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RESPONSE

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In *Statewide Capital Punishment: The Case for Eliminating Counties' Role in the Death Penalty*,[1] Professor Adam Gershowitz presents an interesting proposal to transfer from localities to states the power to enforce the death penalty. In his view, state-level enforcement would result in a more rationally applied death penalty because states are better able than localities to bear the high cost of prosecuting capital cases. As a consequence, states would be much more likely to make capital charging decisions based on desert, without the distorting influence of the severe resource constraints applicable to all but the wealthiest of localities. If enforced at the state level through mechanisms designed to ensure that a state's most qualified personnel will serve as prosecutors, defense attorneys, and judges in capital cases, he contends, the death penalty can be enforced more rationally and evenhandedly statewide.

There is much to commend in Professor Gershowitz's proposal. He wisely resists the inclination to dress up his arguments for sweeping change in constitutional garb, admitting that his proposals are not constitutionally mandated but offered up for legislative consideration. To a degree that is rare for legal scholarship today, he

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1. 63 VAND. L. REV. 307 (2010).

carefully spells out precisely how the state-level enforcement scheme he advocates should be structured and implemented. Moreover, unlike the usual complaints about the high cost of capital punishment—which seek only to make executions cheaper and more expeditious, no matter the impact on the accuracy and reliability of the process by which the law decrees death[2]—his proposals are designed to improve the enforcement of the death penalty.

As well conceived as Professor Gershowitz's proposal is, however, I remain skeptical that statewide enforcement of the death penalty would be preferable to continued local enforcement. First, Professor Gershowitz underestimates the benefits of localism in the death penalty. Localism, properly viewed, is not entirely negative and may actually be quite positive. Second, and more fundamentally, there is every reason to believe the "politics of death"[3] would operate, at the state level, to defeat the salutary purposes of Professor Gershowitz's reforms. Thus, as intriguing as it is, the prospect of statewide enforcement holds little promise as a means of rationalizing the administration of the death penalty.

I. SO WHAT IF LOCALISM LEADS TO DISPARATE ENFORCEMENT?

According to Professor Gershowitz, the high cost of capital punishment is troubling because, in effect, it leads to underenforcement of the death penalty in most localities in "death" states. In all but the largest and wealthiest counties, killers who deserve to be put to death all too often escape the ultimate sanction, while similarly situated suspects who committed murder in the few counties that can afford capital prosecutions face the death penalty. He regards this pattern of disparate enforcement in different localities as an intolerable form of arbitrariness.[4]

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2. *See, e.g.*, Matt Thacker, *Clark County Prosecutor Supports Limits on Death-Penalty Payments*, NEWS & TRIB. (Ind.), Dec. 18, 2010, http://newsandtribune.com/local/x1666507751/Clark-County-prosecutor-supports-limits-on-death-penalty-payments (citing prosecutor's claim that the death penalty is so expensive to enforce because "defendants are allowed to spend an exorbitant amount of money for attorney fees, experts and other expenses").

3. *See* Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 VA. L. REV. 283 (2008).

4. *See* Gershowitz, *supra* note 1, at 318–23 (discussing county-to-county variation in death penalty enforcement and providing examples of counties that have declined to seek the death penalty for budgetary reasons). Although Professor Gershowitz focuses on the underenforcement of the death penalty in counties that rarely or never seek death sentences, the phenomenon may be even broader than he supposes. Even the wealthier counties that do enforce the death penalty do not have unlimited resources, and so the high cost of the death penalty likely causes them, like other counties, to limit their use of the death penalty. In that case, the death penalty is being underutilized *statewide*, not just in smaller, less affluent counties.

In my view, these kinds of disparities are not troubling at all, but rather the inevitable effect of any system of nationally varying law enforcement. Geography—meaning whether crimes are committed in one place or another—routinely determines the treatment that otherwise similarly situated offenders receive. Not only do laws and penalties frequently differ across jurisdictions, but so do resources, enforcement priorities, and prosecutorial and sentencing policies. These differences frequently have outcome-determinative effects. Crimes that, in one place, might not even result in charges may end in arrest and prosecution if committed elsewhere, and even serious crimes might be graded or punished very differently in different jurisdictions. There is nothing unique, or uniquely troubling, about the death penalty in this regard.

Professor Gershowitz implies that such differences are only acceptable when different sovereigns are involved. In his view, it is permissible to give different sentences to two similarly situated offenders guilty of first-degree murder if one of the states involved lacks the death penalty, but not if the murders took place in different counties within a state that allows capital punishment.[5] Although Professor Gershowitz is right that sovereignty considerations can justify differential treatment of similarly situated offenders, it does not follow that differential treatment within a single sovereign is suspect, let alone unjustified. Moreover, if uniformity is required within a single sovereign, as he implies, then *all* of criminal law—not just the death penalty—is riddled with the geographic arbitrariness of which he complains, and he should be advocating statewide enforcement of *all* criminal laws instead of just crimes punishable by death.

Certainly, there is nothing in *Furman v. Georgia*[6] and its progeny suggesting that death should be treated as "different" in this regard. To be sure, Eighth Amendment jurisprudence requires legislatures to enact standards of "death eligibility" that will serve both to narrow the class of offenders who are subject to capital punishment and to channel the jury's discretion in making the life/death decision.[7] The law, however, does not require prosecutors to

5. *See id.* at 312–13 (arguing that federalism concerns justify variation between states but not county-to-county variation within states).

