimed cost prohibited the prosecutor from seeking death.<sup>80</sup> Once again, the prosecutor denied considering costs.<sup>81</sup> Although it is impossible to say for certain that the prosecutors from these two small Indiana counties were lying about not considering costs, it would make logical sense for them to make that very calculation. Prosecutors from Indiana's largest county (Marion County) have estimated that death penalty trials in that state require the resources of five "normal" murder cases.<sup>82</sup>

Other prosecutors from across the country have grudgingly acknowledged that costs play into decisions to seek the death penalty.

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72. Matthew Stoff, *After Confession, Smith Sentenced to Three Life Terms*, DAILY SENTINEL, Apr. 3, 2008.

73. TDCJ, TOTAL NUMBER OF OFFENDERS, *supra* note 3.

74. Stoff, *supra* note 72.

75. U.S. CENSUS BUREAU, STATE & COUNTY QUICKFACTS: PIKE COUNTY, INDIANA, <http://quickfacts.census.gov/qfd/states/18/18125.html> (last visited Jan. 31, 2010).

76. Tim Sparks, *Cost of Death Penalty Trial Can Tip Decision*, FORT WAYNE J. GAZETTE, Oct. 25, 2001, at 1.

77. *Id.*

78. U.S. CENSUS BUREAU, STATE & COUNTY QUICKFACTS: GREENE COUNTY, INDIANA, <http://quickfacts.census.gov/qfd/states/18/18055.html> (last visited Jan. 31, 2010).

79. *See Suspect Makes Deal To Testify in Slaying*, MOBILE REG., Feb. 4, 1999, at Z10.

80. Sparks, *supra* note 76.

81. *Id.* In another Indiana case, prosecutors declined to seek the death penalty for a nurse convicted of killing six patients and suspected in the deaths of dozens of others because of the costs of seeking the death penalty. *See* Bill Dedman, *Ex-Nurse Sentenced to 360 Years in Killings*, N.Y. TIMES, Nov. 16, 1999, at A21 ("Prosecutors did not seek the death penalty because of the higher costs of prosecuting a death penalty case.").

82. Sparks, *supra* note 76 (quoting Marion County prosecutor as saying that "the cost of the death penalty is never a factor in deciding against pursuing a death sentence" even though "a death penalty trial there demands the resources of five normal murder cases").

The District Attorney of Victoria County, Texas (population eighty-six thousand)<sup>83</sup> has stated that “he must consider many factors, including strategy, time and cost when deciding if he’ll seek the death penalty.”<sup>84</sup> In Hamilton County, Ohio, a Cincinnati prosecutor defended a plea bargain for a man who opened fire inside a business and killed two people because it “spared the victims the trauma of a trial and saved the taxpayers thousands of dollars.”<sup>85</sup> In Albuquerque, New Mexico, a prosecutor declined to seek the death penalty for a man accused of killing three people primarily because of the strength of the case.<sup>86</sup> Although the prosecutor claimed resources were a secondary priority, she did acknowledge that seeking death “would take a minimum of seven people out of the office for eight weeks. And we have a tremendous caseload, a tremendous demand for our resources.”<sup>87</sup> In Baltimore City, which rarely seeks the death penalty,<sup>88</sup> a veteran prosecutor explained, “I don’t have a moral problem with the death penalty; I have a resource problem with it.”<sup>89</sup> Put simply, prosecutors only have a certain amount of money, and they must prioritize how to spend it.<sup>90</sup>

Unfortunately, the importance of money compounds the arbitrariness problem over time. Counties with the funds to prosecute large numbers of death penalty cases end up handling many of those cases and thereby training their lawyers how to litigate them effectively.<sup>91</sup> Thus, county prosecutors with the most death penalty experience should be more likely to win at trial and should be able to

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83. U.S. CENSUS BUREAU, STATE AND COUNTY QUICK FACTS: VICTORIA COUNTY, TEXAS, <http://quickfacts.census.gov/qfd/states/48/48469.html> (last visited Jan. 31, 2010).

84. See, e.g., Leslie Wilber, *No Death Penalty for 2 Defendants in Slaying*, VICTORIA ADVOCATE, May 8, 2008 (quoting the Victoria County District Attorney as saying that cost is one factor that must be considered in deciding whether to seek the death penalty).

85. Jessica Brown, *West Gets 2 Life Terms, No Parole*, CINCINNATI POST, Aug. 24, 2004.

86. Ollie Reed, Jr., *DA Decision Not to Retry Harrison Wasn’t Easy*, ALBUQUERQUE TRIB., Feb. 19, 2001, at A1.

87. *Id.*

88. See *supra* note 47 and accompanying text.

89. Julie Bykowicz, *Death Penalty Has Cost: Circumstances, Resources Guide Baltimore’s Policy*, BALT. SUN, Sept. 3, 2006, at 1A.

90. See *infra* Part III.A (discussing the cost savings that come from a statewide capital punishment system). In some states, the state government does step up to the plate to reimburse counties for some of the high costs of death penalty prosecutions. See *infra* notes 223–227 and accompanying text.

91. See Brewer, *supra* note 68 (quoting veteran Harris County prosecutor Ted Wilson as saying, “Quite honestly, we just do so damn many more of [capital cases] than anyone else. You could go into any district attorney’s office in the state and not find as many lawyers with capital prosecution experience.”).



maintain a clean record that will survive on appeal.<sup>92</sup> By contrast, counties that rarely seek the death penalty have little institutional knowledge on how to handle such complicated cases. This relative inexperience would seemingly lead to increased costs and more losses at trial. In turn, the monetary and psychological toll may well lead small counties to hesitate before seeking the death penalty in situations where a district attorney's office experienced in death penalty litigation would have no such hesitation.<sup>93</sup>

Financial factors also likely affect the viewpoints of lawyers who spend their entire careers in a single district attorney's office and rise to leadership positions. Prosecutors who work for years in offices that have the resources to seek the death penalty consistently may come to see aggressive use of the death penalty as appropriate. By contrast, prosecutors in cash-strapped counties that never saw their supervisors pursuing capital punishment may be more likely to believe that this approach is correct.<sup>94</sup> Regardless of which approach is correct, these entrenched views of the death penalty are likely passed down from one generation of lawyers to the next.<sup>95</sup> And these

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92. The former proposition—winning at trial—is not controversial, however the latter proposition—surviving on appeal—is not supported by Professor Liebman's study of thousands of death penalty cases. See LIEBMAN ET AL., *supra* note 8, at 340 (finding that the higher the rate a county imposes death sentences, the higher the reversal rate); see also James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2048 (2000) (discussing the strong incentives to overproduce death sentences).

93. This issue has recently arisen in the very expensive "big city" Atlanta prosecution of Brian Nichols for killing four courthouse employees. A Republican State Senator recently explained that "the cost of the Nichols case is making prosecutors think twice about whether to seek the death penalty in future cases." NPR Morning Edition, *Delays Costly In Courthouse Slaying Suspect's Trial*, 2008 WLNR 12936560, July 10, 2008.

94. See Michael Edmund O'Neill, *When Prosecutors Don't: Trends in Federal Prosecution Declinations*, 79 NOTRE DAME L. REV. 221, 241 (2003) ("Lawyers in a particular U.S. Attorney's office generally hail from that district, and thus are nurtured in a particular legal climate unique to that jurisdiction. What juries and federal prosecutors deem important in a small district that encompasses rural communities may be quite different from those in a large, urban district. As a consequence, even if the policies are not expressly recorded, individual offices will have declination guidelines that arise from custom or practice."); see also Frank O. Bowman III, Response, *American Buffalo: Vanishing Acquittals and the Gradual Extinction of the Federal Criminal Trial Lawyer*, 156 U. PA. L. REV. PENNUMBRA 226, 239 (2007), <http://www.pennumbra.com/responses/11-2007/Bowman.pdf> ("[P]rosecutors made cautious by inexperience and office culture may be especially likely to make risky cases go away, leaving little but 'slam dunks' for trial."); Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 424 (contending that "culture of integrity, as defined by clearly understood and implemented policies and rules, may be more important in shaping the ethics . . . than hiring the 'right' people" (internal quotations and citations omitted)).

95. See, e.g., Tolson, *supra* note 43 (explaining how the newly elected district attorney in Harris County, who had worked with his predecessor for nearly two decades, "promises no change in philosophy on the use of capital punishment").

entrenched opinions help to explain why, over long periods of time, some counties have a stronger culture of seeking the death penalty.

In sum, although most elected prosecutors will not admit it publicly, money affects use of the death penalty. Wealthy counties can afford to seek death more often, and doing so may become a self-fulfilling prophecy whereby their lawyers are well trained to handle such cases and see death as appropriate. By contrast, smaller and poorer counties will pass up the opportunity to seek the ultimate punishment because they lack the enormous funds necessary to do so.

*D. A County-Based System Allows the Problem of Inadequate Lawyers and Under-Funded Indigent Defense to Fester*

The problems with capital punishment are certainly not limited to the prosecution side. Nearly all capital defendants are too poor to hire their own lawyers and are therefore provided with free counsel in the form of a public defender or an appointed lawyer.<sup>96</sup> Unfortunately, in many jurisdictions these poor defendants receive inadequate representation because their lawyers are ineffective or because otherwise-competent lawyers are woefully underfunded.<sup>97</sup>

The former problem—utterly incompetent lawyers—receives the most attention. There are frightening stories about sleeping or intoxicated lawyers who provide practically no assistance at trial. The state of North Carolina executed a man in 2001 even though his lawyer admitted to drinking twelve shots of rum every day during the penalty phase of the trial.<sup>98</sup> The lawyer failed to present the jury with evidence that the defendant's alcoholic parents had given him away when he was four years old, he had started using cocaine before his teenage years, and he had been shuffled to six different families before dropping out of high school.<sup>99</sup> Around the time of trial, the lawyer was in a midday car accident and found to have a near-lethal blood-alcohol level of 0.44.<sup>100</sup>

Then there are the lawyers appointed to capital cases despite being sanctioned for prior misconduct. A Tennessee study found that eleven lawyers remained eligible to take death penalty cases despite having been disciplined by the Bar “for unethical or illegal

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96. See Robert Weisberg, *Who Defends Capital Defendants?*, 35 SANTA CLARA L. REV. 535, 535 (1995) (“The State virtually always pays for the defense of those whom it seeks to execute.”).

97. Bright, *supra* note 18, at 1844.

98. Jeffrey Gettleman, *Execution Ends Debatable Case*, L.A. TIMES, Aug. 31, 2001, at A1.

99. *Id.*

100. *Id.*

activities.”<sup>101</sup> A similar inquiry in North Carolina determined that one in six defendants sentenced to death were represented by lawyers who had been disciplined by the North Carolina State Bar.<sup>102</sup>

Legendary stories also exist of unqualified political cronies being appointed to handle cases as payback for contributing to judges' campaigns.<sup>103</sup> Until the mid-1990s this was common in Harris County, Texas, the so-called capital of capital punishment. The infamous Joe Cannon was regularly appointed to capital cases even though he was widely known for falling asleep during trial.<sup>104</sup> Other unqualified lawyers also received appointments because “courthouse appointment lists were often an informal string of each judge's friends and campaign contributors.”<sup>105</sup>

Finally, there are cases of non-criminal lawyers with little or no litigation experience handling capital cases. In Illinois, a judge appointed a tax lawyer who had never tried a case before to represent a defendant facing the death penalty.<sup>106</sup> Another Illinois judge appointed a real estate and probate lawyer who, when asked whether he had ever handled a criminal jury trial by himself, replied, “Well, is paternity criminal?”<sup>107</sup> In Texas, a wrongfully convicted man spent years on death row after also being represented by a real estate lawyer at trial.<sup>108</sup>

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101. John Shiffman, *Troubled Lawyers Still Allowed to Work Death Cases*, TENNESSEAN, July 25, 2001, at A1.

102. Ronald J. Tabak, *Why an Independent Appointing Authority Is Necessary to Choose Counsel for Indigent People in Capital Punishment Cases*, 31 HOFSTRA L. REV. 1105, 1112 (2003) (citing COMMON SENSE FOUND., LIFE AND DEATH LOTTERY (2002), [http://www.common-sense.org/?fnoc=/consider\\_this/consider\\_this\\_021015](http://www.common-sense.org/?fnoc=/consider_this/consider_this_021015)).

103. See *id.* at 1113–14 (recounting cronyism between a Texas judge and his “buddy,” who was “incompetent to handle capital cases”).

104. See Flood, *supra* note 43, at A1 (stating that “the late state District Judge George Walker, occasionally known for taking a nap on the bench, frequently appointed his good friend, the late Joe Cannon, who slept through parts of a capital murder trial”); see also Paul M. Barrett, *On the Defense: Lawyer's Fast Work on Death Cases Raises Doubts About System*, WALL ST. J., Sept. 7, 1994, at A1 (quoting a sworn affidavit of Cannon's co-counsel that Cannon slept through “significant periods [of the jury selection] on numerous occasions”).

