

AN NTSB FOR CAPITAL PUNISHMENT

*Adam M. Gershowitz**

I.	THE SEARCH FOR FLIGHT 370 AND THE NTSB.....	156
A.	<i>The Flawed Response by Malaysia and the Analogy to American Capital Punishment.....</i>	156
B.	<i>How Might Things Have Been Different if the NTSB Had Been in Charge?.....</i>	160
C.	<i>The Comparison of the NTSB and a National Capital-Punishment Group.....</i>	161
II.	THE FAILURE OF LOCAL CONTROL OF THE DEATH PENALTY.....	163
III.	AN NTSB FOR CAPITAL PUNISHMENT.....	169
A.	<i>The Logistics.....</i>	169
1.	<i>Creating the Institution.....</i>	169
2.	<i>Selection and Role of the Lawyers and Staff.....</i>	170
B.	<i>Why Would States Opt into a Nationwide System?.....</i>	173
IV.	CONCLUSION.....	176

When a fatal traffic accident happens, we expect the local police and prosecutors to handle the investigation and criminal charges. When a fatal airplane crash occurs, however, we turn instead to the National Transportation Safety Board (NTSB). The reason is that air crashes are complicated and the NTSB has vast expertise. Without that expertise, investigations falter. We need look no further than the mess made by Malaysian authorities in the search for Flight 370 to see the importance of expertise in handling complicated investigations and processes. It is easy to point to a similar series of mistakes by local prosecutors and defense attorneys in many death-penalty cases around the country. If we are to continue utilizing capital punishment in the United States, the death-penalty system should follow the air crash model, not the car crash model. Capital cases should be handled by an elite, nationwide unit of prosecutors and investigators who travel to capital-murder sites the way the NTSB travels to airplane and other catastrophic crashes. As the number of death sentences dwindles each year, states have incentive to enter into an NTSB model that allows them to continue using capital punishment without having to handle the complicated cases themselves. This Symposium Essay argues that capital punishment as currently conducted at the local level is a failure, but that the death penalty can be justified if carried out by an elite, national team of lawyers and investigators.

* Kelly Professor of Teaching Excellence and Professor of Law, William & Mary Law School. I am grateful to Professor Arnold Loewy for inviting me to participate in this symposium and to Alana Biltucci for helpful research assistance.

At the time of this symposium in April 2014, the world was mesmerized by the disappearance of Malaysian Airlines Flight 370.¹ There were (and still are) a number of vexing questions: How can an airplane just disappear? Was this a nefarious terrorist event or simply an accident? And, perhaps most surprisingly, with all of the radar and satellite technology in the world, why could the Malaysian government not find the plane in the days, weeks, and months that followed?² What was clear, almost from the beginning, was that the Malaysian authorities were not equipped to effectively handle such a complicated investigation.³

The deeply flawed search for Flight 370 at first might seem like a strange analogy for the problems of capital punishment in the United States. Upon closer inspection, however, it is actually a very good fit.⁴ The search for Flight 370 was badly mismanaged by Malaysian authorities from the beginning because they lacked the experience and information to know they were making grievous errors.⁵ Because of those poor decisions up front, search teams spent weeks looking in the wrong place and wasting valuable time and resources.⁶ Malaysian officials later reversed course and redirected the search based on other evidence.⁷ All the while, the victims' families were anguished because they received limited information from those in charge and could not understand what was taking so long.⁸ And to top it off, many other countries

1. See Kirk Semple, *Hunt for Jet's Black Boxes Is a Race Against Time*, N.Y. TIMES (Apr. 3, 2014), <http://www.nytimes.com/2014/04/04/world/asia/hunt-for-jets-black-box-is-a-race-against-time.html>.

2. See Keith Bradsher, *Hunt for Malaysian Jet Tests Technical Limits*, N.Y. TIMES (Apr. 7, 2014), <http://www.nytimes.com/2014/04/08/world/asia/missing-malaysia-flight-370.html> [hereinafter Bradsher, *Hunt for Malaysian Jet*] (discussing the technological challenges involved in the search).