6. 408 U.S. 238 (1972) (per curiam).

7. *See generally* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 361–71 (1995) (examining the Supreme Court's regulation of capital punishment beginning with *Furman* and distilling the Court's concerns to four themes: desert, fairness, individualization, and heightened procedural reliability).

seek, or jurors to impose, the death penalty in every instance where legislatively prescribed standards of death eligibility are satisfied. Indeed, in the case of capital sentencers, the Supreme Court has held precisely the opposite—that jurors can *never* be required to impose death and must always have unfettered discretion to grant leniency (and, in effect, nullify legislative standards of death eligibility).[8] Needless to say, the potential for disparate results is necessarily implicit in the mandate that capital sentencers must have broad discretion to show mercy, insofar as different juries, presented with similarly situated offenders, might grant mercy to some but not others.

Moreover, the Supreme Court has held that broad prosecutorial discretion in capital charging decisions—and the resulting possibility that such charging decisions will vary from prosecutor to prosecutor—is consistent with *Furman*. In *Gregg v. Georgia*, the Court dismissed a claim that *Furman* requires statewide consistency in capital charging decisions as "nothing more than a veiled contention that *Furman* indirectly outlawed capital punishment by placing totally unrealistic conditions on its use."[9] In so holding, *Gregg* was clear that the arbitrariness *Furman* condemned was arbitrariness in *sentencing*, not routine exercises of prosecutorial discretion.[10] Absent a sufficient showing of unconstitutional discrimination, a defendant properly condemned to die under a valid capital sentencing scheme "cannot prove a constitutional violation by demonstrating that other defendants who may be similarly situated did *not* receive the death

8. *See, e.g.*, Eddings v. Oklahoma, 455 U.S. 104, 113–14 (1982) (holding that the sentencer may not refuse to consider "any relevant mitigating evidence"); Woodson v. North Carolina, 428 U.S. 280, 303–05 (1976) (holding mandatory imposition of the death penalty unconstitutional because it prevents juries from granting mercy). As I have explained elsewhere: "Under Eighth Amendment case law, the fact finder is far more than simply a balancer of aggravating and mitigating circumstances. Its most important function, perhaps, is to serve as a dispenser of mercy—in the case of juries, to bring the mores of the community to bear on whether to spare the life of a defendant whom the law deems 'death-eligible.' " Stephen F. Smith, *Taking* Strickland *Claims Seriously*, 93 MARQ. L. REV. 515, 525 (2009).

9. Gregg v. Georgia, 428 U.S. 153, 199 n.50 (1976) (plurality opinion); *see also id.* at 224–26 (White, J., concurring in judgment) (joining the plurality in rejecting a claim that charging discretion is unconstitutional because it "will inexorably result in the wanton and freakish imposition of the penalty condemned by the judgment in *Furman*").

10. As the plurality in *Gregg* explained: "*Furman* held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant." *Id.* at 199 (plurality opinion). Of course, as *McCleskey v. Kemp*, 481 U.S. 279 (1987), recognizes, *discrimination* in capital charging decisions is a concern of the Equal Protection Clause, but selective enforcement is not the kind of arbitrariness with which *Statewide Capital Punishment* is concerned.

penalty."[11] There would, therefore, appear to be no reason in principle why the localism that prevails in all other aspects of American criminal law should be treated as problematic in the context of offenses punishable by death.

II. THE BENEFITS OF LOCALISM IN THE DEATH PENALTY

As the discussion so far suggests, Professor Gershowitz treats localism in the death penalty as a decidedly negative phenomenon. In light of the high cost of enforcing the death penalty,[12] he argues that localism has resulted (and *necessarily* results) in unjustified disparity in the enforcement of a sanction that should be uniformly applied throughout every "death" state. The few counties with the resources to do so enforce the death penalty, but the majority of counties do not, resulting in an "under-utilization of the death penalty" that Professor Gershowitz describes as "troubling."[13]

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11. *McCleskey*, 481 U.S. at 306–07 (citing *Gregg*). In light of the limitations of existing Eighth Amendment law, Professor Gershowitz wisely makes no claim that localism in the enforcement of the death penalty is unconstitutional, instead urging states, as a matter of legislative choice, to enact his proposed mechanism of statewide enforcement.

12. According to some estimates, each death sentence can cost hundreds of thousands of dollars or more to obtain and several million dollars to defend and carry out years later. One study claims that the average total cost per execution in the United States ranges from two to three million dollars. *See* Smith, *supra* note 3, at 339 n.198 (citing study). In federal death penalty trials, defense costs alone averaged $620,000 from 1998–2004, with a high of almost $1.8 million. JON B. GOULD & LISA GREENMAN, REPORT TO THE COMMITTEE ON DEFENDER SERVICES: UPDATE ON THE COST AND QUALITY OF DEFENSE REPRESENTATION IN FEDERAL DEATH PENALTY CASES 24–25, 25 tbl.2 (2010), *available at* http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel/Viewer.aspx?doc=/uscourts/FederalCourts/AppointmentOfCounsel/FDPC2010.pdf&page=1. As death penalty opponents are quick to point out, even these high cost figures may be significantly understated because they do not include a variety of other pertinent costs, such as the costs incurred in cases where death sentences are sought but not imposed, the cost of retrials in cases where death sentences are reversed (as most are at some point), and higher incarceration costs for prisoners on death row. *See, e.g.*, RICHARD C. DIETER, DEATH PENALTY INFO. CTR., SMART ON CRIME: RECONSIDERING THE DEATH PENALTY IN A TIME OF ECONOMIC CRISIS 14–18 (2009), *available at* http://www.deathpenaltyinfo.org/documents/CostsRptFinal.pdf (claiming that the total cost to taxpayers for each execution may be as high as $30 million).