105. Flood, *supra* note 43, at A1.

106. Ken Armstrong & Steve Mills, *Inept Defenses Cloud Verdicts: With Their Lives at Stake, Defendants in Illinois Capital Trials Need the Best Attorneys Available. But They Often Get Some of the Worst*, CHI. TRIB., Nov. 15, 1999, at 1.

107. Lawrence C. Marshall, *Gideon's Paradox*, 73 FORDHAM L. REV. 955, 959 (2004) (quoting *People v. Rissley*, No. 82536, 2001 Ill. LEXIS 241, at \*40 (Ill. Mar. 15, 2001) (Harrison, C.J., dissenting), *aff'd*, 795 N.E.2d 174 (Ill. 2003)).

108. See Stephen B. Bright, *Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review By Independent Federal Judges Is Indispensable to Protecting Constitutional Rights*, 78 TEX. L. REV. 1805, 1807 (2000) (explaining that although Randall Dale Adams was sentenced to death at trial, he was later exonerated). The unfortunate story of Randall Dale Adams was made famous in the documentary THE THIN BLUE LINE (MGM 1988).

Just as troubling as the anecdotal stories of bad lawyering is the pervasive funding problem for indigent defense throughout the nation. In many jurisdictions, highly competent appointed lawyers are unable to provide adequate defenses because they lack the funding to handle the cases effectively. As Stephen Bright has explained, even though public defender offices “attract some of the most dedicated and conscientious young lawyers, those lawyers find it exhausting and enormously difficult to provide adequate representation when saddled with huge caseloads and lacking the necessary investigative assistance.”<sup>109</sup> Not only do these lawyers lack the money to hire investigators, some must also subsist with insufficient basic necessities such as office equipment, technology, adequate support staff, and expert witness funding.<sup>110</sup> Of course, prosecutors’ offices are not flush with cash, but they still possess considerably greater assets than many of the defense lawyers representing indigent defendants. An analysis of Harris County, Texas found that the district attorney’s entire office budget was \$26 million in 1999, compared with \$11.6 million for “attorneys for indigent clients in county and district court.”<sup>111</sup>

Writing more than a decade ago, Professor Douglas Vick observed that “[i]n most death penalty states, indigent defense is funded at the county level, where it ‘compete[s] as a very low priority among a multitude of other governmental services.’”<sup>112</sup> And while a handful of states have moved toward providing more state funding for indigent defense generally,<sup>113</sup> many of the nation’s counties continue

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

110. STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS’N, *GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE* 10 (2004), available at <http://www.abanet.org/legal/services/sclaid/defender/brokenpromise/fullreport.pdf>.

111. Bob Sablatura, *Study Confirms Money Counts in County Courts; Those Using Appointed Lawyers Are Twice as Likely to Serve Time*, HOUSTON CHRON., Oct. 17, 1999, at A1. In 1992 and 1996, one report found that roughly 80 percent of defendants charged with felonies in seventy-five of the nation’s most populous counties—of which Harris County is one—utilized public defenders or assigned counsel. CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, *DEFENSE COUNSEL IN CRIMINAL CASES* 5 (2001), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=772>.

112. Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 394 (1995) (quoting Jonathan E. Gradess, *The Road From Scottsboro: We’re Not as Far Along as We Think*, 2 CRIM. JUST., Summer 1987, at 2, 4).

113. See Mary Sue Bachus & Paul Marcus, *The Right to Counsel in Criminal Cases: A National Crisis*, 57 HASTINGS L.J. 1031, 1103–16 (2006) (describing legislation providing for additional funding in Texas, Georgia, Virginia, Washington, and Montana).

to lack sufficient funds to provide an adequate defense for capital and non-capital defendants.<sup>114</sup>

In sum, county funding of indigent defense is considered by many to be a failure.<sup>115</sup> In all too many jurisdictions, defendants end up with attorneys who are either incompetent or simply lack the resources to provide an adequate defense.

*E. Poor Judges Fail to Stop Misconduct and Allow  
Reversible Error to Occur*

When scholars analyze the actors in the death penalty system, they focus primarily on prosecutors and defense lawyers.<sup>116</sup> Little attention is paid to the judges who preside over death penalty cases. Perhaps the lack of attention is due to the obvious nature of the problem: some judges are simply better than others at running a fair trial that is unlikely to be reversed on appeal. This problem exists in every area of the legal system; some bankruptcy judges understand the code better than others, just as some family court judges are wiser than their colleagues. The situation is no different in death penalty cases. Some judges are truly excellent while others, unfortunately, are not as knowledgeable about the law or strong enough to reign in aggressive lawyers.

The disparity in the quality of judges is arguably more important in capital cases than in other areas of law—after all, a person's life is on the line. If we take to heart the Supreme Court's

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114. See Eric M. Freedman, *Add Resources and Apply Them Systematically: Governments' Responsibilities Under the Revised ABA Capital Defense Representation Guidelines*, 31 HOFSTRA L. REV. 1097, 1100–01 (2003) (“[T]he states simply refuse to allocate sufficient funds to provide competent capital defense representation. But that does not make the costs disappear. It just shifts them.”).

115. The commentary to Guideline 2.1 of the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases recognizes that defender organizations should be statewide so as to avoid political pressure and improve funding. ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES Guideline 2.1, cmt. at 20 (2003), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/deathpenaltyguidelines2003.pdf> (“Jurisdiction-wide organization and funding can best ameliorate local disparities in resources and quality of representation, and insulate the administration of defense services from local political pressures.”); see also Catherine Greene Burnett, *Guidelines and Standards for Texas Capital Counsel: The Dilemma of Enforcement*, 34 AM. J. CRIM. L. 165, 196 (2007) (suggesting the “radical” change that Texas create a “unified, statewide capital defense office”).

116. The excellent work of the Capital Jury Project has also focused on jurors. See, e.g., SCOTT E. SUNDBY, *A LIFE AND DEATH DECISION: A JURY WEIGHS THE DEATH PENALTY* (2005) (explaining the decision-making process of jurors); William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043 (1995) (same).

assertion that “death is different,”<sup>117</sup> then the deprivation of life, as opposed to liberty or property, is the most serious government action imaginable.<sup>118</sup> It stands to reason that we should have the best possible judges presiding over such trials.

Pragmatic concerns also counsel that high-quality judges are more important in capital cases. Death penalty law is very complicated, and the Supreme Court is continually “tinker[ing] with the machinery of death.”<sup>119</sup> And even when the Court is not changing the law, it has a “troublesome affinity for obsessing over capital cases” by getting into the factual details of individual cases in a way unseen in other areas of law.<sup>120</sup> It therefore is not surprising that Professor James Liebman’s enormous study of capital cases from 1973 to 1995 reveals that 68 percent of capital cases were reversed on appeal by federal or state appeals courts.<sup>121</sup> While many of the most common reversible errors—such as failing to disclose favorable evidence and ineffective assistance of counsel—are outside the hands of judges,<sup>122</sup> some errors are not. Some capital cases are reversed because judges reject defense lawyers’ challenges to questionable peremptory challenges made by prosecutors.<sup>123</sup> Others are reversed because judges give incorrect jury instructions<sup>124</sup> or fail to shut down lawyers making

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117. See *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (“[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long.”).

118. I have previously made this argument in the context of post-trial proportionality review. See Adam M. Gershowitz, Note, *The Supreme Court’s Backwards Proportionality Jurisprudence: Comparing Judicial Review of Excessive Criminal Punishments and Excessive Punitive Damages Awards*, 86 VA. L. REV. 1249, 1288–91 (2000) (arguing that the right to life is more important than the right to liberty and the right to property).

119. See *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting) (stating that he would no longer “tinker with the machinery of death”)

120. Douglas A. Berman, *A Capital Waste of Time: Examining the Supreme Court’s “Culture of Death,”* 34 OHIO N.U. L. REV. 861, 861, 875 (2008) (acknowledging that Supreme Court Justices and their clerks are “institutionally inclined to give particular careful, cautious, and conscientious attention to every claim of death penalty error raised by capital defendants” due to the “practical problems with the administration of the death penalty”).

121. LIEBMAN ET AL., *supra* note 8, at i.

122. *But see* Liebman, *supra* note 92, at 2111–12 (2000) (arguing that judges could demand that more evidence be produced or refuse to appoint ineffective lawyers but decline to do so out of self-interest in being reelected).

123. See, e.g., *Miller-El v. Dretke*, 545 U.S. 231, 265–66 (2005) (vacating conviction and death sentence because prosecutors used peremptory challenges to strike ten of eleven black prospective jurors without offering sufficient race-neutral reasons).

124. See James S. Liebman, Jeff Fagan & Valerie West, *Technical Errors Can Kill*, NAT’L L.J., Sept. 4, 2000, available at <http://www.deathpenaltyinfo.org/node/643> (listing faulty jury instructions as a significant error leading to reversal in capital cases).

prejudicial arguments.<sup>125</sup> Still other cases are reversed because defendants are not permitted to present relevant mitigating evidence.<sup>126</sup> Even if such errors cause only a small number of reversals, they are nevertheless avoidable errors. And given the enormous time, expense, and emotional turmoil involved in capital cases, anything that can reduce reversals should be explored.

An excellent judge is likely to minimize reversible error in at least two ways. First, a judge who is well versed in the law is less likely to make erroneous rulings that would provide a basis for reversal on appeal.<sup>127</sup> Second, a well-respected judge will deter the parties from “pushing the envelope” at trial. With a firm, tough judge in the driver’s seat, prosecutors seemingly would be less likely to try to eliminate prospective jurors based on race or make aggressive arguments that step over the line.

Unfortunately, the current death penalty system does little to push aside less qualified judges. In most counties, capital cases are randomly assigned, just like other criminal matters. Some death penalty cases end up in the hands of good judges, while others do not. The skill of judges in capital trials, however, need not be left to chance. As the next Part demonstrates, it is possible to create a statewide capital punishment system that is staffed by elite prosecutors, defense lawyers, and judges.

## II. DESIGNING A STATEWIDE DEATH PENALTY SYSTEM

As discussed in Part I, there are serious problems with the prosecution, defense, and judging of county-based death penalty cases. That does not mean that there are not prosecutors who make good charging decisions, appointed lawyers who vigorously defend cases, and judges who run a tight and fair ship. Too often, such high-quality

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125. See Welsh White, *Curbing Prosecutorial Misconduct in Capital Cases: Imposing Prohibitions on Improper Penalty Trial Arguments*, 39 AM. CRIM. L. REV. 1147, 1154–56 (2002) (discussing improper arguments, including reference to religious or biblical writings).

126. See, e.g., *Paxton v. Ward*, 199 F.3d 1197, 1215–16 (10th Cir. 1999) (ordering new sentencing hearing, inter alia, because the defendant was not permitted to introduce polygraph evidence explaining why previous criminal charges against him had been dismissed).

127. Let me be clear that I am looking for the most learned judges, not necessarily jurists who have simply spent a lot of time on the bench. As Professor David Schwartz recently found with respect to patent cases, there is no evidence that “district judges’ reversal rates decrease as they handle more patent cases.” David L. Schwartz, *Practice Makes Perfect? An Empirical Study of Claim Construction Reversal Rates in Patent Cases*, 107 MICH. L. REV. 223, 256 (2008). Assuming Professor Schwartz’s findings would be transferable to other areas of law, that does not mean an elite group of death penalty judges cannot help reduce the number of reversals. His findings do seem to indicate, however, that we must choose judges carefully and not simply rely on longevity as our primary criterion.

lawyering goes unrecognized by academics and abolitionists who criticize the death penalty generally. The problem with capital punishment in the United States is not that excellent death penalty lawyers do not exist. The problem is that the excellent lawyers are not asked to handle all of their states' capital cases.

