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On Saving the Death Penalty: A Comment on Adam Gershowitz’s *Statewide Capital Punishment*

*Eric Berger**

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I. INTRODUCTION

We all know that Texas is “the capital of capital punishment.”¹ Since 2006, Texas has carried out nearly half of all executions nationwide.² In 2007, more than sixty percent of the nation’s executions occurred in Texas.³ Whereas momentum seems slowly to be turning against capital punishment elsewhere,⁴ Texas soldiers on.⁵

* Assistant Professor of Law, University of Nebraska College of Law. Thanks to Ty Alper, Anne Duncan, Adam Gershowitz, Bob Schopp, and Elisabeth Semel for very helpful comments; to Omaid Zabih for excellent research assistance; and to James Gottry, Steven Haymore, Niels Jensen, and the other editors of the VANDERBILT LAW REVIEW for superb editorial assistance. Remaining errors are mine.

1. Corinna Barrett Lain, *Deciding Death*, 57 DUKE L.J. 1, 45 (2007).

2. According to data available at the Death Penalty Information Center, Texas executed 109 individuals from the beginning of 2006 to January 9, 2011. The other forty-nine states collectively executed 121 people. Death Penalty Information Center, *Searchable Executions Database*, <http://www.deathpenaltyinfo.org/executions> (last visited Jan. 9, 2011).

3. Adam Liptak, *At 60% of Total, Texas Is Bucking Execution Trend*, N.Y. TIMES, Dec. 26, 2007, at A1.

4. See James S. Liebman & Lawrence C. Marshall, *Less Is Better: Justice Stevens and the Narrowed Death Penalty*, 74 FORDHAM L. REV. 1607, 1650–65 (2006) (summarizing recent erosion of support for capital punishment); Elisabeth Semel, *Reflections on Justice John Paul Stevens’s Concurring Opinion in Baze v. Rees: A Fifth Justice Renounces Capital Punishment*, 43 U.C. DAVIS L. REV. 783, 866 (2010) (“The national trend is still toward a decreased use of the death penalty.”).

5. Interestingly, while executions in Texas remain high, capital sentences in Texas have declined dramatically. See Semel, *supra* note 4, at 820 n.169 (noting that capital sentences in Texas have declined by sixty-five percent since 2006).

That, at least, is the common wisdom. In *Statewide Capital Punishment: The Case for Eliminating Counties' Role in the Death Penalty*, Professor Adam Gershowitz argues that it is misleading “to suggest that ‘the State’ of Texas is a prolific user of capital punishment.”⁶ As Gershowitz explains, it is not the *State* of Texas that prosecutes death penalty cases, but rather counties within the State. In fact, only a few of Texas’s 254 counties seek capital punishment with any regularity.⁷ In this regard, Texas is not anomalous. Other states, such as Pennsylvania and California, also have wide variations among counties’ imposition of the death penalty, even among demographically similar counties.⁸ Indeed, a recent study indicates that only ten percent of counties in the United States accounted for all death sentences imposed between 2004 and 2009, and that only five percent of counties accounted for all the death sentences between 2007 and 2009.⁹ From this perspective, the nationwide disparity in death penalty practices is driven less by state policy and more by county prosecutorial practices.

These disparities, Professor Gershowitz argues, create serious problems of various sorts. Counties aggressively pursuing the death penalty sometimes win controversial death sentences at trial. Gershowitz argues that such sentences are either reversed after rounds of expensive appeals or result in executions “that raise serious questions about the culpability of the inmate.”¹⁰ On the other side of the spectrum, some small, poor counties must choose between foregoing the death penalty for even the most heinous crimes and pursuing a death sentence that may be especially vulnerable to reversal on appeal, given the inexperience of the trial participants.¹¹

Professor Gershowitz offers a solution to these problems. He argues that rather than handling death penalty cases at the county level, all aspects of capital punishment cases “should be handled at

6. Adam M. Gershowitz, *Statewide Capital Punishment: The Case for Eliminating Counties' Role in the Death Penalty*, 63 VAND. L. REV. 307, 308 (2010).

7. *Id.* at 308–09.

8. *See id.* at 314–15 (comparing Philadelphia County with 106 death row inmates and Allegheny County with ten death row inmates); ACLU OF NORTHERN CALIFORNIA, DEATH BY GEOGRAPHY: A COUNTY BY COUNTY ANALYSIS OF THE ROAD TO EXECUTION IN CALIFORNIA 1, http://www.aclunc.org/docs/criminal_justice/death_penalty/death_by_geography/death_by_geography.pdf (last visited Feb. 13, 2011) (explaining that ten counties account for nearly eighty-five percent of the death sentences in California since 2000).