13. *See* Gershowitz, *supra* note 1, at 309–10 (citing Texas as an example of widespread underenforcement of the death penalty in most counties). In fairness to Professor Gershowitz, his concern is not with increasing the use of the death penalty *per se*. His concern, rather, is having the death penalty enforced uniformly statewide, and underenforcement of the death penalty in most localities, combined with possible overenforcement in wealthy counties, is troublesome to him because it suggests an arbitrary lack of uniformity in capital charging decisions. Nevertheless, given his account of the limiting effect of local resource constraints on the enforcement of the death penalty, uniform enforcement of the death penalty by states without reference to cost would almost certainly result in greater (perhaps even *significantly greater*) use of the death penalty.

However appealing this line of reasoning might be to those who believe the death penalty is underenforced—and many do[14]—the relevant point here is that this critique of local disparities in capital charging decisions rests on an unsupported empirical premise. The premise is that resource disparities among localities explain why only the largest and wealthiest counties typically enforce the death penalty with any regularity.

Although it is likely that the high cost of capital trials has something to do with this phenomenon, there is no reason to think that *only* differences in local resources are at work here. It might be, for example, that greater population and higher murder rates (real or perceived) account for much of the greater use of the death penalty by larger, wealthier counties. To his credit, Professor Gershowitz recognizes that these kinds of factors might also account for variation across counties, but he assumes that differing patterns of local enforcement must otherwise result from localities' ability or inability to bear the cost of expensive capital prosecutions.[15]

By focusing so heavily on resource differentials as the source of arbitrariness in capital charging decisions across localities, Professor Gershowitz misses what may be the most important benefit of localism in criminal justice—namely, its tendency to make the enforcement of criminal law more responsive to the values, priorities, and felt needs of local communities. In our society, crime is not conceived of solely as an offense against the sovereign itself. Even if criminal cases are, formally speaking, prosecuted in the name of a sovereign such as the "United States of America" or one of the several states, crimes are also understood as offenses against the local community in which they were committed.

The localism inherent in the American conception of crime is reflected in myriad ways. At the state level, most law enforcement is performed by local police agencies and funded, in large part, by local governments—and, in virtually all states, criminal cases are prosecuted locally, albeit in the name of the state. Interestingly enough, localism is still the order of the day in the minority of states with statewide enforcement of the criminal law. The three states in which prosecutions are handled primarily at the state level—Alaska, Delaware, and Rhode Island—have populations small enough that

14. *See* Smith, *supra* note 3, at 294 (citing opinion poll finding that "by a two-to-one margin, Americans say the death penalty is not imposed enough rather than imposed too much").

15. *See id.* at 318–23 (stating that "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" except as resource-driven).

statewide prosecutors necessarily "reflect local preferences," and where it exists, statewide prosecution authority is exercised in cooperation with local prosecutors and only "rarely used" to take over cases.[16] In most states, prosecutors (and trial judges) are elected by the people of each city or county—an effort to hold them directly accountable to the local community.[17] Even in the federal system, with presidential appointment of U.S. Attorneys, the Senate confirmation process ensures that prosecutors will be accountable to the local communities they serve.[18]

Moreover, regardless of the manner in which prosecutors and judges are selected, localism is guaranteed by constitutional law. Barring valid grounds for changes of venue, criminal prosecutions must occur in "the State and district wherein the crime shall have been committed."[19] In cases where the right to trial by jury applies, the jury must be selected from a group of citizens that is fairly representative of the diversity of the local community.[20]

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16. Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 562, 572 (2011). Professor Barkow's fascinating survey of state practice leads her to the following conclusion: "In almost every state, a conscious choice has been made to defer to local prosecutors. States have centralized authority in a statewide prosecutor in a handful of areas, ... [b]ut outside these contexts, local prosecutors are responsible for the vast bulk of criminal law enforcement within a state. And these local prosecutors are operating in most states with little centralized supervision by a state-level actor." *Id.* at 545.

17. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 533 & n.117 (2001) (stating that more than ninety-five percent of local district attorneys are elected); *id.* at 533–35 (contending that the accountability of elected prosecutors to voters gives them incentives to produce litigation outcomes the public would favor).

18. *See* Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 789–90 (1999) (discussing how U.S. attorneys are responsive to police and other local interests).