Because capital cases are the most serious, we should call on the best prosecutors and defense lawyers from around the state to handle *all* of the state's capital cases, not just the cases from their home counties. In this Part, I argue that the state's best prosecutors, defense lawyers, and judges should work on a statewide, rather than a county-wide, basis and handle all of the state's death penalty cases.<sup>128</sup>

*A. An Anecdotal Example of a Fair Fight: Bringing in Top-Notch Lawyers from Outside the County Line*

During her twenty-one years as a Harris County prosecutor, Kelly Siegler became a famed trial lawyer and personally handled nineteen death penalty trials, eighteen of which resulted in a death sentence.<sup>129</sup> Siegler was so skilled in the courtroom that Twentieth

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128. The State of Illinois has implemented a system that moves in this direction but does not go far enough. Following the large number of exonerations in Illinois in the 1990s, the Illinois Supreme Court established the Special Supreme Court Committee on Capital Cases. Barbara J. Hayler, *Moratorium and Reform: Illinois's Efforts to Make the Death Penalty Process "Fair, Just, and Accurate,"* 29 JUST. SYS. J. 423, 424 (2008). The Committee recommended that "[l]ead counsel would be required to have at least five years of criminal litigation experience; to have tried at least eight felony trials, including two murder cases; and to have specialized capital-case training or experience." *Id.* at 425. Unfortunately, the Illinois approach still allows too many lawyers to be involved in capital cases, rather than relying on an elite unit. As one observer noted, by the end of 2004, the Illinois Capital Litigation Trial Bar had 714 lawyers certified to handle capital cases. See Judge Michael P. Toomin, *Capital Punishment Reform and the Illinois Supreme Court: At the Forefront of Change*, 92 ILL. B.J. 642, 644 (2004) ("As of October 15, 2005, 714 attorneys statewide have been certified as members of the Capital Litigation Trial Bar . . ."). As I explain below, the number of death penalty lawyers should be much smaller in order to promote consistency and to ensure that quality representation is always provided. See discussion *infra* Part II.B.2 (advocating selection of the best defense lawyers to represent defendants charged with capital offenses). The Chair of the Illinois General Assembly Capital Punishment Reform Committee appears to agree, as he recently lamented that "the capital punishment system in Illinois lacks any overall, statewide system in place to assure consistency in capital certifications or to protect against . . . racial and geographic bias." Thomas P. Sullivan, *Efforts to Improve the Illinois Capital Punishment System: Worth the Cost?*, 41 U. RICH. L. REV. 935, 966 (2007); see also Robert S. Burke, *The Illinois Death Penalty Defense System and the ABA Capital Defense Guidelines*, 29 JUST. SYS. J. 348, 353–54 (2008) (reviewing the Illinois approach to appointing defense lawyers in capital cases and explaining that there is minimal monitoring of lawyers or corrective action for inadequate performance).

129. The Law Offices of Kelly Siegler, Bio, <http://www.kellysieglerlaw.com/bio.html> (last visited Jan. 31, 2010).



Century Fox ordered a television pilot based on her career.<sup>130</sup> In 2008, after losing her bid to become the elected Harris County District Attorney, Siegler quietly resigned her position as an assistant district attorney.<sup>131</sup> She declined numerous lucrative offers to work in private practice,<sup>132</sup> and instead she accepted a post-election position as a special assistant prosecutor in Wharton County, Texas, to work on a single case: the capital prosecution of James Garrett Freeman.<sup>133</sup>

Wharton County has a population of just over forty thousand people.<sup>134</sup> And despite being only sixty miles from Harris County, which had 119 inmates awaiting execution on death row as of the summer of 2008,<sup>135</sup> Wharton County had not prosecuted a death penalty case in over thirty years.<sup>136</sup> The County chose to seek the death penalty against Freeman after he engaged in a shootout with game warden officers and killed an officer in cold blood.<sup>137</sup>

Notably, Siegler was in for a tough fight because Freeman was represented by Stanley Schneider, one of Houston's most recognized and effective criminal defense lawyers.<sup>138</sup> Schneider had been honored by the State Bar of Texas as the Outstanding Criminal Defense Lawyer of the Year<sup>139</sup> and had three decades of experience in capital

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130. See Brian Rogers, *Defense Attorney Dick DeGuerin is Methodical, Prosecutor Kelly Siegler Is Theatrical: In the Temple Murder Trial, Expect Fireworks*, HOUSTON CHRON., Oct. 20, 2007, at A1 ("In 2005, 20th Century Fox TV shot a television pilot based on Siegler's life.").

131. Peggy O'Hare, *Siegler Resigns From DA's Office, She Will Try Capital Murder Case in Wharton County Later This Year*, HOUSTON CHRON., May 10, 2008, at B1.

132. See *id.* (pointing out that Siegler accepted the Wharton County position despite having "between five and 10" job offers from civil law firms and other district attorneys' offices).

133. See *id.* ("Siegler is looking forward to working as a special prosecutor, trying a capital murder case in Wharton County this fall.").

134. See U.S. CENSUS BUREAU, STATE AND COUNTY QUICK FACTS: WHARTON COUNTY, TEXAS, <http://quickfacts.census.gov/qfd/states/48/48481.html> (last visited Jan. 31, 2010).

135. Scott Phillips, *Racial Disparities in the Capital of Capital Punishment*, 45 HOUSTON L. REV. 807, 838 (2008).

136. See Peggy O'Hare, *Game Warden Slaying: Wharton Residents Assemble for Trial: Death Penalty Case Is the First in This Small Town in Three Decades*, HOUSTON CHRON., Sept. 9, 2008, at B1 (stating that Freeman's trial is the first death penalty trial to occur in Wharton since the 1970s).

137. See Peggy O'Hare, *Murder Trial in Death of Warden Begins: Death Penalty Case is the First in Decades in Wharton County*, HOUSTON CHRON., Oct. 20, 2008, at B1 ("I believe that someone who kills a cop is just a little more culpable than, say, some thug who, in the heat of an armed robbery, kills someone."); see also Brandon L. Leonard, *600 Summoned for Capital Murder Case*, VICTORIA ADVOC., Sept. 9, 2008, at 1 ("He is charged with capital murder in the shooting death of game warden Justin Hurst, 34.").

138. See Brian Rogers, *Former Harris Prosecutor to Testify About Confession*, HOUSTON CHRON., Sept. 20, 2008 (describing Schneider as a "a prominent defense attorney").

139. Rose Nisker, *The Crusaders of Death Row*, TEXAS SUPER LAWYERS, Oct. 2009, available at <http://www.superlawyers.com/texas/article/The-Crusaders-of-Death-Row/aa6f34b2-8696-4974-840b-4015ca4bed47.html>.

cases.<sup>140</sup> Although he was based out of Houston, Schneider accepted the case. Ultimately, Freeman was convicted and sentenced to death.<sup>141</sup> And while appeals will certainly continue for years, there is little chance that a plausible ineffective assistance of counsel claim could be leveled against Schneider.

Regardless of whether one thinks Freeman was the “worst of the worst” and deserving of death, his case is notable for the quality of the attorneys on both sides. Even more noteworthy is that both the prosecutor and defense lawyer were brought in from outside the county line to handle the case.

The question, then, is whether the Freeman case can be used as a model to move from a county-based death penalty system to a statewide approach. As I explain in Part II.B below, it is plausible to create a functioning statewide capital punishment system, even in very large states that have long relied on a county-based death penalty model.

### *B. Transitioning to a Statewide Capital Punishment System Staffed by Elite Prosecutors, Defense Lawyers, and Judges*

In a world of perfect information, it would be easy to transition to a statewide system because everyone would know that Pam Prosecutor from Los Angeles and Dan Defense Attorney from San Francisco are the best in the business. In reality, however, most lawyers have little knowledge about their peers in other counties. Moreover, attorney skill is highly subjective. It would therefore be very difficult to select a statewide team by relying solely on word of mouth. A more plausible approach would be to begin primarily with “paper” qualifications to select the first group of lawyers and then to allow those lawyers to give significant input in selecting the next wave of attorneys. Let us begin with selecting the prosecutors.

#### 1. Selecting the Best Prosecutors by Relying on Quantitative and Qualitative Information

At the outset, participation in an elite statewide capital prosecution unit should require considerable experience. Thus, to

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140. See Rosanna Ruiz & Mike Tolson, *Capital Punishment on Decline in County*, HOUSTON CHRON., July 25, 2007, at A1 (stating that Schneider “has been involved in death penalty cases for three decades”).

141. Sonny Long, *Unanimous Death Sentence: Wharton County Jury Gives Game Warden’s Killer the Ultimate Penalty*, VICTORIA ADVOC., Nov. 8, 2008, at A1.

serve as an elite capital prosecutor, state legislatures should require that a lawyer possess such experience. For example, they should require at least ten years of experience in handling felony cases and serving as counsel of record in at least five death penalty cases. Of course, because it would be impossible for future generations of lawyers to gain death penalty experience if they were not already in the capital case unit, this requirement would have to be modified after the first round of capital prosecutors.<sup>142</sup>

Another obvious criterion is ethics. The legislature should eliminate any prosecutor who has been the subject of a successful ethics complaint filed with the bar.<sup>143</sup> More importantly, any lawyer who has had at least one case (capital or otherwise) reversed for prosecutorial misconduct should be excluded. While "misconduct" could be defined in many ways, the legislature should be most concerned with the serious types of misconduct that lead to reversal of criminal convictions: suppressing favorable evidence, striking prospective jurors based on race, and presenting improper arguments to the jury.<sup>144</sup>

Regarding general appellate records, prosecutors should not be disqualified from service because they have a less-than-perfect record on appeal in their capital cases. As Professor James Liebman and his colleagues have demonstrated, thousands of capital cases have been reversed on appeal over the last few decades, often for reasons beyond the control of prosecutors, such as erroneous jury instructions or ineffective assistance of defense counsel.<sup>145</sup> Still, an elite statewide capital punishment unit should be staffed with prosecutors who know how to select and try cases with an eye toward avoiding reversal. In order to help narrow down the list of eligible prosecutors, the legislature should impose a bright-line rule eliminating prosecutors

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142. Additionally, if a state had recently enacted the death penalty or has rarely sought it in previous years, no prosecutor would have experience in five or more cases. For these states, the experience requirement would have to be modified.

143. By "successful," I mean a complaint resulting in a finding that the prosecutor has engaged in misconduct. This will likely not be much of a qualifier because successful ethics complaints are rare even against misbehaving prosecutors. See Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 697 (1987) (claiming that despite universal adoption by the states of disciplinary rules, and despite numerous reported cases showing violations of these rules, "disciplinary charges have been brought infrequently and meaningful sanctions rarely applied").

144. Unfortunately, there are dozens of capital cases that have been reversed for these types of misconduct. See Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059, 1075–84 (2009) (discussing some of the twenty-six *Brady* violations and fifteen *Batson* violations that led to reversals of capital convictions between 1997 and 2007).

145. LIEBMAN ET AL., *supra* note 8, at 8.

whose capital cases have been reversed more than, for example, 25 percent of the time.<sup>146</sup>

These quantitative (or “paper”) requirements would significantly narrow the list of eligible prosecutors, but they probably would not be enough to select a final group. Thus, more qualitative, reputational criteria should also be employed. The initial list should be narrowed and the final candidates selected based on input from lawyers who have practiced with them. Because the prosecutors are a statewide unit, the state attorney general should be responsible for gathering input and making the final decision. Thus, the enabling statute should instruct the attorney general to survey prosecutors, defense lawyers, and judges who have worked with each finalist, just as local bar associations survey lawyers to ascertain their views on judicial candidates.<sup>147</sup> If a majority of defense lawyers or judges rates a candidate as “unqualified,” then the attorney general should be forced to strike that candidate from the list.<sup>148</sup>

Finally, the legislation should instruct the attorney general to achieve geographic diversity in selecting prosecutors. Unless the attorney general specifies in writing that there are no viable candidates, she should be required to select at least one prosecutor from each of the state’s federal districts.<sup>149</sup> Moreover, to ensure that the views of smaller counties are represented, the attorney general should also be required to select at least one prosecutor from a county with a population of less than two hundred and fifty thousand people.

Ideally, the attorney general would choose prosecutors who are respected not only by fellow prosecutors, but also by the defense lawyers and judges with whom they have worked for many years.<sup>150</sup>

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146. A 75 percent success rate would actually be quite impressive. See *id.* (finding a 68 percent reversal rate for capital cases between 1973 and 1995).

147. For a discussion of one state’s approach to surveying opinions of judicial candidates, see A. John Pelander, *Judicial Performance Review in Arizona: Goals, Practical Effects, and Concerns*, 30 ARIZ. ST. L.J. 643, 655–61 (1998).

148. This rule should operate reciprocally when selecting statewide defense lawyers. If a majority of prosecutors or judges rates a defense lawyer as unqualified, she should be eliminated from consideration.

149. In smaller states, of course, there will be only one federal district from which to choose.

150. Of course, it is possible that the Attorney General will select candidates who mirror his ideological view of the death penalty, rather than choosing solely based on qualifications. See Jonathan DeMay, *A District Attorney’s Decision Whether to Seek the Death Penalty: Toward an Improved Process*, 26 FORDHAM URB. L.J. 767, 771, 802 (1999) (arguing for a committee, rather than a single district attorney, to determine who should face the death penalty, but recognizing that “[t]he composition of the death penalty committee is likely to reflect the views espoused by the individuals who select members”). This problem is tempered by the fact that the Attorney General can only select prosecutors who have already met the seniority, experience, ethics, and low reversal qualifications.

However, even if the attorney general does not have the purest of motives, the "paper" qualifications would limit her discretion and ensure that an experienced, qualified, and diverse group of prosecutors from across the state is selected as the first group of statewide capital prosecutors.