9. *See* Death Penalty Information Center, *ARBITRARINESS: 10% of Counties Account for All Recent Death Sentences in the U.S.*, <http://www.deathpenaltyinfo.org/arbitrariness-10-counties-account-all-recent-death-sentences-us> (last visited Jan. 9, 2011).

10. Gershowitz, *supra* note 6, at 309.

11. *Id.* at 310.

the state level by an elite group of prosecutors, defense lawyers, and judges whose sole responsibility is to deal with capital cases.¹² Such a professionalized, statewide system, he contends, would help reduce costs, eliminate geographic arbitrariness, and restore confidence in both the overall system and individual verdicts.¹³ For instance, by cutting counties out of the equation and placing the decision to seek death at the state level, the plan would presumably reduce the number of governmental units empowered to seek capital punishment from well over a thousand to roughly thirty-five, thus somewhat mitigating the geographic arbitrariness. Gershowitz also argues that his proposal would help reduce the system's errors, because elite prosecutors, defense attorneys, and judges would be less likely to make mistakes at trial. The reduction of such error would be intrinsically beneficial, and, as Gershowitz emphasizes, it may also help states avoid expensive appeals.¹⁴

Gershowitz's article accomplishes much of what legal scholarship should accomplish. It challenges the common wisdom (that state policies drive the disparate utilization of capital punishment), identifies serious problems (the arbitrariness, errors, and costs of our current capital punishment system), and proposes a thought-provoking, ambitious solution (the creation of statewide teams of capital prosecutors, defense attorneys, and judges) that may mitigate some of those problems. For all its merits, though, Gershowitz's piece may underestimate the economic and political obstacles to his plan and overestimate his proposal's capacity to effect substantial improvements. The balance of this Response addresses these issues and the related question of whether Gershowitz's proposed reforms would be preferable to abolition.

II. THE ECONOMIC AND POLITICAL OBSTACLES TO REFORM

Professor Gershowitz makes a plausible case that his plan would mitigate some problems of our death penalty system, but a threshold question is whether his proposal is politically viable. One significant political obstacle is cost. Capital punishment is already extremely expensive; studies estimate that it costs several states millions of dollars per case—significantly more than life imprisonment.¹⁵ By conservative estimates, California alone spends

12. *Id.*

13. *Id.* at 311.

14. *Id.*

15. See, e.g., PHILIP J. COOK & DONNA B. SLAWSON, THE COSTS OF PROCESSING MURDER CASES IN NORTH CAROLINA 1, 78 (1993), available at <http://www.deathpenaltyinfo.org/>

\$137.7 million annually to maintain its capital system.¹⁶ Gershowitz's proposal may add even more to those costs. For his part, Gershowitz concedes that the upfront costs of his plan would be substantial but contends that his plan would ultimately save states money by reducing the number of costly appeals.¹⁷ In effect, Gershowitz is betting that savings on appeal will more than offset greater trial expenses.

While it is impossible to predict these kinds of costs with certainty, there are reasons to be skeptical. With regard to trial expenses, some states have already experimented with statewide capital defender offices similar to the elite defenders in Gershowitz's proposal, and these offices have been extremely expensive.¹⁸ New York's Capital Defender Office, for instance, was so costly that the Governor proposed cutting its budget by seventy percent.¹⁹ Georgia created a similar capital defender office, only to subsequently withdraw funding due to legislators' concerns over the "Lexus level"

northcarolina.pdf (concluding that the extra cost of prosecuting a capital case in North Carolina is more than \$2.16 million per execution); John Roman et al., *Urban Institute, Justice Policy Center, The Cost of the Death Penalty in Maryland 2* (2008), available at <http://www.deathpenaltyinfo.org/CostsDPMaryland.pdf> (estimating that the average cost of a death penalty prosecution in Maryland is \$1.9 million more than a non-capital prosecution); see generally James R. Acker, *Be Careful What You Ask For: Lessons from New York's Recent Experience with Capital Punishment*, 32 VT. L. REV. 683, 712–13, n.129 (2008) (discussing various studies concluding "that, for reasons including lengthier pretrial investigation, heightened motions practice, greater involvement of experts, prolonged jury selection, bifurcated trials, lengthy appellate and postconviction review and frequent reversals, intensive security associated with death row confinement, and others, capital punishment imposed costs greatly in excess of life imprisonment"); RICHARD C. DIETER, DEATH PENALTY INFORMATION CENTER, MILLIONS MISSPENT: WHAT POLITICIANS DON'T SAY ABOUT THE HIGH COSTS OF THE DEATH PENALTY (rev. ed. 1994), available at <http://www.deathpenaltyinfo.org/node/599> ("Death penalty cases are much more expensive than other criminal cases and cost much more than imprisonment for life with no possibility of parole.").