19. U.S. CONST. amend. VI. Though it might appear to be a technical venue requirement only, the Sixth Amendment vicinage requirement tells us something important about the traditional American conception of crimes and the juries who adjudicate guilt or innocence. Crimes are not merely offenses against crime victims or a distant sovereign; crimes are also wrongs against the local communities where they were committed. Similarly, juries are not just bodies of citizens designed to impose democratic checks on the power of state officials to impose punishment, but representatives of the local communities aggrieved by the alleged conduct of the accused. The intensely local nature of crimes and juries is a key reason for requiring that prosecutions take place in the localities where the crimes occurred. For an exploration of the common law and constitutional roots of the vicinage requirement, see Steven A. Engel, *The Public's Vicinage Right: A Constitutional Argument*, 75 N.Y.U. L. REV. 1658, 1673–1704 (2000).

20. *See. e.g.*, Taylor v. Louisiana, 419 U.S. 522, 528 (1975) (ruling that the Sixth Amendment requires that juries be drawn from a fair cross-section of the local community). Of course, jury-selection practices may serve to undermine the degree to which the petit jury is truly representative of the community. The removal of jurors for cause or through peremptory challenges may cause juries to lose some degree of the representativeness they had at the venire stage. Moreover, in capital cases, the controversial but accepted practice of "death qualifying" juries has been shown to result in "hanging juries" that have fewer minorities and women and are significantly more likely to convict and impose the death penalty than other juries. *See*

The fact that localism is hardwired into longstanding American notions of criminal justice has significant ramifications for Professor Gershowitz's project. It shows that localism in criminal law has been viewed, on the whole, as beneficial in our country—a feature that promotes the sound operation of the criminal justice system by keeping law enforcement accountable to the wishes and values of the communities it serves.[21] This traditional view, of course, might be wrong, but with localism as entrenched as it is in American criminal practice, it cannot simply be assumed that localism (and the lack of uniformity it permits) lacks redeeming virtues. The burden is on those who would jettison localism in capital punishment to show that the benefits of doing so outweigh the attendant costs.

At least at this juncture, that critical showing has not been made. The only reason Professor Gershowitz gives for moving to state-level enforcement is that localism, coupled with the high cost of enforcing the death penalty, leads counties that would otherwise pursue capital charges against deserving suspects to decline such charges for cost reasons, resulting in arbitrary disparities in capital charging decisions statewide. To be sure, he identifies several *advantages* of a properly constructed system of statewide enforcement—such as staffing capital cases with experienced, highly skilled trial judges and lawyers and achieving cost savings by reducing the high rate of reversible error in capital cases[22]—but those advantages are not, as he frames it, the *reason* for moving to statewide enforcement. The reason is to "eliminat[e] the geographic arbitrariness of the death penalty" that results from the inability of most localities to bear the high cost of trying capital cases.[23]

Smith, *supra* note 3, at 335 & n.179 (citing studies finding that death-qualified juries are more conviction-prone and more likely to impose death). Still, local representativeness is a central idea behind the American conception of criminal juries.

21. *See generally* Richard Briffault, *What About the "Ism"? Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1305 (1994) (identifying "increasing opportunities for political participation, keeping government close to the people, intergovernmental competition, [and] the representation of diverse interests" as core values of localism).

22. *See* Gershowitz, *supra* note 1, at 344–58 (discussing advantages of "elite" statewide enforcement of the death penalty). Professor Gershowitz specifically refers to these advantages as "benefits" (as opposed to motivating aims) of his proposals. *Id.* at 344.

23. *Id.* at 311. The ultimate goal, he says, is for states "to make capital charging decisions without regard to money" and, in doing so, to "equalize capital cases across the state." *Id.* at 359. This, of course, responds directly to what the article identifies at the outset as the source of "serious problems" in the death penalty: "[t]he uneven use of the death penalty across the nation" (including the "troubling" phenomenon of "under-utilization of the death penalty in many counties"). *Id.* at 309–10. If done in the manner Professor Gershowitz suggests, solving the geographic arbitrariness problem might have the collateral benefit of making capital trials fairer, more reliable, and more cost-effective. Those benefits, however, can be achieved through

Although I agree with Professor Gershowitz that cost undoubtedly plays a key role at the margin in capital charging decisions,[24] that hardly means that the death penalty is prohibitively expensive for most localities to enforce. To the contrary, even smaller, poorer localities have repeatedly shown a willingness, in appropriate cases, to go to remarkable (and, at times, astonishing) lengths to finance trials in which prosecutors insist on seeking the death penalty.

In one well-known recent example, Vinton County, Ohio (population 13,000), agreed to fund a case in which the local prosecutor wished to seek the death penalty. The county did so despite the fact that, according to the president of the county board of commissioners, a capital trial would wreak havoc on the county's annual budget of $2.7 million. As he put it, "[i]f [the prosecutor and grand jury] need the money, we'll find it."[25] Only the trial judge's extraordinary decision to invoke cost concerns as grounds for precluding the prosecutor from seeking the death penalty prevented the case from going forward as a capital case. Interestingly, although he agreed with the judge that seeking the death penalty would have a catastrophic effect on the county's budget, the board president decried the judge's decision and supported allowing the prosecution to proceed as a capital case.