If the legislature were to follow this suggested approach, it would eventually lead to a new problem. Once the transition to a statewide death penalty system is complete and all death penalty cases are handled by the new unit, local prosecutors will no longer be able to acquire any capital trial experience. Thus, once prosecutors from the statewide capital unit retire, there would be no one with enough capital experience to be eligible to replace them. Accordingly, the requirement that statewide prosecutors have handled five death penalty cases should only apply to the initial group of prosecutors who are selected for the elite unit.

Once those elite prosecutors are in place, they should begin interviewing experienced prosecutors to join the capital unit as junior capital prosecutors. These prosecutors would still need to have sterling records—at least ten years of felony experience, no ethical violations, and no reversals for prosecutorial misconduct—but they need not have extensive death penalty experience. The original elite team of statewide prosecutors, with their years of capital experience, would be in a good position to select their junior subordinates from around the state.<sup>151</sup> And the original elite team of experienced capital prosecutors should be well suited to mentoring and evaluating their junior colleagues. Because the junior prosecutors would be working exclusively on capital cases once they join the statewide unit, the senior prosecutors would have an uninterrupted opportunity to observe their talents and weaknesses. If they do well, the junior prosecutors would eventually be promoted when the original members of the elite capital team retire or return to their home jurisdictions. With multiple years of exclusively death penalty cases under their belts, the formerly junior prosecutors would be ready to take over primary responsibility for their state's capital cases—and to select hard-working, smart, ethical prosecutors to take over the junior positions.

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151. As with the initial group of prosecutors, junior prosecutors should come from each of the state's federal districts and at least one should come from a county with a population of less than 250,000 people.

## 2. Selecting the Best Defense Attorneys

Once the prosecutors are selected, the next and equally important task is to select the very best defense attorneys. The qualifications for defense attorneys should be similar to those for prosecutors. The original group of statewide defense attorneys should have extensive and unblemished resumes: for instance, at least ten years of felony experience, no ethical violations, no successful ineffective assistance of counsel challenges, and a minimum of five death penalty cases.<sup>152</sup>

As with the selection of prosecutors, once these initial “paper” qualifications are satisfied, the attorney general’s office should survey lawyers and judges from each candidate’s jurisdiction. Any candidate with a majority of “unqualified” votes should be disqualified. Thereafter, the attorney general should select among the remaining candidates. Because defense lawyers are not responsible for capital charging, ensuring representation from around the state and from small counties is not essential; although defense lawyers’ life experiences may differ depending on whether they are from a smaller county or a large city, those different experiences will not affect the prosecutors’ charging decisions. Accordingly, geographic diversity in selecting defense lawyers should be aspirational, though not required. In selecting statewide capital defense lawyers, the single most important factor will be attorney skill.

As with the elite prosecutors, the process must be slightly modified for the second generation of elite capital defense attorneys. Once the first wave of elite defense attorneys has been selected and begins handling all of the state’s capital cases, up-and-coming local defense attorneys (like their prosecutor counterparts) will be unable to acquire death penalty experience. Thus, the first generation of elite defense attorneys should be called upon to interview and hire junior lawyers. The junior lawyers should be required to fulfill all of the three “paper” qualifications that do not require specific death penalty experience: at least ten years of felony experience, no ethical violations, and no successful ineffective assistance of counsel challenges. As with prosecutors, the junior defense lawyers would

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152. Unfortunately, the ineffectiveness criterion does not serve as much of a limitation because, while ineffective assistance challenges are often filed, they are rarely successful. See, e.g., Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1, 1 (discussing the infrequency with which courts reverse convictions based on ineffective assistance of counsel and arguing for prospective means of improving assistance of counsel).

learn the ropes by working exclusively on capital cases and would eventually move up the ladder to replace their senior colleagues.

An important question is how this system should handle the less-common case in which a defendant wishes to retain a private lawyer, rather than accept state-funded indigent defense counsel. The best practice would be for private lawyers to be permitted to supplement—but not supplant—the elite lawyers from the capital defense unit. In Illinois, which has recently established elaborate rules to ensure quality defense counsel, defense lawyers must be members of the Capital Litigation Trial Bar in order to be appointed to represent an indigent capital defendant.<sup>153</sup> If a defendant can afford to retain a private lawyer who is not on the list, he is free to do so, but that lawyer must take a backseat to the two lead lawyers who are members of the Capital Litigation Trial Bar.<sup>154</sup>

The Illinois approach is sound. When jurisdictions across the country have taken steps to impose standards and to provide adequate funding, the quality of representation has vastly improved<sup>155</sup> to the point where appointed lawyers are often better than retained counsel.<sup>156</sup> Thus, while a retained lawyer might do a first-rate job in a capital case, it is possible that a lawyer who only occasionally handles capital cases will do a poor job.<sup>157</sup> And because a statewide system is designed to equalize justice and eliminate post-trial claims such as ineffective assistance of counsel, it would be counterproductive to open up that possibility by allowing retained lawyers to replace the elite, state-funded defense lawyers.

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153. See *supra* note 128 (discussing capital punishment reform in Illinois).

154. See Hayler, *supra* note 128, at 435 (discussing reforms to the Illinois death penalty system).

155. For instance, all observers appear to believe that indigent defense in Texas has improved substantially since the enactment of the Texas Fair Defense Act in 2001. See Kyung M. Lee, *Reinventing Gideon v. Wainwright: Holistic Defenders, Indigent Defendants, and the Right to Counsel*, 31 AM. J. CRIM. L. 367, 386 (2004) ("As reformers in Texas have been diligently working to change the system since 2001, the results so far have been promising, including some improvements in attorney selection procedures and attorney qualification requirements.").

156. In Harris County, Texas, where the author resides, there is anecdotal (though no empirical) evidence to support this proposition. Cf. George C. Thomas, III, *When Lawyers Fail Innocent Defendants: Exorcising the Ghosts that Haunt the Criminal Justice Systems*, 2008 UTAH L. REV. 25, 43 ("During my small-town law practice, the representation of criminal defendants by appointed counsel, that sometimes included me, was competent if not stellar.").

157. See *Cuyler v. Sullivan*, 446 U.S. 335, 344–45 (1980) (recognizing that ineffective assistance of counsel claims can be made against privately retained lawyers).

### 3. Selecting a Pool of Exceptional Judges

Judges should also be selected from a pool of candidates who have the requisite tangible qualifications. For the initial group of judges, the legislature should limit death penalty cases to judges who have been on the bench hearing felony cases for at least ten years. These judges also should have no disciplinary infractions and should have received high marks on judicial qualification questionnaires conducted by the local bar.

More importantly, however, the judges selected should have low reversal rates in capital and non-capital cases. At present, the nationwide reversal rates in capital cases are dramatically higher than in non-capital cases.<sup>158</sup> While low reversal rates are not always a proxy for the best judges,<sup>159</sup> the fact remains that the current death penalty system could benefit greatly from judges who run trials so as to avoid reversible error. As such, the initial qualification to be selected as an elite capital judge should be a below-average reversal rate in both capital and non-capital cases. Along with the requirement of ten years of felony experience, this requirement should narrow the list to a much smaller pool of eligible candidates.<sup>160</sup>

Once a pool of eligible judges is in place, the prosecutors and defense lawyers should have the authority to select a particular judge for each trial. Just like the process for selecting an arbitrator in some states,<sup>161</sup> the prosecutors and defense lawyers should be permitted an

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158. Scholars estimate the reversal rate for ordinary criminal cases to be between 10 and 20 percent, which is obviously far below the capital reversal rate. See Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLA L. REV. 503, 516 (1992) (reviewing California cases and estimating that "approximately one criminal conviction in five was modified by the appellate process"); Liebman, *supra* note 92, at 2053 n.90 (estimating that non-capital reversal rate is "probably far less than ten percent").

159. See Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 401-04 (2007) (challenging conventional wisdom that judges fear reversal and arguing that higher reversal rates do not necessarily inhibit promotion to higher judicial positions).

160. The Illinois Supreme Court has issued a rule requiring all judges presiding over capital cases to attend a capital litigation training seminar at least once every two years. See ILL. SUP. CT. R. 43. This has resulted in hundreds of judges attending death penalty seminars. Toomin, *supra* note 128, at 644. According to the Chair of the Illinois General Assembly's Capital Punishment Reform Committee, the training, along with other reform efforts, has established a situation in which "judges now assigned to try capital cases have the requisite knowledge and experience." Sullivan, *supra* note 128, at 957. Once again, I believe this is a step in the right direction but it does not go far enough. Rather than training a large number of judges and hoping they do a good job, it would be preferable to put all of a state's capital cases in the hands of a much smaller number of elite trial judges who can be trained more thoroughly and carefully monitored.

161. See COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES M-4(b) (Am. Arbitration Ass'n), available at <http://www.adr.org/sp.asp?id=22440%20> ("If the parties are



equal number of strikes to eliminate judges whom they find unacceptable. The last remaining judge should preside over the trial.

In early cases, lawyers who have not appeared before a particular judge may find it hard to assess how favorable that judge will be toward the prosecution or defense. However, both prosecutors and defense lawyers can turn initially to statewide professional organizations—for instance, the District and County Attorneys' Association, or the local chapter of the National Association of Criminal Defense Lawyers—to seek information about judges they do not know. And after the lawyers have a few cases under their belts, they will quickly form their own opinions as to which judges are the most capable and fair. While prosecutors might prefer Judge X, and defense lawyers might prefer Judge Y, each side's ability to strike judges would eliminate the outliers and leave a small group of judges to handle the vast majority of capital cases.

Having a very small pool of mutually acceptable judges would have enormous benefits. The judges would get to know the prosecutors and defense lawyers who would appear frequently in front of them. By knowing each other, the lawyers and judges would hopefully work well together. This would move cases along briskly and reduce the time of trials, thus saving money. Perhaps more importantly, the judges would learn the strengths and weaknesses of individual lawyers. From repeated interaction, judges may come to recognize that a particular prosecutor is an aggressive questioner who pushes the boundaries of what is permissible. Judges would therefore know when to be on guard for prosecutors exceeding their bounds and thus cut off any prospect of reversible error before it occurs.

In sum, the role of judges in capital cases is too important to be left to the whims of random assignment. Because it is plausible to separate the good judges from the bad, at least in terms of relative reversal rates, states should take steps to ensure that capital cases are staffed by the most competent judges who are least likely to be reversed.

#### 4. Adopting a Committee Approach to Capital Charging

Once the key players are in place, the next logistical challenge is to determine which cases become death penalty cases and which are returned to local prosecutors to be tried as "ordinary" murder prosecutions. Having created an elite statewide group of prosecutors,

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unable to agree upon a mediator, each party shall strike unacceptable names from the list, number the remaining names in order of preference, and return the list to the AAA.").

the most effective approach would then be to utilize a committee made up of those prosecutors to make charging decisions. Many prosecutors' offices already have advisory committees to recommend whether the district attorney should seek the death penalty.<sup>162</sup> I would go further and turn over the entire charging decision to the committee.<sup>163</sup> As explained below, junior prosecutors should prepare the cases, and senior prosecutors should vote on whether to seek the death penalty.

After local prosecutors decide that a defendant will face murder charges, they should be statutorily obligated to refer the case to the elite capital punishment unit.<sup>164</sup> That elite unit must then decide, for

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162. The most prominent is the Department of Justice's Capital Case Review Committee, which advises the U.S. Attorney General. See Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 FORDHAM URB. L.J. 347, 407–40 (1999) (detailing the Department of Justice's process for deciding how to prosecute potentially capital cases). For a discussion of U.S. Attorneys turning to a voluntary committee before referring the case to the Justice Department, see Benjamin Weiser, *Pondering Death, by Committee: What Is a Capital Crime? Federal Panel Decides Case by Case*, N.Y. TIMES, June 26, 1997, at B1.