16. See CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE, FINAL REPORT 146 (2008), available at <http://www.ccfaj.org/documents/CCFAJFinalReport.pdf> [hereinafter CALIFORNIA COMMISSION] (using "conservative" estimates to find that the annual cost of capital punishment in California is \$137.7 million as compared with a \$11.5 million annual price tag for a system in which life imprisonment without parole is the maximum penalty).

17. See Gershowitz, *supra* note 6, at 354 (arguing that "[e]lite prosecutors would exercise their charging discretion more carefully and handle cases more effectively, thus reducing the number of appeals that states would have to fund").

18. See, e.g., Yilu Zhao, *Counting up the Costs of a Death-Penalty Trial*, N.Y. TIMES, June 8, 2003, at B5 (explaining that New York spent at least \$1 million in defense of a defendant accused of a capital crime and that capital defender offices like New York's are "a very expensive proposition").

19. See Michael Cooper, *Cuts Possible for Program That Handles Capital Cases*, N.Y. TIMES, Feb. 5, 2005, at B5 ("Gov. George E. Pataki's budget proposal would cut spending by 70 percent on the state's program to represent poor defendants accused of capital crimes."); Richard Perez-Pena, *The Death Penalty: When There's No Room for Error*, N.Y. TIMES, Feb. 13, 2000, at D3 (discussing the New York Capital Defender Office's \$15 million budget).

defense of capital defendants that in one case cost \$1.8 million.²⁰ In light of these experiences, Gershowitz's proposals to employ elite capital defenders would probably make capital trial defense even more expensive and politically unpopular than it already is. Indeed, other states have already resisted proposals to improve the quality of capital representation, suggesting that Gershowitz's plan, however meritorious, may meet similar resistance.²¹

Moreover, genuinely trustworthy capital trials may require still more money. The quality of representation for capital defendants hinges not only on the caliber of their lawyers but also on the resources available to those lawyers to conduct investigations and gather evidence.²² Indeed, investigation is so important that the California Commission on the Fair Administration of Justice recommended that to provide adequate representation in capital trials, the State needed not only to appoint two qualified capital defense attorneys but also "an investigator and mitigation specialist."²³ Such appointments, of course, would cost even more money and render improvements to the capital system even more politically challenging.²⁴

20. Brenda Goodman, *Official Quits in Georgia Public Defender Budget Dispute*, N.Y. TIMES, Sept. 7, 2007, at A18 (discussing the high cost of the Georgia Office of the Capital Defender and the Brian Nichols case).

21. See, e.g., Gov. George Ryan, *Moratorium on Death Row Executions*, 5 LOY. J. PUB. INT. L. 1, 4 (2003) ("One of my great regrets is that I could not convince the Illinois General Assembly to pass reforms of our capital punishment system. The reforms were met with fierce opposition in the state Senate . . ."); Death Penalty Information Center, *Alabama's Compliance with ABA Policies*, <http://www.abanet.org/moratorium/assessmentproject/alabama.html> (last visited Jan. 9, 2011) (detailing Alabama's failure to comply with several ABA recommendations to improve flaws in Alabama's death penalty system, including many recommendations pertaining to adequate capital defense and prosecutorial professionalism). In fairness, some states have recently taken steps to improve their systems of capital representation, see, e.g., 2006-2007 STATE BAR OF TEXAS COMMITTEE REPORTS, 70 TEX. B.J. 612, 617 (2007), but money nevertheless often remains a driving force in death penalty politics. See Darryl K. Brown, *The Multifarious Politics of Capital Punishment: A Response to Smith*, 94 VA. L. REV. IN BRIEF 57, 64 (2008) (observing that Georgia has cut defense funding every year from 2005 to 2008).

22. See 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 (arguing that even though some 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").

23. CALIFORNIA COMMISSION, *supra* note 16, at 28; cf. *Wiggins v. Smith*, 539 U.S. 510, 537 (2003) (vacating death sentence due to counsel's failure to present "the available mitigating evidence, [which] taken as a whole, might well have influenced the jury's appraisal of Wiggins' moral culpability") (internal quotation marks and citations omitted).

24. In fairness, non-capital criminal trials would also benefit from increasing defense attorneys' resources, but the dangers of inadequate defense resources are arguably most disturbing when the defendant's life is on the line.

Gershowitz responds to these cost concerns by contending that his system would save money on appeal, but it is questionable whether those savings would be as substantial as he suggests. Gershowitz argues, for instance, that more elite prosecutors would be “much” less likely to commit *Brady* violations, thus substantially reducing the number of meritorious capital appeals.²⁵ This seems overstated. Even if some violations occur because inexperienced prosecutors, “with the purest of motives, fail to turn over potential *Brady* material simply because they did not realize it should have been disclosed,”²⁶ it is doubtful that these good-faith mistakes account for all or even most *Brady* violations. To the contrary, ambition and pressure to win cases likely explain some—and possibly many—*Brady* violations.²⁷ To this extent, Gershowitz may be over-estimating how differently “elite” and “non-elite” prosecutors will approach issues like exculpatory evidence and, consequently, how much money his proposal will save on appeal.