There are other examples of small, cash-strapped localities working to overcome resource constraints to finance death penalty prosecutions. In 1998, Jasper County, Texas, agreed to fund an effort to execute three white supremacists who dragged a black man to death. The cost of the prosecution exceeded $1 million, fully ten percent of the county's budget for that year, and the county had to raise property taxes by almost seven percent for two years to pay for the prosecution.[26] In another case, Quitman County, Mississippi, said

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local enforcement, such as by increasing funding for indigent defense, issuing demanding standards of effective representation, and providing local judges and lawyers rigorous training in death penalty law and procedure. Only the desire to eliminate cost-driven geographic variation and achieve statewide uniformity in capital charging decisions necessitates a move to statewide enforcement.

24. *See id.* at 318–23. Some prosecutors in smaller localities report being pressured not to bankrupt their counties by seeking the death penalty. For example, according to a recent news report, prosecutors from smaller localities in Georgia who were considering filing capital charges "had pressure, with people telling them, 'you're going to break us' [if you seek the death penalty]." Stephen Gurr, *The High Cost of Death*, GAINESVILLE TIMES (Ga.), Oct. 5, 2008, http://www.gainesvilletimes.com/archives/7755/.

25. Adam Liptak, *Citing Cost, Judge Rejects the Death Penalty*, N.Y. TIMES, Aug. 18, 2002, at A18.

26. *See* Russell Gold, *Counties Struggle with High Cost of Prosecuting Death-Penalty Cases*, WALL ST. J., Jan. 9, 2002, at B1 (providing examples of counties taking extreme measures to pay for capital trials).

to be the state's poorest county, raised taxes three times in several years and took out loans to pay for a death penalty case that took years to litigate.[27] In other jurisdictions, localities have responded to the high cost of death penalty trials not just by raising taxes, but also by slashing spending on police, fire, and rescue services, as well as by delaying necessary capital projects and incurring debt.[28]

Examples such as these, though admittedly anecdotal in nature, refute the notion that the death penalty is prohibitively expensive for most localities to enforce. What they show is that, in cases deemed to be worth the sacrifices involved, even small counties with severe resource constraints are willing and able to make the tradeoffs necessary to ensure that appropriate cases go forward as capital prosecutions. In other cases, where the sacrifices are not viewed as worth the potential gains of achieving death sentences, localities are insisting that their prosecutors utilize life imprisonment or other suitably long prison sentences to protect the safety of the community.

Even if wealthier counties would make different choices in handling similarly situated offenders, this does not add up to arbitrariness. Rather, local governments make precisely these sorts of tradeoffs all the time in fiscal matters affecting the health, safety, and welfare of their citizens, including K–12 education, policing, public works, and other beneficial public expenditures. It is a cardinal virtue of localism that local communities get to make these choices for themselves, in a manner that reflects the priorities, needs, and values of their constituents. To say the least, it is hardly self-evident that, of all the important matters that localities fund, capital cases alone should be immunized from routine tradeoffs among competing fiscal priorities.[29]

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27. *Id.*; *see also* Katherine Baicker, *The Budgetary Repercussions of Capital Convictions* 5–6 (Nat'l Bureau of Econ. Research, Working Paper No. 8382, 2001), *available at* http://www.nber.org/papers/w8382 (providing examples of counties taking drastic measures to pay for capital cases).

28. *See generally* Baicker, *supra* note 27, at 5 ("One Texas county tried to raise taxes to pay for a high-profile capital trial and the taxpayers revolted and voted for a tax rollback, which forced the county commissioners to cut funding to fire and ambulance services in the county . . . ."). According to Professor Baicker, over the fifteen-year period she studied, localities raised, through tax hikes or spending cuts, $1.6 billion to fund death penalty prosecutions. *Id.* at 15; *see also* RICHARD C. DIETER, DEATH PENALTY INFO. CTR., MILLIONS MISSPENT: WHAT POLITICIANS DON'T SAY ABOUT THE HIGH COSTS OF THE DEATH PENALTY 4–7 (1994), *available at* http://www.deathpenaltyinfo.org/node/599 (describing the cost of the death penalty to local governments).

29. It is even less obvious why, in the state-level enforcement scheme Professor Gershowitz advocates, localities should be required to help underwrite the costs of state death penalty trials. Under present law, localities typically pay for capital trials, with some financial help at times

III. SAVING *FURMAN* FROM ITSELF: A POSTSCRIPT ON THE "POLITICS OF DEATH"

Despite the disagreements noted thus far, it is hard for me to be too critical of Professor Gershowitz's provocative reform proposals. After all, his motivating goals—to promote greater rationality and less unwarranted variation in capital charging and sentencing decisions—are undeniably laudable. Ever since *Furman v. Georgia*, the Supreme Court has sought to ensure that the death penalty will be reserved for the "worst" or most deserving killings and rationally imposed pursuant to uniform statewide legislative standards of "death eligibility."[30] In seeking to reduce the distorting influence of severe resource constraints in capital cases—on, importantly, *both* the prosecution and defense sides[31]—his proposal seeks to promote the *Furman* regime's stated goal of rationalizing the imposition of the death penalty by ensuring that individual desert will determine who is sentenced to death.