163. Other observers have advocated that capital charging be done by committees rather than individual prosecutors. The most detailed proposals are DeMay, *supra* note 150, at 811–18 (proposing two solutions: (1) that a committee of experienced and ideologically diverse prosecutors review all potentially capital cases in order to make a non-binding recommendation on whether to seek the death penalty; and (2) a statewide committee made up of prosecutors from across the state that will make binding determinations on whether to seek death) and Horowitz, *supra* note 28, at 2573, 2600–02 (arguing for a committee appointed by the governor and the local district attorney to eliminate conflicts between state and local officials in jurisdictions that allow for supersedure). For other proposals, see Anna-Liisa Joseloff, *Connecticut's Capital Punishment Scheme: Still Tinkering With the Machinery of Death*, 23 QUINNIPIAC L. REV. 889, 924 (2004) (advocating that a committee of the state's attorneys be statutorily empowered to determine whether to seek the death penalty); McCarthy, *supra* note 61, at 995 (suggesting that the state attorney general review every death eligible case); Paul Schoeman, Note, *Easing the Fear of Too Much Justice: A Compromise Proposal to Revise the Racial Justice Act*, 30 HARV. C.R.-C.L. L. REV. 543, 573 (1995) (suggesting an independent central authority that would require super majority vote to seek death). Finally, the Illinois Commission on Capital Punishment has proposed that a committee of five individuals—the Attorney General, the Cook County State's Attorney, another county's State's Attorney, the president of the Illinois State's Attorneys Association, and a retired judge—approve a local prosecutor's request to seek the death penalty. See GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT, REPORT OF THE GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT 84–85, Recommendation 30 (2002), available at [http://www.idoc.state.il.us/ccp/ccp/reports/commission\\_report/index.html](http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/index.html). The Illinois legislature did not adopt this proposal. Thomas P. Sullivan, *Capital Punishment Reform: What's Been Done and What Remains to Be Done*, 51 FED. LAW. 37, 39 (2004). While these proposals have all recognized the benefits of capital charging, none would require the same prosecutors to actually try the cases and thereby eliminate county involvement altogether.

164. Federal cases are handled in a somewhat similar fashion. Whenever a federal grand jury indicts a capital crime and the U.S. Attorney intends to seek the death penalty, the U.S. Attorney is required to notify the Department of Justice in writing. See Little, *supra* note 162, at 409–10 (detailing the Department of Justice's process for deciding how to prosecute potentially capital cases).

all murder cases in that state, whether to pursue the death penalty. If the local district attorney feels strongly that the defendant should face the death penalty, she should have the option to write a memorandum explaining why death is merited. Although such a memorandum is not required, it would be forwarded to a junior prosecutor in the elite capital unit. That junior prosecutor would then independently review the case. Either building on the local district attorney's memorandum or starting from scratch, the junior prosecutor from the capital unit would draft a neutral memorandum for the senior prosecutors that analyzed the strength of the state's case at guilt and sentencing. The memorandum would be analogous to a bench memorandum that law clerks write for their judges.

Defense counsel should be invited to make an oral presentation before the junior prosecutor. Defense counsel may have facts relevant to guilt or punishment that might not be fully appreciated on a paper record. Such information may save prosecutors from seeking the death penalty in a case that would be hard to win at trial or to defend on appeal. Although it probably would not happen often, the opportunity for an hour-long presentation by defense counsel might save the state hundreds of thousands of dollars in trial and appeal costs by weeding out those cases that would likely result in a life sentence or less.<sup>165</sup>

While the junior prosecutors should possess all information about the case, at least three pieces of information—the race of the defendant, the race of the victim,<sup>166</sup> and the county where the crime occurred—should be redacted from their memorandum so as not to allow irrelevant criteria to influence the senior prosecutors in their final charging decisions.<sup>167</sup>

Once complete, the memorandum should be provided to all senior prosecutors. Those prosecutors would then vote on whether to seek the death penalty. If a majority of the senior prosecutors votes to

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165. See *id.* at 424–26 (noting that while he served on the Department of Justice's capital committee defense counsel always invoked their right to make a presentation to the committee and that such presentations were effective); see also DeMay, *supra* note 150, at 810 (proposing that prosecutors should provide defense counsel with “an opportunity to present arguments why the defendant is not an appropriate candidate for the imposition of the death penalty”); Liebman, *supra* note 92, at 2145 (proposing that prosecutors should provide all defense counsel with “a meaningful opportunity to convince the district attorney to settle the case or at least not to proceed capitally”).

166. In some instances, it may also be necessary to redact the name of the defendant or victim if that name would indicate that the person is a member of a particular racial or ethnic group.

167. See Little, *supra* note 162, at 411–12 (noting that federal cases are presented to the Attorney General “‘race-blind,’ that is, devoid so far as possible of racial identification”). To the extent that a defendant is accused of a hate crime, it would make little sense to keep that information from the final decisionmakers, however.

seek the death penalty, one senior prosecutor should take charge of the case and should be assisted by the junior prosecutor who drafted the memorandum. If the senior prosecutors vote against seeking the death penalty, the case should then be returned to the local county prosecutor to be handled as an “ordinary” murder case.

Committee charging would have numerous benefits. First, no single person would be able to rely too heavily on her personal experience. Different committee members with different life experiences would balance each other out. Second, money would cease to be a factor because the state would pay the bill, and the committee, rather than the elected local prosecutor, would decide how to spend the funds.<sup>168</sup> While money may influence the total number of cases for which the committee approves death, no individual case would turn on local funding. Third, using a committee with steady membership would promote consistency because the same group of prosecutors would observe all of a state’s murder cases and would make all of the charging decisions. A committee with consistent membership thus would conduct an inverted proportionality review, in which cases would be judged against one another up front, rather than after trial, when time and money have already been expended.<sup>169</sup> Relatedly, committee charging would increase the probability of prosecutors choosing the “right” cases—those that are most worthy of death—because they would not be looking at cases in isolation. Finally, this approach would uniquely use junior prosecutors to flush out the facts and draft a neutral memorandum to help the final decisionmakers make informed choices without reference to irrelevant factors such as race and geography.

Given the benefits of charging committees, it is not surprising that the Department of Justice has implemented a charging committee approach similar to the one outlined above.<sup>170</sup> Yet the example from the federal system is problematic. The final decision rests in the hands of a single individual, the Attorney General,<sup>171</sup> who

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168. Of course, state prosecutors could also face funding pressures. At the statewide level, however, resources are not as scarce as they are at the local level.

169. The Supreme Court has held that post-trial proportionality review is not required. See *Pulley v. Harris*, 465 U.S. 37, 49–51 (1984) (discussing Supreme Court precedent holding that proportionality review is not required). Nevertheless, about half of the states that impose the death penalty still provide for at least some level of proportionality review. See Maxine D. Goodman, *A Death Penalty Wake-Up Call: Reducing the Risk of Racial Discrimination in Capital Punishment*, 12 *BERKELEY J. CRIM. L.* 29, 44 n.114 (2007) (listing states that do and do not provide for proportionality review).

170. See *supra* note 162 and accompanying text.

171. Little, *supra* note 162, at 412.

(as a political appointee) might never have tried a capital case.<sup>172</sup> Moreover, even if the Attorney General always follows the committee's collective wisdom, the federal government would still not achieve a "pure" elite capital punishment unit because the prosecutors who constitute the charging committee at Main Justice are not the same prosecutors who handle the actual trials. Rather, local U.S. Attorneys prosecute the cases. In fact, in the federal system the local U.S. Attorneys can cut the rug out from under the central charging committee by taking a case where the Attorney General has decided to seek death and then negotiate it down to a prison term without consulting Main Justice.<sup>173</sup>

To maximize the benefits of committee charging, it is important that the committee's decision be final and that the members of the committee making the charging decisions be the very same prosecutors who are in the trenches actually prosecuting the cases. If we are able to attract the very best lawyers to serve in that capacity, there will be greater uniformity and fairness in the death penalty system. As the next section recognizes, however, attracting the best lawyers is a key challenge.

#### 5. Attracting the Best Lawyers to Work on Capital Cases

One lingering but important question remains about the feasibility of statewide capital punishment units: How will we convince excellent local prosecutors and defense attorneys to leave their home jurisdictions and travel the state to work on death penalty cases? In other words, will excellent lawyers decline to participate in such a system because it is too inconvenient? Although some lawyers will be unwilling to serve, there are several reasons why many lawyers would uproot themselves temporarily to take on this important task.

First, and hopefully most importantly, excellent prosecutors and defense lawyers have a commitment to justice and improving the criminal justice system. Committed lawyers regularly sacrifice convenience to further public service goals. And for lawyers who feel

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172. For instance, recent Attorney General Alberto Gonzales, while having a wide variety of legal experience, never served as a prosecutor before becoming Attorney General and having final say over capital charging. See Jason McLure, *Staying the Course: The AG Hasn't Satisfied Critics Who Doubt His Independence*, LEGAL TIMES, Feb. 27, 2006, at 1.

173. See Little, *supra* note 162, at 417–18 ("Under the protocols, United States Attorneys in the field may dispose of federal capital cases, once charged, without advance approval or review by the Attorney General or Main Justice.").

strongly about capital punishment, either on the prosecution or defense side, the opportunity to devote all of their attention to a small number of very important cases would be a big draw.<sup>174</sup>

A second reason why lawyers would sign up for an elite capital trial unit is prestige. Capital cases are already considered to be the most prominent cases in the criminal justice system, and lawyers are eager to sink their teeth into the biggest cases.<sup>175</sup> Thus, many will be on board from the beginning.

Third, prestige often translates into career advancement, including a higher-profile office. Serving as an elite prosecutor (and to a lesser extent as an elite defense lawyer) would be a stepping-stone to a judgeship or other elected office, such as attorney general or governor. And to the extent that Presidents look for the best possible lawyers when selecting U.S. Attorneys, trying exclusively high-profile death penalty cases would be a helpful qualification.

In fact, prosecutors already accept assignments outside their geographic areas in order to heighten their prestige. After the collapse of energy giant Enron, the Department of Justice staffed the Enron Task Force with elite prosecutors from across the country.<sup>176</sup> Members of the Task Force went on to secure prominent and lucrative positions, including Attorney General of Oregon,<sup>177</sup> head of the Department of Justice Criminal Division, Interim U.S. Attorney for the Eastern District of New York, Chief of Staff for the Director of the FBI, and partnership in some of the best white-shoe law firms in the country.<sup>178</sup> This model of mobility is currently employed at the FBI, where agents

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174. See Editorial, *Regional Public Defender's Office Has Worked Well*, LUBBOCK AVALANCHE-J., Dec. 10, 2008 (describing the West Texas Regional Public Defender Office that was created with the support of sixty-five counties and noting that the office has been a success "[b]ecause the sole focus is capital cases, [and] the staff is able to get to work immediately on a case and spend a lot of time preparing for it").

175. See Kenneth Bresler, *Seeking Justice, Seeking Election, and Seeking the Death Penalty: The Ethics of Prosecutorial Candidates' Campaigning on Capital Convictions*, 7 GEO. J. LEGAL ETHICS 941, 945–46 (1994) (discussing how some elected district attorneys highlight capital convictions in their campaign literature); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 155 (2004) (same).

176. John R. Kroger, *Remarks: Enron and Multi-Jurisdictional Fraud*, 28 CARDOZO L. REV. 1657, 1660 (2007) (explaining that the Enron Task Force "grabbed prosecutors from all over the country—Chicago, Boston, Orange County, New York, San Francisco"). In the *Enron* case the nationwide task force model was troublesome because prosecutors were asked to temporarily relocate across the country, not to permanently take up a new job for a long period of time. This led to frequent turnover. *Id.* This approach can be avoided at the statewide level because lawyers will be taking permanent or at least long-term positions.

177. Oregon Department of Justice, Biography of Attorney General John Kroger, [http://www.doj.state.or.us/ag\\_bio.shtml](http://www.doj.state.or.us/ag_bio.shtml) (last visited Jan. 31, 2010).

178. Mary Flood, *Task Force Enjoys Post-Enron Success*, HOUSTON CHRON., June 2, 2008, at 1.

are often asked to relocate to more prestigious and career-enhancing jobs.<sup>179</sup>

A fourth reason to join the statewide capital unit would be the added compensation that the legislature should provide. Prosecutors do not take their positions for the money, and many defense attorneys also are not primarily concerned with salary. However, if lawyers are still permitted to practice in an area about which they are passionate, extra compensation may be a draw.<sup>180</sup> Legislatures should be willing to increase the salary for elite death penalty lawyers because, as explained in Part III.A below, enormous savings can be realized later in truncated appeals and habeas corpus petitions. Finally, although it would not be politically popular, it is essential that there be salary parity between prosecutors and defense lawyers in order to attract high quality defense lawyers.<sup>181</sup>

### III. WHY A STATEWIDE SYSTEM WOULD ACTUALLY SAVE MONEY AND DEPOLITICIZE CAPITAL PUNISHMENT

There are a multitude of problems with capital punishment in the United States, ranging from racial discrimination to wrongful conviction. A statewide death penalty cannot cure all of these ills, but it can be expected to have numerous benefits. Two are particularly worthy of discussion. A statewide system staffed by elite lawyers and judges at trial would help to reallocate more funding to the early stages of death penalty cases, rather than focusing enormous state funding on appeals. In this respect, a statewide approach could be less costly for states than the current system, while simultaneously reducing problems such as wrongful convictions and racial

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179. The FBI's website explains that "all Special Agents are subject to transfer at any time to meet the organizational and program needs of the FBI. Special Agents accept the possibility of transfer as a condition of their employment." Federal Bureau of Investigations, Special Agent Career Path Program, <http://www.fbijobs.gov/113.asp> (last visited Jan. 31, 2010); see also KURT EICHENWALD, THE INFORMANT 32-33 (2000) (detailing the inner workings of the FBI's investigation of Archer Daniels Midland and discussing how some of the key agents had relocated from across the country).