Even assuming *arguendo* that Gershowitz’s proposal would save states money in the long run, there are still political obstacles to rational debate. State legislators’ perceptions of their constituents’ views on capital punishment often guide their votes on the death penalty more than informed arguments about cost savings. Recent events in Nebraska help illustrate the point. After the State’s electric chair was declared unconstitutional,²⁸ the Judiciary Committee of the Unicameral Legislature held hearings about whether the legislature should adopt lethal injection as a new method of execution or, alternatively, abolish the death penalty altogether. Despite expert testimony regarding the sizable financial costs of the death penalty,²⁹ the State chose to preserve capital punishment and adopted lethal injection as its new method of execution. To most observers, this outcome was unsurprising. Far more surprising was the fiscal note

25. See Gershowitz, *supra* note 6, at 350 (“An elite team of prosecutors that focuses exclusively on handling capital cases is much more likely to prevent non-meritorious *Brady* claims.”); see also *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (requiring the prosecutor to disclose exculpatory evidence).

26. Gershowitz, *supra* note 6, at 349.

27. See, e.g., Andrew Horwitz, *Taking the Cop out of Copping a Plea: Eradicating Police Prosecution of Criminal Cases*, 40 ARIZ. L. REV. 1305, 1320 (1998) (“Even with the existence of clear and binding ethical rules, the pressure to suppress exculpatory evidence often overwhelms a prosecuting attorney.”); *infra* notes 54–58 and accompanying text.

28. See *State v. Mata*, 745 N.W.2d 229, 278 (Neb. 2008) (“death by electrocution . . . violates the prohibition against cruel and unusual punishment in Neb. Const. art. I, § 9”).

29. See, e.g., *Neb. Unicameral Leg. Judiciary Comm. Hearings* at 54 (Jan. 29, 2009) (testimony of Michael Radelet) (arguing that the continuation of the death penalty and adoption of lethal injection would require Nebraska “to commit bundles of cash” to the issue).

attached to the lethal injection bill, estimating that the adoption of lethal injection and continuation of the death penalty in Nebraska would have “no fiscal impact.”³⁰ Just a few months later, a news report indicated that the State had already spent more than \$33,000 adopting lethal injection.³¹ That price tag was limited to costs associated with developing a lethal injection procedure; it did not figure in the much higher costs associated with the death penalty more generally, such as the great expense of capital trials and appeals. Nor did the \$33,000 figure include costs almost certain to arise from litigation challenging the new lethal injection procedure as cruel and unusual.³² Nor did it account for the fact that the State may someday change its execution procedure again, a distinct possibility given the nationwide shortage of thiopental, the anesthetic administered in Nebraska’s and other states’ three-drug protocol.³³ Reasonable officials, of course, can disagree about the propriety of capital punishment, but it is manifestly preposterous to contend that legislation preserving a state’s death penalty and adopting a new method of execution has “no fiscal impact.” Whether the fiscal note attached to the Nebraska bill resulted from delusion, confusion, or willful misrepresentation, the episode suggests that states may not always respond rationally to arguments like Gershowitz’s about the death penalty’s costs.

One should not overstate the point here. Some legislators *do* try to wrestle with difficult issues. Indeed, to their credit, half of Nebraska state legislators voted in favor of funding a study to explore the costs of capital punishment.³⁴ Other states also have begun to consider whether the death penalty is too expensive to retain.³⁵ But

30. See JoAnne Young, *Records Show State Has Spent More than \$33,000 Preparing for Lethal Injection*, LINCOLN J. STAR, Apr. 7, 2010, at A1 (discussing the attorney general’s fiscal note attached to the lethal injection bill).

31. See *id.*

32. One prominent Nebraska attorney guaranteed the Judiciary Committee that he and other lawyers would challenge lethal injection. See *Neb. Unicameral Leg. Judiciary Comm. Hearings* at 86 (Jan. 29, 2009) (testimony of Alan Peterson) (testifying that if Nebraska adopts lethal injection “[o]f course, we’ll all litigate that and many other issues”); see generally Eric Berger, *Lethal Injection and the Problem of Constitutional Remedies*, 27 YALE L. & POLY REV. 259, 283–93 (2009) (discussing lethal injection litigation in various states).