In a way, Professor Gershowitz seeks to save the *Furman* regime from itself—and, judging from the current state of the death penalty, it needs all the help it can get. His account suggests that *Furman* sowed the seeds of its own destruction. Although *Furman* sought to achieve a rational and fairly administered death penalty, he argues that this goal cannot be achieved because death sentences are

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from states, but localities also have the power to decide, in conjunction with local prosecutors, whether or not to incur the resulting high costs. Professor Gershowitz, however, would take from localities the power to make the critical decision over whether to seek the death penalty but allow states to force them to contribute to the cost of capital trials that state officials decide to pursue. *See* Gershowitz, *supra* note 1, at 353–54. If enforcing the death penalty truly is to be treated as a state function from start to finish, as he urges, with states making capital charging decisions and prosecuting capital cases through state personnel, then funding the resulting capital trials should be entirely the responsibility of the states. When localities perform the state's function of enforcing the death penalty, it is proper for states to choose to compensate them for it. In Professor Gershowitz's enforcement scheme, however, states are enforcing the death penalty *for themselves*, not for localities, and doing so through state personnel and state enforcement mechanisms.

30. *See generally* Steiker & Steiker, *supra* note 7, at 361–71 (describing the goals of *Furman* and other Eighth Amendment cases).

31. Professor Gershowitz is to be commended (ideally not just in a footnote) for his admirable evenhandedness on resource constraints in capital cases. Many who complain of the high cost of the death penalty are concerned only with reducing the costs *incurred by the defense*. These critics are perfectly willing to allow prosecutors and police to spend whatever they believe to be necessary to obtain death sentences; it is only costs incurred in the defense of capital charges that they deem to be wasteful. To his great credit, Professor Gershowitz recognizes that defense attorneys, no less than prosecutors, should be freed from resource constraints that prevent them from performing their important role in the proper functioning of the adversarial system of justice. Thus, his goal is not just a cheaper death penalty, but a *fairer* death penalty.

so expensive to obtain.[32] Of course, it is the *Furman* regime itself, and more generally the Supreme Court's "death is different," "super due process" approach to capital punishment, that has made the death penalty so expensive to enforce. Seen in this light, *Statewide Capital Punishment*, although not framed in these terms, is part of a larger literature that treats current shortcomings in the administration of the death penalty as unintended consequences of the Supreme Court's reform efforts.[33]

The question is how best to rehabilitate the *Furman* regime. Critics of capital punishment argue that the game is not worth the candle—the death penalty can never be fairly administered, and judicial efforts to improve it, no matter how well intentioned, tend only to make matters worse.[34] Some argue for "mend it, don't end it" approaches, such as using constitutional law strategically to counteract leading sources of arbitrariness in capital punishment while allowing legislatures continued latitude to utilize the death penalty.[35] Professor Gershowitz takes the latter course in *Statewide Capital Punishment*, in keeping with his prior work in this area.[36]

Some aspects of Professor Gershowitz's reform proposals would indeed make the death penalty fairer—and they would do so precisely because they would counteract key ingredients of the politics of death.

The politics of death gives the actors with institutional roles in the enforcement of the death penalty—legislators, governors, prosecutors, and judges—incentives to perform their functions in ways that make death sentences easier to obtain and more impervious to

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32. *See* Gershowitz, *supra* note 1, at 319–23.

33. *See generally* Steiker & Steiker, *supra* note 7, at 371–403 (arguing that *Furman* not only failed to achieve its stated objectives, but has entrenched the death penalty in American criminal practice by giving the false impression that constitutional law limits capital punishment to truly deserving cases); Smith, *supra* note 3, at 286–336 (arguing that *Furman* unleashed the politics of death and caused the political branches to make the death penalty easier to impose and harder to defend against).

34. *See, e.g.*, Steiker & Steiker, *supra* note 7, at 357–60 (arguing that, despite the Supreme Court's efforts to reform the death penalty, capital punishment remains as arbitrary as before and that judicial regulation has only served to legitimize and entrench the death penalty).

35. *See, e.g.*, Smith, *supra* note 3, at 346–80 (contending that a more demanding constitutional standard of effective assistance of counsel can be used to counteract legislative underfunding of indigent defense in capital cases).

36. *See* Adam M. Gershowitz, *Get in the Game or Get out of the Way: Fixing the Politics of Death*, 94 VA. L. REV. IN BRIEF 51 (2008); Adam M. Gershowitz, *Imposing a Cap on Capital Punishment*, 72 MO. L. REV. 73 (2007); 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 (2007); Adam M. Gershowitz, *The Diffusion of Responsibility in Capital Clemency*, 17 J.L. & POL. 669 (2001).

attack.[37] They have acted on these incentives in a variety of ways. Legislatures have expanded the scope of the death penalty, severely underfunded indigent defense, and restricted access to the courts. Prosecutors, eager to convince voters that they are "tough" on crime but forced by the high cost of capital trials to limit their use of the death penalty, push (and all too often cross) the line separating zealous from overzealous advocacy in capital prosecutions. Particularly in cases involving killings that are covered extensively in local media, state judges who must stand for reelection have upheld death sentences even in the face of errors that were clear enough eventually to result in federal habeas relief. Governors, who prior to *Furman* liberally granted clemency to death-row inmates, rarely do so today except in cases with strong innocence claims, defeating the role of clemency as a viable avenue for relief when the judicial process produces unjust results.