180. See Stephanos Bibas, *Rewarding Prosecutors for Performance*, 6 OHIO ST. J. CRIM. L. 441, 442 (2009) (arguing for financial rewards to "attract and retain the best candidates and also encourage those who are already prosecutors to perform better"); Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct With Financial Incentives*, 64 FORDHAM L. REV. 851, 879 (1995) ("Significant evidence indicates that the behavior of prosecutors could be affected by financial incentives.").

181. See James S. Liebman, *Opting for Real Death Penalty Reform*, 63 OHIO ST. L.J. 315, 328, 337 (2002) (recognizing inadequate compensation of capital defense attorneys as a limiting factor in the quality of representation in capital cases and advocating parity between defense and prosecution resources).

discrimination. Second, the use of elite lawyers would restore faith in the death penalty system. This would help to depoliticize the death penalty by eliminating many arguments of proponents (who see too much attention focused on appeals) and opponents (who criticize the shabby defense representation and arbitrary prosecutorial discretion afforded under the current system).

*A. Reducing Costs and Providing for More Efficient Capital Punishment*

The most obvious objection to a statewide capital punishment system is that it would be expensive. While some states do provide occasional supplemental funding to counties for “extraordinary” cases, for the most part states do not fund capital trials.<sup>182</sup> Accordingly, moving to a statewide death penalty system would cost states huge sums that were previously funded by counties. Although it might be nice for states to invest heavily in the important life-or-death decisions made at capital trials, there are countless other matters on which states could focus their criminal justice spending.<sup>183</sup> For instance, it would be worthwhile to have more state-funded drug programs, crime prevention programs, or organized crime task forces.<sup>184</sup> Because money is limited and states have countless other priorities, there is good reason why states should not volunteer to take on large capital trial expenditures.<sup>185</sup>

While the cost criticism may seem compelling, it is ultimately flawed. Most states that authorize capital punishment already spend huge sums of state money on capital cases. While counties typically

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182. See *infra* notes 223–227 and accompanying text.

183. See Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument From Institutional Design*, 104 COLUM. L. REV. 801, 809 (2004) (“Many public services are underfunded, including foster care, medical care, indigent defense, and public schools.”).

184. See James R. Acker, *Be Careful What You Ask For: Lessons from New York’s Recent Experience with Capital Punishment*, 32 VT. L. REV. 683, 719 n.155 (2008) (citing testimony of various criminal justice experts on other uses for funds currently spent on death penalty cases).

185. Indeed, costs have been a major reason why states have recently considered abolishing the death penalty. See Ian Urbina, *In Push to End Death Penalty, Some States Cite Cost-Cutting*, N.Y. TIMES, Feb. 25, 2009, at A1 (discussing legislative efforts to repeal the death penalty in Maryland, Colorado, Kansas, Nebraska, and New Hampshire in part based on the economic expense of capital cases). Costs played a role in New Jersey’s recent abolition of the death penalty. See NEW JERSEY DEATH PENALTY STUDY COMMISSION REPORT 31–34 (2007), available at [www.njleg.state.nj.us/committees/dpsc\\_final.pdf](http://www.njleg.state.nj.us/committees/dpsc_final.pdf) (recommending abolition in large part based on the costs); Jeremy W. Peters, *Corzine Signs Bill Ending Executions, then Commutes Sentences of 8*, N.Y. TIMES, Dec. 18, 2007, at B3 (discussing New Jersey’s abolition of the death penalty). In tight fiscal times, it is hard to imagine states volunteering to spend huge sums of additional money.



fund trials, many states foot the bill for appeals and habeas corpus challenges to death sentences,<sup>186</sup> and these post-trial proceedings are very expensive.<sup>187</sup> The question therefore should not be whether states would have to outlay large sums of money to create a statewide unit to handle the trial of all capital cases. Rather, the relevant question should be whether a statewide trial unit would save states money over time by reducing the huge costs of capital appeals and habeas petitions. There are at least three reasons to answer that question in the affirmative.

#### 1. Fewer Reversals Means Fewer Retrials, Fewer Subsequent Appeals, and Lower Costs

First, if a case is tried by the best prosecutors and defense attorneys, the case is less likely to be reversed on appeal. This would eliminate the costs of retrial (which would have been borne by the counties under the system currently in place in most jurisdictions), and it would eliminate the costs of all the appeals following the retrial. Given that these appeals run for years and cost hundreds of thousands of dollars, the state will save huge sums of money on the back end.

For instance, in December 2008, the Supreme Court heard oral argument in *Cone v. Bell*, a death penalty case that raised a technical question about federal courts' ability to reconsider state court findings.<sup>188</sup> According to one observer, Justice Scalia began the argument "incredulous that lawyers were at it again" and asked, "How long has this case been going on?"<sup>189</sup> Justice Scalia no doubt remembered Cone's case, which the Supreme Court had reversed twice since his initial death sentence in 1984.<sup>190</sup> In the 2008 oral argument, Cone's lawyer made a compelling argument that his case should be reversed a third time because the local county prosecutor who tried the case had suppressed favorable evidence.<sup>191</sup> The county prosecutors did not argue in their defense. It was left to the Deputy Attorney General, a state employee utilizing state resources, to try to

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186. Gershowitz, *supra* note 15, at 864.

187. See JOHN ROMAN ET AL., URBAN INST. JUSTICE POLICY CTR., THE COST OF THE DEATH PENALTY IN MARYLAND 2 (2008), available at <http://www.urban.org/publications/411625.html> (finding that a Maryland death penalty case cost \$1.9 million more than a non-death case and that about 30 percent of the added cost is attributable to post-trial costs).

188. *Cone v. Bell*, 129 S. Ct. 1769, 1772 (2009).

189. Robert Barnes, *Justices Question Withholding of Evidence in Capital Case*, WASH. POST, Dec. 10, 2008, at A2.

190. Adam Liptak, *Justices Weigh Misconduct in Tennessee Murder Case*, N.Y. TIMES, Dec. 10, 2008, at A26.

191. *Id.*

preserve the case on appeal.<sup>192</sup> Although she fought admirably, the Deputy Attorney General was forced repeatedly to concede that the local trial prosecutors failed to turn over favorable evidence and that their arguments to the jury “overstated” their case.<sup>193</sup> Had the case been tried by an elite team of prosecutors, the misconduct would probably not have occurred, thus saving years of appeals and millions of dollars in state-funded appellate costs.

A simple numerical example illustrates the multiple ways by which elite statewide capital trial units would save costs on appeal. Assume that under the current capital punishment system, five out of ten cases are reversed on appeal, and that when those cases are retried, they result in five new death sentences.<sup>194</sup> Those five new death sentences will be the subject of five new sets of appeals. In total, then, the state will be responsible for defending fifteen cases on appeal (the original ten appeals and the extra five following retrials). Now imagine a system using an elite group of prosecutors and defense lawyers that tries the cases with full knowledge of the law and an eye toward avoiding reversal. Such lawyers will be far less likely to purposefully or inadvertently hide favorable evidence. To be conservative, imagine that four out of ten death sentences are reversed on appeal and subsequently retried. The state will now be responsible for only fourteen appeals rather than fifteen. The cost savings in avoiding just one set of appeals will be considerable.<sup>195</sup>

However, an elite prosecution unit would eliminate far more than this one set of appeals. Utilizing an elite prosecution unit to make capital charging decisions would likely reduce the number of marginal cases in which prosecutors seek the death penalty in the first place, thus reducing the number of death verdicts that states would have to defend on appeal. Because county prosecutors reap

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192. *Id.*

193. *Id.*

194. Professor Liebman’s study from 1973–1995 found a 68 percent reversal rate. LIEBMAN ET AL., *supra* note 8, at 8. Given the difficulty of prevailing under the Anti-Terrorism and Effective Death Penalty Act and a more conservative federal judiciary, the reversal rate is likely considerably lower today. See Joseph L. Hoffman, *Violence and the Truth*, 76 IND. L.J. 939, 946 (2001) (criticizing the Liebman study for assuming a constant error rate over time which “is not a safe assumption, especially in federal habeas, where reversal rates have been dropping as the U.S. Supreme Court’s Eighth Amendment law has gradually begun to stabilize”). On the increasing difficulty of prevailing under the AEDPA, see John H. Blume, *AEDPA: The “Hype” and the “Bite,”* 91 CORNELL L. REV. 259, 284 (2006).

195. See, e.g., Lise Olsen, *State Fund Doesn’t Provide Much Relief from Case Costs; Despite Promises, State Fund Doesn’t Provide Much Relief from Case Expenses*, SEATTLE POST INTELLIGENCER, Aug. 8, 2001, at A8 (“In a single resentencing last year, Thurston County spent \$1.1 million as it attempted to put double-killer Mitchell Rupe back on death row nineteen years after his original conviction.”).

political benefits from being tough on crime but do not typically have to pay for expensive appeals, they have an incentive to seek the death penalty in marginal cases that may be hard to defend on appeal.<sup>196</sup> An elite group of state prosecutors may choose not to seek the death penalty in such marginal cases, thus reducing the number of capital prosecutions.<sup>197</sup> And because it is very possible that the marginal death penalty case would be reversed on appeal and retried, state prosecutors would be spared having to defend that case on appeal not once, but twice.

In the hypothetical example above, state prosecutors would eliminate three sets of death penalty appeals. In practice, the number could well be higher. Because each capital case involves multiple levels of direct and collateral review, eliminating multiple sets of death penalty appeals potentially would save millions of dollars in appellate costs. (And this is to say nothing of the savings at trials because the cases will not have to be retried.) These savings in turn may fund a substantial portion of the elite statewide capital trial units.

## 2. Better Trial Lawyers Means Less Time Spent on Non-Meritorious Issues on Appeal

Utilizing an elite team of trial lawyers would also reduce the number of non-meritorious claims that presently consume the time of appellate judges, law clerks, appellate prosecutors, and appointed defense lawyers. Presently, death row inmates litigate dozens of issues on appeal and post-conviction review. Two of the most common issues are *Brady* challenges (arguing that prosecutors withheld favorable evidence) and ineffective assistance of counsel claims.<sup>198</sup> While neither type of claim would be eliminated by implementing a statewide death

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196. See Gershowitz, *supra* note 15, at 877 ("Under the current system, prosecutors who procure death sentences are rewarded with good publicity, promotions, and perhaps even with judicial office. By contrast, those same prosecutors suffer little stigma when death sentences are reversed on appeal because many years have gone by . . . and the public's attention has moved on to new death penalty cases.").

197. Of course, state prosecutors will still have to defend a non-death verdict on appeal. However, such cases will be cheaper to defend because, unlike death-penalty cases, non-death cases typically do not carry a right of automatic appeal to the state supreme court and the lack of a death sentence will remove numerous legal issues that otherwise would have been litigated. See ROMAN ET AL., *supra* note 187, at 25 (finding in a 2008 study of Maryland that cases resulting in a death sentence cost hundreds of thousands of dollars more at the state appellate level than cases where death was not sought).

198. See Johnson, *supra* note 17, at 1108 n.5 ("The three most common species of claims in capital cases are ineffective assistance of counsel claims, *Batson* claims, and *Brady* claims.").

penalty system, both claims would be reduced, and this reduction would result in significant cost savings.

First consider *Brady* claims. To state a successful *Brady* claim, the prisoner must demonstrate that the government failed to turn over evidence that was not only favorable but also material,<sup>199</sup> meaning evidence that would create a reasonable probability of changing the outcome.<sup>200</sup> In the current system, there are very few prosecutors who would knowingly withhold impeachment or exculpatory evidence that could reasonably be expected to change the outcome of a defendant's capital case.<sup>201</sup> Thus, transitioning to a statewide unit would not accomplish much in these situations.

However, prosecutors often may accidentally fail to turn over marginal evidence, and these more frequent occurrences might lead defendants to allege unsuccessful *Brady* violations. Prosecutors who are not well trained or lack death penalty experience may, with the purest of motives, fail to turn over potential *Brady* material simply because they did not realize it should have been disclosed. For example, in a case where multiple witnesses saw the defendant kill the victim, the prosecution may neglect to disclose to the defendant that one of the witnesses had a prior conviction for theft or that he initially stated the wrong time of the offense.<sup>202</sup> This impeachment evidence is favorable and should be turned over to the defendant, though it is exceedingly unlikely that an appellate court would reverse a conviction or death sentence when there are multiple additional witnesses tying the defendant to the crime.