33. See Kathy Lohr, *States Delay Executions Owing to Drug Shortage*, NAT’L PUB. RADIO: ALL THINGS CONSIDERED (Sept. 16, 2010), <http://www.npr.org/templates/story/story.php?storyId=129912444> (explaining that a thiopental shortage required some states to delay executions).

34. See JoAnne Young, *Nebraska Lawmakers Turn down Death Penalty Study*, LINCOLN J. STAR, Mar. 25, 2010, at A1.

35. See Semel, *supra* note 4, at 871 n.421 (summarizing numerous studies addressing the high economic cost of capital punishment); Ian Urbina, *In Push to End Death Penalty, Some States Cite Cost-Cutting*, N.Y. TIMES, Feb. 25, 2009, at A1 (noting the role cost has played in

the death penalty remains a hot-button issue and is therefore often likely to inspire hot-button responses, rather than rational, thoughtful policy decisions. Nebraska, like many states, has had a handful of high-profile murders, and some state legislators may not have wanted to question the appropriateness of capital punishment with those crimes still relatively fresh in the public consciousness.³⁶

The point here is not that democratic outcomes are necessarily regrettable; numerous factors can and should play a role when a state decides whether to have the death penalty. That being said, politics and emotion can render even the most intelligent proposals politically unrealistic. Even though the cost issue was raised repeatedly, Nebraska not only adopted lethal injection with a fiscal note predicting “no fiscal impact” but also rejected the proposed cost study that would have given the legislature a clearer idea of precisely how much capital punishment costs the State.³⁷ In short, the Nebraska legislature preferred to support capital punishment without learning the facts about it. This episode suggests that Gershowitz may have a hard time persuading state legislatures to implement his plan, especially given that its initial costs are likely high and its long-term savings are debatable.

III. THE RELATIVE MERITS OF REFORM

In light of the political and economic obstacles to Gershowitz’s proposal, it is worth addressing whether this is a political battle worth fighting. Gershowitz candidly concedes that a statewide death penalty system cannot cure all the problems with capital punishment,³⁸ but he does not address whether his proposal would mitigate some of those serious problems substantially enough so that his improved system would be preferable to no system at all. American capital punishment is riddled with problems including, *inter alia*, cost, error, and racial inequality. Gershowitz’s plan would address some of these concerns, but serious flaws would remain. It is therefore worth briefly considering whether his reforms would likely improve the system enough to merit retaining capital punishment.

legislative debates about whether to repeal the death penalty in, *inter alia*, Maryland, Colorado, Kansas, and New Hampshire).

36. See JoAnne Young, *Families of Murder Victims Live with the Memories*, LINCOLN J. STAR, Apr. 1, 2009, at A1 (reporting on family members of Nebraska murder victims and the sentiment that the death penalty for such cases is “logical, appropriate and practical”).

37. See Young, *supra* note 34, at A1 (discussing the debate surrounding the Nebraska cost study).

38. Gershowitz, *supra* note 6, at 344.

To begin (again) with money, Gershowitz argues that his plan would reduce financial costs associated with the death penalty by saving “huge sums of money” currently spent on capital appeals.³⁹ He contends that better trial lawyers and judges would make fewer mistakes, thus resulting in fewer appeals, reversals on appeal, retrials, and appeals from retrials.⁴⁰ Nevertheless, even though fewer meritorious appeals (whether from the initial trial or from retrials) may save substantial sums, the economic costs of capital punishment would likely still be very significant. As discussed above, Gershowitz’s plan probably increases the initial trial costs, which are already high.⁴¹ Moreover, even if Gershowitz were correct that his plan would reduce appealable errors at trial, death row inmates would probably still appeal numerous aspects of their convictions and sentences. Gershowitz contends that “attorneys are ethically forbidden from raising frivolous issues on appeal,”⁴² but they also have an ethical duty to represent their clients zealously, a duty that is heightened in the criminal defense and capital context.⁴³ Given that their clients’ lives are on the line, death row lawyers often appeal aggressively,⁴⁴ and even without an attorney, death row inmates can still file *pro se* appeals.⁴⁵ Even assuming that these appeals would be collectively less numerous and less meritorious under Gershowitz’s plan, states would still need to expend significant resources to deal with them.⁴⁶ The death penalty, then, would still cost states a great deal—probably

39. *Id.* at 346.

40. *See id.* at 346–48.

41. *See supra* notes 17–24 and accompanying text.

42. *See* Gershowitz, *supra* note 6, at 351.