To the extent legislatures accept Professor Gershowitz's suggestions wholesale—by providing well-trained judges and ethically responsible prosecutors insulated from the pull of politics, and by adequately funding indigent defense—the death penalty would indeed be more fairly administered than it presently is. Here, though, lies the rub. These measures would improve the death penalty by counteracting the politics of death. Nevertheless, it is the politics of death that would cause states not to enact those measures in the first place.

After all, Professor Gershowitz's scheme would only make it *harder* for prosecutors to obtain death sentences. In case after case, it has become clear that the zealous, competent defense representation that he rightly seeks to achieve can only lead to juries being presented with stronger grounds for leniency, even for defendants who committed gruesome killings.[38] This, to say the least, is not what

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37. *See generally* Smith, *supra* note 3, at 294–336 (explaining the politics of death by exploring how institutional incentives affect political behavior regarding the death penalty).

38. *See generally id.* at 353–370 (discussing cases in which errors by defense attorneys likely skewed the life/death balance capital jurors struck). *Williams v. Taylor*, 529 U.S. 362 (2000), is a striking example. There, a Virginia jury had little trouble imposing the death penalty on a defendant whose appointed lawyer was incompetent at the sentencing phase. The lawyer made no effort to discover and present grounds for leniency and thus missed evidence that his client was borderline mentally retarded and had endured what the Supreme Court described as a "nightmarish childhood" of severe abuse and neglect. *Id.* at 372 n.4, 395. Faced with the prospect on remand of encountering a mitigation case, the prosecutor threw in the towel and agreed to accept a life sentence instead of death. *See* Frank Green, *Death Row Veteran's Life Spared*, RICHMOND TIMES-DISPATCH (Va.), Nov. 15, 2000, at A1. Sadly, cases of poor defense representation in capital cases are all too common nationwide. *See* Stephen B. 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) ("It is not the facts of the crime, but the quality of legal representation, that

legislators want—which is why they so severely constrain the funding of indigent defense representation and, comparatively speaking, so lavishly fund the prosecution side of the case.[39]

Presumably in recognition of the considerable political obstacles facing passage of the fairness-promoting aspects of his proposal, Professor Gershowitz has little choice but to pitch them as cost-saving measures. Better defense representation, more competent trial judges, and more ethical prosecutors, he claims, will pay for themselves over time in the form of averted reversals and retrials.[40] It would be wonderful news if in fact this were the case, but I am skeptical that the overall result of a fairer process would be to reduce the cost of enforcing the death penalty—as, I expect, legislatures will be as well.

The resources available to indigent representation should be increased, not because doing so will save money, but because it is the right thing to do in a system that prides itself on affording due process and equal justice under law. If these lofty constitutional imperatives do not move legislatures to enact reforms that would promote the integrity and reliability of the capital sentencing process, it is highly doubtful that the remote chance of cost savings will.[41]

[determines whether] the death penalty [is] imposed . . . ."); Gershowitz, *supra* note 1, at 323–26 (discussing incompetent and underfunded capital defense attorneys).

39. *See* Smith, *supra* note 3, at 302–07 (discussing how legislators facilitate the death penalty by strategically allocating funds to favor prosecutors). Professor Gershowitz assumes that underfunding of indigent defense is the result of local enforcement of the criminal law. *See* Gershowitz, *supra* note 1, at 325–26 (stating that "many of the nation's counties continue to lack sufficient funds to provide an adequate defense for capital and non-capital defendants"). This assumption is mistaken. The cause of severe constraints on indigent defense is not lack of resources but rather lack of political desire to provide a fair defense for indigent defendants. Bluntly put, legislatures *want* to underfund indigent defense relative to prosecution because doing so makes it considerably easier for prosecutors—their natural allies—to obtain convictions and, in capital cases, death sentences. *See* Smith, *supra* note 3, at 302–07 (discussing legislative underfunding of criminal defense). As one commenter notes: "[T]he state and federal governments together allocate over half of their criminal justice spending to the investigation and prosecution of crimes but only about two percent to indigent defense." Kyung M. Lee, *Reinventing* Gideon v. Wainwright*: Holistic Defenders, Indigent Defendants, and the Right to Counsel*, 31 AM. J. CRIM. L. 367, 373 (2004) (citing Justice Department data). The problem, then, is even deeper than Professor Gershowitz supposes: at *all* levels—local, state, and federal—funding is skewed, and heavily and intentionally so, in favor of the prosecution and law enforcement, to the detriment of indigent defendants and the lawyers who struggle to defend them in the face of such daunting obstacles.

40. Gershowitz, *supra* note 1, at 346–53.

41. Recent experience with federal habeas corpus reform provides support for this admittedly grim assessment. In the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2241 (2006 & Supp. 2009), Congress allowed states to opt into a scheme of streamlined habeas corpus review by enacting a number of reforms designed to bolster the reliability of death sentences. *See id.* §§ 2261, 2263, 2266. These reforms included allocating more funding for indigent defense, addressing the problem of ineffective representation in capital cases, and

To the extent legislatures take any interest in Professor Gershowitz's proposals, they would most likely enact those that would ease the prosecution's path to death sentences and pass on those that would help the defense. This could most easily be done by having the state underwrite the cost of prosecuting (but not defending) capital cases.[42] By holding current inadequate levels of defense funding constant and infusing new funds into the prosecution of capital cases, states would substantially ease the cost to localities of seeking the death penalty and exacerbate the already wide gap in funding available to prosecution and defense.