Nevertheless, because the good faith of the prosecutor is not relevant to whether a *Brady* violation occurred,<sup>203</sup> prosecutors cannot simply dispose of *Brady* claims by saying that they acted with pure motives. Rather, any potential *Brady* violation must be briefed by prosecutors and defense lawyers. And briefing is expensive. Due to the complexity of the law under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), the Chief Justice of the Washington Supreme Court estimated that the size of appellate briefs in death penalty cases

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199. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

200. See *United States v. Bagley*, 473 U.S. 667, 682 (1985) ("The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.").

201. Gershowitz, *supra* note 144, at 1061–62.

202. See *Belmontes v. Brown*, 414 F.3d 1094, 1111–15 (9th Cir. 2005) (discussing how prosecutor failed to disclose that state witness in a capital case had several traffic charges that prosecutor helped to resolve but that were not material for *Brady* purposes).

203. *Brady*, 373 U.S. at 87.

increased from 50 to 250 pages between 1990 and 2000.<sup>204</sup> Such briefs take upwards of three thousand hours of attorney time to draft.<sup>205</sup> Appellate judges also spend significant time reviewing these briefs and drafting opinions. The matter might then be remanded to the trial court to hold a hearing and find further facts.<sup>206</sup> At the end of the day, because the materiality standard for a successful *Brady* claim is onerous,<sup>207</sup> the prisoner is likely to lose. But not before the state is forced to spend a substantial amount of money to fight the non-meritorious claim.

An elite team of prosecutors that focuses exclusively on handling capital cases is much more likely to prevent non-meritorious *Brady* claims. These prosecutors would know to disclose evidence that is arguably favorable to the defendant. Thus, prosecutors, defense lawyers, and appellate judges (and possibly trial judges on remand) would not have to spend valuable time and money litigating issues that, while sufficiently plausible to provoke an appeal, would ultimately be resolved against the defendant.<sup>208</sup>

Indeed, elite prosecutors could likely conduct “cleaner”<sup>209</sup> trials than less experienced local prosecutors on a host of issues similar to *Brady* claims. Highly trained capital prosecutors could avoid claims that inadmissible evidence was offered,<sup>210</sup> that admissible evidence was excluded,<sup>211</sup> or that inappropriate arguments were made to the

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204. RICHARD P. GUY, STATUS REPORT ON THE DEATH PENALTY IN WASHINGTON STATE 10 (2000), available at <http://www.courts.wa.gov/newsinfo/content/deathpenalty/deathpenalty.pdf>.

205. *Id.*

206. *Id.* at 11 (“Washington Supreme Court review not infrequently results in additional trial level hearings in the county where the case originated.”).

207. See *United States v. Bagley*, 473 U.S. 667, 682 (1985) (clarifying the materiality standard); Elizabeth Napier Dewar, Note, *A Fair Trial Remedy for Brady Violations*, 115 YALE L.J. 1450, 1455 (2006) (noting that *Brady* violations are rarely identified and that “even when [prisoners] do their convictions are rarely overturned because they face a tremendous burden on appeal”).

208. See Liebman, *supra* note 181, at 339 (recognizing that procedural roadblocks to habeas review add litigation time and that reducing litigation would best be accomplished “by eliminating altogether the most frequently litigated habeas claims”). Professor Liebman has proposed that states ensure improved trial and direct appellate review in exchange for death row prisoners foregoing substantial amounts of habeas review. *Id.* at 334. To date, states have not embraced this very logical proposal.

209. No case is perfect. By “cleaner,” I mean a trial that leaves open far fewer grounds for a defendant’s appeal.

210. See, e.g., *Caudill v. Commonwealth*, 120 S.W.3d 635, 659–60 (Ky. 2003) (concluding in a death penalty case that the trial court admitted inappropriate character evidence but that it was harmless).

211. See *State v. Glass*, 136 S.W.3d 496, 519 (Mo. 2004) (considering in capital case whether excluded letter from defendant’s grandmother amounted to mitigating evidence, but finding that it was cumulative and therefore harmless); *Doorbal v. State*, 837 So. 2d 940, 959–60 (Fla. 2003) (concluding that the trial court should have admitted letters showing co-defendant’s domination

jury.<sup>212</sup> Although each of these examples constitutes viable legal issues, these issues are rarely successful on appeal.<sup>213</sup> Thus, they consume time to brief and argue but are very unlikely to be resolved in the defendant's favor. Put simply, the better the prosecutors, the less opportunity the defendant has to raise time-consuming and ultimately unsuccessful legal claims on appeal and post-conviction review.

Of course, the counterargument exists that proactively eliminating the defendant's non-meritorious arguments only goes so far. Critics might argue that a defendant can always find something to point to in order to challenge his conviction and death sentence on appeal. While that may be true, there is a big difference between a reasonable challenge that ultimately proves to be unsuccessful (such as the ones suggested above) and one so frivolous that it does not pass the laugh test (and can thus be easily disposed of by a court). Defense attorneys are ethically forbidden from raising frivolous issues on appeal<sup>214</sup> and would risk sanctions by doing so.<sup>215</sup> And while prisoners are free to file their own briefs raising issues, courts would not likely devote significant time and attention to those issues when defense attorneys are unwilling to raise the issues themselves.<sup>216</sup>

In sum, while it is impossible to eliminate all issues on appeal (and, indeed, defense lawyers are obligated to file *Anders* briefs when

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over the defendant but finding that the error was harmless because it could not outweigh the five aggravating factors, including that the murder was committed in a cold, calculated, and premeditated fashion).

212. See *Williams v. State*, 188 P.3d 208, 230 (Okla. Crim. App. 2008) (concluding that prosecutor's argument to jury that they would devalue victim's life by giving less than a death sentence was improper but nevertheless harmless error); *Merck v. State*, 975 So. 2d 1054, 1062 (Fla. 2007) (finding that the prosecutor's improper argument that the jury should give the defendant the same mercy that defendant showed to the victim was harmless error); *Duncan v. State*, No. 05-00-01773-CR, 2002 WL 1611848, at \*2 (Tex. App. July 23, 2002) (finding that multiple inappropriate references to defendant's parole eligibility if he did not receive a death sentence was harmless error).

213. See Margaret A. Berger, *When, If Ever, Does Evidentiary Error Constitute Reversible Error*, 25 LOY. L.A. L. REV. 893, 894–95 (1992) (concluding that reversal for evidentiary reasons is rare).

214. MODEL RULES OF PROF'L CONDUCT R. 3.1 (2008) ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous . . .").

215. See Brent E. Newton, *Almendarez-Torres and the Anders Ethical Dilemma*, 45 HOUSTON L. REV. 747, 748 n.3 (2008) (collecting cases in which appellate counsel were sanctioned for filing frivolous claims).

216. See A.C. Pritchard, *Auctioning Justice: Legal and Market Mechanisms for Allocating Criminal Appellate Counsel*, 34 AM. CRIM. L. REV. 1161, 1168 (1997) ("The onslaught of frivolous appeals unleashed by *Anders* has driven the courts to a system of judicial triage. Confronted with ever-increasing numbers of appeals, courts have adopted screening mechanisms to sort out cases warranting close judicial attention from those appropriate for summary rejection.").

there is no viable legal issue),<sup>217</sup> it is possible to reduce dramatically the time that prosecutors, defense lawyers, judges, clerks, and court staff spend on non-meritorious claims. A proactive elite team of prosecutors can therefore reduce appellate costs.

The same logic applies with even greater force to ineffective assistance of counsel claims. The most common allegation in post-conviction death penalty cases is that the defendant did not receive adequate counsel.<sup>218</sup> Too often, defendants have valid or at least colorable claims to support their ineffectiveness allegations. When these claims are indeed valid, the death sentences (and perhaps also the underlying convictions) should be reversed.<sup>219</sup> But, once again, reversals are very much the exception, not the rule.<sup>220</sup> Defendants consume enormous amounts of court time with ineffectiveness challenges by submitting supporting documentation and voluminous briefs that require prosecutors to make responsive filings and force judges to review all of the materials and issue factual findings. Judges in the Sixth Circuit have accused some defense counsel of sandbagging in capital cases so as to create ineffectiveness claims and delay the time between conviction and execution.<sup>221</sup> In the vast majority of cases, however, all the time and money is for naught because the claims are rejected.

Now imagine that instead of your average local public defender, the defendant was represented by an elite lawyer from the

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217. *Anders v. California*, 386 U.S. 738, 744 (1967) (providing that counsel must file a brief stating that she has reviewed the record carefully and identify the legal issues she believes are frivolous but that an appellate court might determine to be non-frivolous before the attorney will be permitted to withdraw as counsel on direct appeal); see Newton, *supra* note 215, at 757 (explaining that “the federal courts of appeals have continued to require *Anders*-type ‘no merit’ briefs in federal appeals”).

218. Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 114 (2008) (“Studies of postconviction filings show that ineffective assistance of counsel is the most commonly raised claim during appeals.”).

219. I am in agreement with critics who maintain that it is too difficult to demonstrate a successful ineffective assistance of counsel claim and that the standard should be changed. See, e.g., Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 243 (1997) (“The courts should broaden their focus to concentrate on the fairness of the proceedings rather than the absence of identifiable errors by defense counsel.”).

220. See Note, *Gideon’s Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 HARV. L. REV. 2062, 2068 (2000) (“It is thus exceedingly difficult to win a claim under the standard established in *Strickland*.”).

221. See *Poindexter v. Mitchell*, 454 F.3d 564, 588 (6th Cir. 2006) (Boggs, C.J., concurring) (“If counsel provides fully-effective assistance, and the jury simply does not buy the defense, then the defendant is likely to be executed. However, if counsel provides ineffective assistance, then the prisoner is likely to be spared, certainly for many years, and frequently forever.”). For an analysis of whether sandbagging would be good strategy, see Kyle Graham, *Tactical Ineffective Assistance in Capital Trials*, 57 AM. U. L. REV. 1645, 1675–80 (2008).

statewide capital punishment unit. Unlike some local death penalty attorneys, that lawyer has a decade of felony experience, at least five death penalty cases under her belt, and no successful ineffective assistance challenges against her. Also imagine that the defense lawyer was hand-selected by the state attorney general based on interviews with her colleagues and judges from around the state.<sup>222</sup> Although these elite defense attorneys would inevitably still be the subject of some ineffective assistance challenges, the number of claims would likely decrease by a substantial margin. Even if ineffectiveness claims are still filed, appellate judges would have confidence that most are frivolous, and they would likely devote considerably less attention and resources to them. Put simply, with elite defense lawyers handling cases at trial, expensive but marginal ineffectiveness claims would be less prevalent and time-consuming on appeal, thus saving time and money.

### 3. Requiring Counties to Contribute Money to States for Capital Cases, Rather than Vice Versa

Under the current system, most funding for capital trials is provided by counties.<sup>223</sup> In some states, however, the counties receive supplemental assistance from the state treasury. For instance, under Washington State's Extraordinary Criminal Justice Act, counties can apply to the state for reimbursement of the costs of aggravated murder cases.<sup>224</sup> Unfortunately, the program has not managed to put much money in the hands of counties.<sup>225</sup> The state of Indiana is much more generous and reimburses 50 percent of indigent defense costs.<sup>226</sup> Most impressively, the state of Illinois created a Capital Litigation

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222. See discussion *supra* Part II.B.2 (discussing proposed qualifications for capital defense lawyers).

223. Vick, *supra* note 112, at 394.

224. GUY, *supra* note 204, at 8.

225. See WASHINGTON DEATH PENALTY ASSISTANCE CTR., WASHINGTON'S DEATH PENALTY SYSTEM: A REVIEW OF THE COSTS, LENGTH AND RESULTS OF CAPITAL CASES IN WASHINGTON STATE 11, 13 (2004) (explaining that a substantial amount of state money has ended up being sent to large counties and to non-death penalty cases); Olsen, *supra* note 195 ("In the first year of the program, counties asked for \$4.5 million; the Legislature has set aside only \$550,000."); Report: State Rarely Aids Counties With Murder-Case Costs: 3 Out of 4 Requests Denied; Defendants' Legal Bills Usually Paid By Public, SEATTLE TIMES, Oct. 16, 2006, at B2 (explaining that only one county received assistance and only a fraction of what it requested).

226. Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument From Institutional Design*, 104 COLUM. L. REV. 801, 815 (2004); see also Editorial, *The Cost to Execute*, EVANSVILLE COURIER & PRESS, Oct. 18, 2006, at A10 ("Counties can be reimbursed for up to 50 percent of costs.").



Trust Fund that provides substantial supplemental funding (though not full reimbursement) for death penalty trials.<sup>227</sup>

If states were to assume responsibility for prosecuting death penalty cases, this model would be inverted. Counties could be asked to provide a modest amount of funding when states take over their cases and seek the death penalty. States would have discretion in how much they asked counties to pay. Larger counties could be called on to pay more than medium-sized counties. Small counties could be exempted altogether. States could also adopt a more complicated approach that tied the county's obligation to whether it requested that the state seek the death penalty. For instance, counties could be asked to pay for 20 percent of the costs of trial. However, if the county had filed a memorandum advocating that the defendant face death, the county's share of the costs could be increased to 30 percent.<sup>228</sup> Either scenario would amount to a substantial windfall for the county because even with a more expensive elite team of statewide lawyers, the county would still pay less than if it had handled the case itself.