43. *See, e.g.*, MODEL RULES OF PROF’L CONDUCT, pmb. para. 2 (2011) (“As advocate, a lawyer zealously asserts the client’s position.”); *id.* R. 3.1[3] (stipulating that the criminal defense lawyer’s obligation not to file frivolous claims is “subordinate” to the criminal defendant’s constitutional entitlement to the assistance of counsel); Ty Alper, *The Truth About Physician Participation in Lethal Injection Executions*, 88 N.C. L. REV. 11, 66 (2009) (discussing lawyers’ obligation to represent their death penalty inmate clients zealously); Monroe H. Freedman, *The Professional Obligation to Raise Frivolous Issues in Death Penalty Cases*, 31 HOFSTRA L. REV. 1167, 1177–79 (2003) (arguing that capital lawyers have an ethical and professional obligation to advocate zealously and raise all conceivable arguments); Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925, 961 (2000) (“As a matter of professional ethics, criminal defense lawyers are required to thoughtfully consider all lawyering strategies that ethical rules allow and to employ them if they serve the client’s interests.”).

44. *See, e.g.*, Freedman, *supra* note 43, at 1177–79 (discussing “the necessity to make ‘frivolous’ arguments in death penalty cases”).

45. *See* Ray Sebastian Pantle, *Blacker than Death Row: How Current Equal Protection Analysis Fails Minorities Facing Capital Punishment*, 35 CAP. U. L. REV. 811, 825 (2007) (explaining that some death row inmates proceed through the appeals process *pro se*).

46. *See supra* notes 25–27 and accompanying text.

substantially more than life imprisonment without parole.⁴⁷ Abolition, by contrast, would leave states with more money to spend on other criminal justice matters, such as drug programs, crime prevention programs, and task forces to investigate unsolved violent crimes.⁴⁸ In light of capital punishment's high price tag and great uncertainty about whether it actually serves as a deterrent,⁴⁹ the costs even of Gershowitz's improved capital punishment system may well exceed its benefits.

Of course, economic cost is just one issue. Another major problem is error. Professor James Liebman concluded in a massive study that sixty-eight percent of capital cases from 1973 to 1995 resulted in reversal.⁵⁰ Given that some errors likely result from inexperienced trial actors,⁵¹ the adoption of Gershowitz's suggestions may improve these numbers, but substantial risk of error will likely remain. Even excellent lawyers and judges make mistakes, and, in all events, the adversarial system is far from foolproof.⁵² Convictions, for instance, sometimes rest on unreliable evidence, such as police

47. See *supra* notes 15–16 and accompanying text.

48. Gershowitz, *supra* note 6, at 345.

49. Compare Jeffrey Fagan et al., *Capital Punishment and Capital Murder: Market Share and the Deterrent Effects of the Death Penalty*, 84 TEX. L. REV. 1803, 1860 (2006) (stating that “the marginal deterrent effect of the threat or example of execution on those cases at risk for such punishment is invisible”) with Zhiqiang Liu, *Capital Punishment and the Deterrence Hypothesis: Some New Insights and Empirical Evidence*, 30 E. ECON. J. 237, 237 (2004) (arguing that the death penalty does have a deterrent effect) and Joanna M. Shepherd, *Deterrence Versus Brutalization*, 104 MICH. L. REV. 203, 205 (2005) (arguing that “executions deter murder in only six states . . . actually increase[] murder in thirteen states, [and] [i]n eight states . . . ha[ve] no effect on the murder rate”).

50. See JAMES S. LIEBMAN, A BROKEN SYSTEM, PART II: WHY THERE IS SO MUCH ERROR IN CAPITAL CASES AND WHAT CAN BE DONE ABOUT IT i (2002); see also CALIFORNIA COMMISSION, *supra* note 16, at 30 (noting that nationally there were 205 exonerations of defendants convicted of murder from 1989 and 2003, including seventy-four exonerations of defendants sentenced to death).

51. See Gershowitz, *supra* note 6, at 346 (discussing prosecutorial error in *Cone v. Bell*). Some of these reversals also may have resulted from the confused state of Eighth Amendment doctrine in the years after *Gregg v. Georgia*, 428 U.S. 153 (1976). See, e.g., Steven Grossman, *Proportionality in Non-Capital Sentencing: The Supreme Court's Tortured Approach to Cruel and Unusual Punishment*, 84 KY. L.J. 107, 161–62 (1996) (discussing confusion in Eighth Amendment doctrine).

52. The literature on flaws inherent in the adversarial system is vast. See, e.g., Peter J. van Koppen & Steven D. Penrod, *Adversarial or Inquisitorial: Comparing Systems*, in ADVERSARIAL VERSUS INQUISITORIAL JUSTICE: PSYCHOLOGICAL PERSPECTIVES ON CRIMINAL JUSTICE SYSTEMS 15–17 (Peter J. van Koppen & Steven D. Penrod eds., 2003) (discussing criticisms of the adversarial system); Saad Gul, *The Truth That Dare Not Speak Its Name: The Criminal Justice System's Treatment of Wrongly Convicted Defendants Through the Prism of DNA Exonerations*, 42 No. 6 CRIM. LAW BULL. art. 1 (2006) (“the rancor of the adversarial system means that the truth has taken a back seat to other, less lofty concerns”).

fabrication or earnest but mistaken eyewitness testimony.⁵³ In other words, the innocent can be sentenced to death even without any wrongdoing by the prosecutor, incompetence by the defense attorney, or reversible error by the judge.