This partial displacement of localism in the death penalty would address the central arbitrariness that worries Professor Gershowitz—namely, cost-driven geographic disparities in capital charging decisions. Importantly, however, it would *worsen* the administration of the death penalty by making it even easier for "resource-constrained capital defenders [to] get steamrolled by prosecutors determined to win even at great cost."[43] This is not the result Professor Gershowitz advocates, of course, but it is, I fear, the most likely outcome of deviating from the tradition of localism in enforcement of the death penalty.

This outcome would not save *Furman* from itself but rather turn *Furman* on its head. The limited success that *Furman* has had in reining in the death penalty depends critically on local enforcement.

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providing death-row inmates a right to counsel in state post-conviction proceedings. *Id.* § 2261. Although these reforms would have dramatically reduced the expense and delays of federal habeas corpus proceedings in state capital cases, no state has opted into the streamlined review process. *See* Betsy Dee Sanders Parker, Note, *The Antiterrorism and Effective Death Penalty Act ("AEDPA"): Understanding the Failures of State Opt-In Mechanisms*, 92 IOWA L. REV. 1969, 1981–96 (2007) (discussing state failures to satisfy the standards necessary for streamlined treatment under the AEDPA). Evidently, regardless of the potential gains of reducing costs and delays in the enforcement of the death penalty, states were simply unwilling to take meaningful steps to improve the poor quality of representation that indigent defendants typically receive in capital cases.

42. In fact, in a number of cases where localities claimed they could not pursue capital charges without state financial assistance, states have supplied the necessary funding. *See* Gold, *supra* note 26, at B1. Furthermore, state attorneys general routinely come to the aid of local prosecutors in need of assistance in criminal cases. *See* Barkow, *supra* note 16, at 560 (discussing, among other forms of state assistance to local prosecutors, investigative help, forensic support, financial assistance, and lobbying).

43. Smith, *supra* note 3, at 286. Of course, widening the resource gap between prosecution and defense is hardly the only way that states could undermine Professor Gershowitz's scheme. For example, in place of the fair-minded and apolitical prosecutors he advocates, states could put the statewide enforcement mechanism in the hands of the prosecutors who have been the most aggressive in enforcing the death penalty. These prosecutors not only would find the prospect of a career devoted to capital cases to be especially rewarding, but would be least likely to exercise discretion fairly and wisely (particularly without the discipline of external funding constraints), and most likely to pursue death sentences overzealously.

The death penalty has not been limited in the manner that *Furman* anticipated—by having juries, presented with full information about potential mitigating circumstances, apply meaningful standards of death eligibility in truly adversarial sentencing hearings. In this respect, the *Furman* regime has been an abject failure[44]—and will remain so unless the Supreme Court shifts regulatory strategies and addresses the politics of death that have worked so effectively in *Furman*'s wake to undermine the Court's regulatory goals.[45]

The *Furman* regime has succeeded only in the limited sense that it has made capital prosecutions so expensive that localities have strong financial incentives, at the margin, to exercise restraint in the use of the death penalty. The results speak for themselves. As one study of local enforcement of the death penalty over almost two decades has found, "most counties (more than 80 percent) had no death penalty convictions and more than 10 percent had exactly 1 year with a death penalty conviction between 1983 and 1997."[46] Thus, while states have rushed to expand the death penalty and make it easier to impose since *Furman*,[47] the localities that actually bear the cost of funding capital trials have shown remarkable restraint in the use of the ultimate sanction.

Here lies the danger of deviating, in whole or in part, from localism in the death penalty. If states take over the enforcement of the death penalty, as Professor Gershowitz urges, or underwrite the cost of local prosecution of capital cases, prosecutors will have less incentive to show the remarkable restraint that localities have shown in the "states authorize, but localities subsidize" approach to capital punishment. Given the greater resources that are available to states, states are better positioned than localities to bear the financial costs of seeking the death penalty. Consequently, deviations from localism in capital punishment will most likely result in more death sentences and more executions—and, importantly, the increased use of the death penalty would take place under the failed *Furman* regime that has

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44. *See* Steiker & Steiker, *supra* note 7, at 360 ("[T]he Supreme Court's Eighth Amendment jurisprudence, originally promoted by self-consciously abolitionist litigators and advanced by reformist members of the Court, not only has failed to meet its purported goal of rationalizing the imposition of the death penalty, but also may have helped to stabilize and entrench the practice of capital punishment in the United States").

45. *See* Smith, *supra* note 3, at 294–95 (explaining how the politics of death unleashed after *Furman v. Georgia* resulted in a death penalty that is easier to obtain and more frequently imposed and carried out).

46. Baicker, *supra* note 27, at 9.

47. *See generally* Smith, *supra* note 3, at 295–307 (discussing how the political incentives derived from the death penalty's visibility and popularity have driven legislative efforts to facilitate capital punishment since *Furman*).

done so little to improve the administration of capital punishment. This would solve the geographic arbitrariness that troubles Professor Gershowitz, but at a very high price indeed.