There are various other approaches states could utilize to seek reimbursement from counties. The key point, however, is that the state could seek to make up some of the money it is expending to try the cases. Together with the savings on appellate costs, the supplementation from the counties may help states break even or reduce their total costs.

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In sum, there is good reason to believe that the costs of a statewide capital trial unit could be offset from savings on appeals. Elite prosecutors would exercise their charging discretion more carefully and handle trials more effectively, thus reducing the number of appeals that states would have to fund. And because of their skills and reputations, elite prosecutors and defense lawyers would reduce the time and money the death penalty system currently spends on non-meritorious claims. Finally, to the extent there is a shortfall, counties could be asked to contribute a portion of the trial costs they would have paid if they had handled the trial.

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227. Hayler, *supra* note 128, at 435-36.

228. By contrast, if the county recommended against seeking death and the statewide prosecutors chose to do so anyway, the county's obligation could be dropped to 10 percent of the trial costs. From a financial perspective, counties therefore would have an incentive to oppose capital charges. Yet, they could not do so vocally because it would be politically unpalatable to be on record opposing the death penalty in gruesome cases.

*B. Depoliticizing the Death Penalty through an Elite Group of Lawyers*

Assuming a statewide capital punishment system would cost roughly the same amount of money as the current system, if not less, the final question is whether such an approach would be beneficial. To answer this question, it is worth taking a moment to put the flaws of the current death penalty system in perspective.

As almost every observer knows, there are numerous problems with the implementation of capital punishment in the United States: racial discrimination, geographic arbitrariness, underfunded defense lawyers, and wrongful convictions, to name just a few.<sup>229</sup> These are serious problems, and scholars are certainly justified in proposing remedies for them. The proposed remedies, however, often tend to be more procedural protections and greater appellate review.<sup>230</sup> Unfortunately, these remedies tend to aggravate the other problem with capital punishment that often goes unrecognized by academics: the frequent reversals of convictions and sentences and the concomitantly long delay in carrying out executions. Proponents of capital punishment complain, sometimes with good reason, that the death penalty system is bogged down by needless legal wrangling that results in decades of delay for defendants who deserve death under states' laws. Opponents respond that without the long and careful review, wrongful death sentences, including execution of the innocent, would be carried out. And so we are often left at stalemate. The death penalty remains highly politicized,<sup>231</sup> with proponents and opponents alike suspicious of reform proposals.<sup>232</sup>

Obviously, abolitionists will never be satisfied with simply fixing the death penalty system to make it more equitable. Fervent

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229. See generally DAVID R. DOW, EXECUTED ON A TECHNICALITY: LETHAL INJUSTICE ON AMERICA'S DEATH ROW (2005) (chronicling the systemic problems with capital punishment); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 359 (1995) (questioning why the Supreme Court's regulation of capital punishment has been "so messy and so meaningless").

230. See Liebman, *supra* note 92, at 2136 ("Most proposals for curing [the ills of capital punishment] are doomed to make it worse. Typically, those proposals aim merely to treat one or another procedural symptom at either the stern or the stem, without attacking the disease itself (the skewed incentive system) or its principal substantive symptom (the overproduction of death).").

231. See Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 VA. L. REV. 283, 285 (2008) (explaining how the Court's capital punishment jurisprudence allowed the death penalty to become highly politicized).

232. See Douglas A. Berman, *Reorienting Progressive Perspectives for Twenty-First Century Punishment Realities*, 3 HARV. L. & POL'Y REV. ONLINE 1, 12 (2008) (noting that legal reformers' "advocacy is likely to grate on those not categorically opposed to the punishment of death").

supporters of capital punishment will not find it acceptable to marginally decrease, rather than greatly reduce, appeals and reversals. Recognizing that these two polar opposites will never agree to a modest reform proposal, the question then is whether those interested in reforming the existing system can find merit in a statewide capital punishment system. The answer should be affirmative because the existence of an elite statewide capital punishment unit would restore confidence in the system and likely improve accuracy, while limiting appeals and reducing reversals. In short, there is something for both sides of the debate.

First, an elite statewide unit staffed by the best prosecutors, defense lawyers, and judges should help to ensure that the most culpable defendants are the ones who will be sentenced to death. Elite prosecutors who focus exclusively on death penalty cases would have a better sense of who is truly deserving of death than county prosecutors who only occasionally handle capital cases. And because the state would pay the bill, rather than cash-strapped counties, money should play no role in deciding which defendants face death.<sup>233</sup> This consequence alone should amount to a dramatic improvement over the current system. Furthermore, because the race of the victim and the defendant would be redacted from the charging committee's file, bias would be reduced, if not eliminated completely.<sup>234</sup> Thereafter, once the defendant is on trial for her life, her sentence would not be based on the lottery of which defense lawyer she receives.<sup>235</sup> Because all cases would be handled by elite defense lawyers, we can be sure that when a defendant is sentenced to death it is because she deserved it, not because she had a lousy lawyer.<sup>236</sup> Relatedly, because defense lawyers would be funded at the state level with resources equivalent to prosecutors, we can be sure that the death sentence was not the

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233. See Liebman, *supra* note 181, at 328 (recognizing inadequate compensation of capital defense attorneys as a limiting factor in the quality of representation in capital cases).

234. See Little, *supra* note 162, at 412 (describing how, in federal death-penalty cases, the Justice Department "self-consciously eliminates racial information from the Attorney General's review process").

235. See Stephen B. Bright, *Death by Lottery—Procedural Bar of Constitutional Claims in Capital Cases Due to Inadequate Representation of Indigent Defendants*, 92 W. VA. L. REV. 679, 685 (1990) ("In practice, however, the system for imposing capital punishment is most often a game of chance in which the winners and losers are distinguished not by their criminal and moral culpability, but by the luck of the lawyers they draw.").

236. See Craig Haney, *Exoneration and Wrongful Condemnations: Expanding the Zone of Perceived Injustice in Death Penalty Cases*, 37 GOLDEN GATE U. L. REV. 131, 163 (2006) (arguing that "too many defense attorneys lack the kind of training and professional experience that is needed to find and develop th[e] humanizing testimony" that is necessary to separate the truly death-worthy).

product of a resource deficit.<sup>237</sup> An elite statewide capital punishment unit can provide assurance that the defendant received a fair shake during the charging process and at trial.<sup>238</sup>

Second, an elite capital punishment unit should reduce the possibility of convicting (and later executing) innocent defendants. Statewide prosecutors would be under less pressure than local district attorneys to achieve convictions and death sentences for high-profile crimes.<sup>239</sup> They would therefore be less likely to push the envelope and seek death when there is a plausible claim that the defendant might be innocent.<sup>240</sup> More importantly, because a statewide system would provide every defendant with a highly qualified and adequately funded defense attorney, the risk of a wrongful conviction should be dramatically reduced. Quite simply, good lawyering at trial, not years of habeas proceedings, is the best defense against a wrongful execution.<sup>241</sup> Additionally, because each prosecutor would be carefully vetted to select only those with sterling ethical reputations, it is highly unlikely that the defendant would be prosecuted by an overly aggressive lawyer willing to cut corners and risk a wrongful conviction.

Third, an elite statewide unit would reduce the number of plausible and frivolous appellate claims that defendants could raise. Defendants represented by elite lawyers would be unable to allege plausible ineffective assistance of counsel claims.<sup>242</sup> Likewise, elite prosecutors would steer clear of most *Brady* claims, as well as

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237. *Id.* at 164 (“[D]efense attorneys in many jurisdictions are overmatched and outspent by experienced prosecutors who have the state’s considerable resources at their disposal. This disparity in resources increases the likelihood that wrongful condemnations will occur in death penalty cases.”).

238. As Professor David Dow has argued, the issue of innocence in death penalty cases often distracts courts and observers from the numerous other problems with the system that deny defendants a fair trial. David R. Dow, *Death By Good Intentions*, WASH. POST, Oct. 15, 2006, at B7.

239. See Michael Hall, *Death Isn’t Fair*, TEX. MONTHLY, Dec. 2002, at 122 (noting that district attorneys consider “how much publicity the case is getting” in deciding whether or not to seek the death penalty).

240. See Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 BUFF. L. REV. 469, 475 (1996) (“Erroneous convictions . . . may occur disproportionately often in capital cases for two types of reasons: (1) Because of factors that are common or inevitable in capital prosecutions, but that occur in other cases as well—for instance, the fact that the crime involves homicide, or that it was heavily publicized; (2) Because of consequences that flow from the demand for the death penalty itself.”).

241. *Id.* at 496 (“Other things being equal, higher quality representation will decrease the likelihood of conviction, and may operate as a check on errors and misconduct that drive some innocent capital defendants to trial and to conviction.”).

242. See *supra* notes 218–222 and accompanying text.

incorrect jury instructions and evidentiary errors.<sup>243</sup> This would serve to eliminate some (though not all) of the defendants' appellate issues. In turn, there should be fewer reversals on appeal, fewer remands for evidentiary hearings, shorter response briefs for government lawyers to draft, and fewer legal issues for appellate judges to decide.<sup>244</sup> The cost savings would be enormous, and the time from conviction to execution would be greatly shortened.

However, the greatest benefit of an elite statewide death penalty unit may be intangible. The problems with capital punishment—particularly wrongful convictions—have shaken faith in the legal system.<sup>245</sup> A statewide death penalty system staffed by elite lawyers could help to restore confidence in the system. With an elite capital unit in place, wrongful convictions should decrease, and reversal rates for clearly guilty defendants should lessen. There should be fewer alarming news stories about atrocious defense lawyers and overly aggressive prosecutors. The elite capital unit should be able to carry out its work without it being politicized. While the crimes themselves will continue to be news stories, the criminal justice process should fade into a less prominent place in the background.

### CONCLUSION

Nearly two decades ago, Professor Vivian Berger explained that just as we would not allow chiropractors to conduct brain surgery simply because a town has no brain surgeons, we should not permit inadequate criminal lawyers to handle capital cases simply because they are the only lawyers available.<sup>246</sup> In this Article, I have argued that even having competent lawyers handling capital cases is not sufficient. Specialists are needed. The death penalty system should be staffed by prosecutors, defense lawyers, and judges who are not only

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243. See *supra* notes 199–213 and accompanying text.

244. See *supra* notes 195–197 and accompanying text.

245. See Daniel S. Medwed, *Innocentrism*, 2008 U. ILL. L. REV. 1549, 1557 (2008) (recognizing that stories of exonerations “convey a mixed message to the American public [and] demonstrate that the system is flawed – that the police occasionally arrest the wrong people, that prosecutors charge them with crimes, and that judges and juries fail them” but also lead some to argue that “the post-conviction process serves an effective corrective function”).

246. Vivian Berger, *The Chiropractor as Brain Surgeon: Defense Lawyering in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 245, 254 (1990–1991) (citing Minority Report of Stephen B. Bright, in TOWARD A MORE JUST AND EFFECTIVE SYSTEM OF REVIEW IN STATE DEATH PENALTY CASES: RECOMMENDATIONS AND REPORT OF THE ABA TASK FORCE ON DEATH PENALTY HABEAS CORPUS app. at A-46 (1989)).

exceptional lawyers but who are willing to devote their attention exclusively to capital cases.

By using specialists, the system can reduce the number of reversals and thereby cut the costs of capital cases. Relying on highly skilled and ethical trial lawyers can transfer more of the costs of the death penalty from the appellate end of capital cases—where they do little good—and place them at the trial stage. Such an approach would not only reduce the costs and length of appeal, but it would also restore faith in the system and hopefully reduce the likelihood of wrongful convictions.

Because most counties are far too small to staff an elite unit of capital prosecutors, defense lawyers, and judges, a statewide approach is necessary. Handling death penalty cases at the state level would have the benefit of not just a wider pool of talent, but also the ability to equalize capital cases across the state. At present, some counties lack the resources to seek the death penalty even when the defendant truly deserves it, while other counties have the financial ability to seek the death penalty even in marginal cases. The geographic arbitrariness of the death penalty could be greatly minimized by utilizing a centralized charging system in which the same small group of prosecutors reviews all cases in which death is a potential punishment. If all capital cases are handled by an elite group of state prosecutors, there will be a constant group of attorneys to make capital charging decisions without regard to money.

An elite statewide unit of capital lawyers will not solve all of the problems with the death penalty. However, it could go far toward improving the quality of defense counsel, reducing prosecutorial misconduct, equalizing charging across the state, shifting expenditures from appeals to trials, reducing the risk of convicting the innocent, shortening the delay between conviction and execution, and generally restoring confidence in the death penalty system.

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