Relatedly, it is unclear that error in the capital system hinges so primarily on the *quality* of the lawyers. While better prosecutors, defenders, and judges may be less likely to make mistakes, they may also be driven by many of the same pressures currently exerted on less competent actors holding the same positions. Good prosecutors, for example, may be as or more susceptible to political pressures and personal ambitions than bad prosecutors.⁵⁴ Of course, by removing prosecutors from direct elections, Gershowitz's proposal may insulate them somewhat from this political pressure, but it would still require the attorney general to appoint the capital prosecutors.⁵⁵ State attorneys general presumably would weigh political concerns when making such appointments, and prosecutors likely would be cognizant of those concerns and may have political ambitions themselves.⁵⁶ Similarly, the team of capital judges would themselves come from a pool of current state judges, who are elected in many states and thus vulnerable to the acute political pressures posed by the death penalty.⁵⁷ The proposal here might somewhat mitigate the

53. See, e.g., DAVID R. DOW, EXECUTED ON A TECHNICALITY: LETHAL INJUSTICE ON AMERICA'S DEATH ROW xv (2005) (arguing that some people are executed as a result of eyewitness mistakes or police lies); Richard A. Wise et al., *How to Analyze the Accuracy of Eyewitness Testimony in a Criminal Case*, 42 CONN. L. REV. 435, 452 (2009) ("For decades, psychologists and defense attorneys have maintained that eyewitness testimony can be notoriously unreliable . . .").

54. While many prosecutors are very capable, honest, law-abiding officials, many are also subject to well documented political pressures. See, e.g., Guido Calabresi, *Address, The Current, Subtle—and Not So Subtle—Rejection of an Independent Judiciary*, 4 U. PA. J. CONST. L. 637, 639 (2002) (arguing that prosecutors enjoy great sentencing discretion and that they "are subject to political pressures"); Deborah L. Johnson et al., *Juvenile Transfer to the Adult Criminal Court: The Case for Reform*, 43 No. 3 CRIM. LAW BULL. art. 8 (2007) (describing "political and public pressures" as "inherent" in prosecutors' jobs); *supra* notes 26–27 and accompanying text.

55. See Gershowitz, *supra* note 6, at 333 (discussing how legislatures should instruct attorneys general to make selections of prosecutors).

56. See, e.g., Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 VA. L. REV. 283, 308 & n.96 (2008) (arguing that during campaigns prosecutors and attorneys general will signal their "toughness" to voters by signaling their support for capital punishment).

57. See, e.g., Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 760–65, 784–92 (1995) (citing examples of groups targeting sitting judges for politically unpopular death penalty votes); Keith Swisher, *Pro-Prosecution Judges: "Tough on Crime," Soft on Strategy, Ripe for Disqualification*, 52 ARIZ. L. REV. 317, 377 (2010) (arguing that state judges "impose the death penalty more frequently as their elections near"); see generally Richard Briffault, *Judicial Campaign Codes After Republican Party of Minnesota v. White*, 153 U. PA. L. REV. 181, 181 (2004) ("[T]he people select or retain at least some judges in thirty-nine states, and

majoritarian pressures on our capital punishment system, but given that Gershowitz's primary attention is to the participants' experience and competence—and not to the political pressures within the system—it probably would not substantially alter those pressures.⁵⁸ Even after Gershowitz's improvements, then, a substantial rate of error may well remain.⁵⁹ Needless to say, while error is disturbing in any criminal context, it is especially intolerable in the death penalty context given the finality of an execution.⁶⁰

Finally, a discussion of death penalty reform must address the issue of race. As Stephen Bright argues, “[a]lmost every study of capital sentencing practices has found racial disparities that are striking, powerful, and undeniable.”⁶¹ These disparities, many critics agree, result in large part from prosecutorial decisions regarding when to seek the death penalty.⁶² Any serious proposal to reform American capital punishment must therefore grapple with the criticism that race appears to be a significant factor influencing who is capitally charged and sentenced to death.⁶³

Gershowitz does address race by suggesting that it be redacted from state-level charging committees' capital files.⁶⁴ This may be an admirable suggestion, though one wonders how effectively it would address the problem. The kinds of crimes that frequently become capital cases often generate media attention, so it is quite possible that a charging committee reading a race-redacted capital file would still know a good amount about the case, including the race of the

all judges are elected in twenty-one states[;] . . . 87% of the state and local judges in the United States have to face the voters at some point if they want to win or remain in office.”).

58. See, e.g., *Harris v. Alabama*, 513 U.S. 504, 519–20 (1995) (Stevens, J., dissenting) (“[T]he ‘higher authority’ to whom present-day capital judges may be ‘too responsive’ is a political climate in which judges who covet higher office—or who merely wish to remain judges—must constantly profess their fealty to the death penalty The danger that they will bend to political pressures when pronouncing sentence in highly publicized capital cases is the same danger confronted by judges beholden to King George III.”).

59. See, e.g., James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2156 (2000) (arguing that “trial-level officials have been free to turn their part of the [capital punishment] system into a machine for generating political capital on a per-death-sentence basis, with the inevitable byproduct of . . . error”).

60. See, e.g., *Commonwealth v. McKenna*, 383 A.2d 174, 181 (Pa. 1978) (“Because imposition of the death penalty is irrevocable in its finality, it is imperative that the standards by which that sentence is fixed be constitutionally beyond reproach.”).

61. Stephen B. Bright, *The Failure to Achieve Fairness: Race and Poverty Continue to Influence Who Dies*, 11 U. PA. J. CONST. L. 23, 24 (2008) [hereinafter Bright, *Failure to Achieve Fairness*].

62. *Id.* at 24.

63. See *id.* at 26–27 (summarizing evidence of racial prejudice in prosecutorial offices in Houston and Philadelphia).

64. Gershowitz, *supra* note 6, at 356.

suspects and victims. Race redaction, in other words, may not be a terribly effective way of removing race from the charging and sentencing equation.

It is possible, of course, that the Gershowitz plan may improve the system enough so as indirectly to reduce racial disparities.⁶⁵ Perhaps the elite teams of prosecutors, defense attorneys, and judges would collectively be better-attuned to racial issues than current participants in the capital system. Perhaps also Gershowitz's plan would so substantially reduce the system's errors and arbitrariness that the death penalty's racial disparities would somehow be incidentally but significantly reduced. This is the optimistic view. The more pessimistic view is that the racial disparities in capital punishment will persist unless addressed more directly and thoroughly.⁶⁶ In all events, given the tremendous "influence" of race on the capital punishment system,⁶⁷ this is an issue that should be examined more carefully if American capital punishment is in fact to be retained and reformed.

Gershowitz's project implies that the death penalty is worth saving, but the problems with capital punishment in the United States run so deep that he might have addressed why his (possibly expensive) reforms are preferable to abolition. Of course, abolition is not currently politically realistic in some states (such as Texas), and the reforms Gershowitz proposes may result in some improvements wherever instituted. Unfortunately, though, major reform of capital punishment may be less politically realistic in states where the death penalty remains politically popular. In other words, a state like Texas is unlikely either to abolish the death penalty or to adopt Gershowitz's plan anytime soon. As for states where the death penalty is on shakier political footing, Gershowitz might have addressed whether abolition may be preferable—and possibly even more politically attainable—than substantial reform. Given that support for the death penalty appears to be eroding,⁶⁸ it seems all the more important to weigh

65. As a side note, Gershowitz's proposal to create statewide capital punishment teams is in tension with Professor William Stuntz's fascinating article contending that the racial inequities in our criminal justice system stem largely from a lack of *local* control. See generally William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969 (2008).

66. See Kenneth Williams, *The Death Penalty: Can It Be Fixed?*, 51 CATH. U. L. REV. 1177, 1226 (2002) (arguing that proposed death penalty reforms naively and incorrectly assume that "once the death penalty system has been reformed, race will no longer be an issue").

67. See, e.g., Bright, *Failure to Achieve Fairness*, *supra* note 61, at 24–32.

68. See Semel, *supra* note 4, at 819 (noting that in the past few years "[p]opular support for capital punishment [has] declined" and that during this time span there have been "fewer capital prosecutions, fewer death sentences, fewer executions, growth in legislative activity to abolish the death penalty, and additional exonerations of death row inmates").

potential reforms not just against the status quo but also against abolition.

IV. CONCLUSION

Reasonable people can disagree about the morality of the death penalty, but, as a policy matter, American capital punishment is deeply flawed. Professor Gershowitz's proposal may improve the system, but, given the depth of the flaws, the resulting system would likely remain very problematic. To his credit, Gershowitz does not contend that his plan would cure all of capital punishment's problems, but he may underestimate the economic costs of his plan, the political obstacles to his plan, and the depth of the problems that likely would still remain. States might be wise, then, to use his recommendations to spur debate about whether they would be better off reforming the death penalty or, alternatively, abandoning the system altogether.