3. See Keith Bradsher & Michael Forsythe, *Series of Errors by Malaysia Mounts, Complicating the Task of Finding Flight 370*, N.Y. TIMES (Mar. 15, 2014), <http://www.nytimes.com/2014/03/16/world/asia/series-of-errors-by-malaysia-mounts-complicating-the-task-of-finding-flight-370.html>.

4. Any analogy one might make pales in comparison to the brilliant comparisons the late Andy Taslitz made in these pages in past symposia. See generally, e.g., Andrew E. Taslitz, *Bullshitting the People: The Criminal Procedure Implications of a Scatological Term*, 39 TEX. TECH L. REV. 1383 (2007) (discussing the impact of "political bullshit" on our society); Andrew E. Taslitz, *Why Did Tinkerbell Get off So Easy?: The Roles of Imagination and Social Norms in Excusing Human Weakness*, 42 TEX. TECH L. REV. 419 (2009) (analyzing the role compassion plays in our cultures).

5. See Keith Bradsher & Chris Buckley, *Malaysia Backtracks on When Airliner's Communications Were Disabled*, N.Y. TIMES (Mar. 17, 2014), <http://www.nytimes.com/2014/03/18/world/asia/malaysia-backtracks-on-when-airliners-communications-were-disabled.html> (explaining that the transportation minister who briefed the press appeared not to understand the admittedly complicated communications system on the plane).

6. See Chris Buckley, *Jet's Disappearance Puzzles a World Under Constant Electronic Watch*, N.Y. TIMES (Mar. 22, 2014), <http://www.nytimes.com/2014/03/23/world/asia/in-a-wired-world-with-abundant-eyes-a-vanished-jet-vexes-and-perplexes.html> ("As recently as last weekend, American aviation investigators in Malaysia told the government there that it was searching for the plane in the wrong areas, and that it needed to redirect its search to the Indian Ocean, according to a person briefed on the inquiry.").

7. See Keith Bradsher & Michelle Innis, *Search for Missing Jet Is Moved Nearly 700 Miles, Based on Radar Analysis*, N.Y. TIMES (Mar. 27, 2014), <http://www.nytimes.com/2014/03/28/world/asia/missing-malaysia-airlines-flight-370.html>.

8. See Edward Wong, *Tension Is Growing as Families of Flight 370 Passengers Hold Vigil*, N.Y. TIMES (Mar. 17, 2014), <http://www.nytimes.com/2014/03/18/world/asia/tension-is-growing-as-families-of-flight-370-passengers-hold-vigil.html> [hereinafter Wong, *Tension is Growing*] ("What you say today is

were involved in the search, spending tens of millions of dollars following through on flawed search plans set in motion by the missteps of the Malaysian authorities.⁹

Capital punishment in the United States operates much the same way. Cases are reversed at an alarming rate.¹⁰ Many reversals are for ineffective assistance of counsel.¹¹ Other capital cases are reversed for prosecutorial misconduct.¹² Still other cases are overturned years later on direct appeal or habeas corpus because of invalid jury selection, improper arguments, and incorrect jury instructions.¹³ The result is years and years of wasted time while cases wind their way up and down the judicial system.¹⁴ Victims do not understand the process and are anguished by the lack of communication¹⁵ and the enormous delays (not to mention the false hopes that come from an initial death sentence or a later affirmance by a state supreme court).¹⁶ Just like the search for Flight 370, capital punishment in the United States costs a small fortune—certainly much more than it would cost to impose life imprisonment.¹⁷ And this is to say nothing of other issues¹⁸—such as racial

different from what you said yesterday,’ said one man who had waited along with hundreds of other relatives over the weekend for any morsel of news. Another man said, ‘How can you still not know after so many days?’”).

9. See Kirk Semple, *Search for Malaysian Jet to Be Costliest in History*, N.Y. TIMES (Apr. 8, 2014), <http://www.nytimes.com/2014/04/09/world/asia/search-for-malaysian-jet-to-be-costliest-in-history.html> (noting expenditures by “dozens of countries”); Kirk Semple & Michelle Innis, *More Ships and Planes Join Search for Jetliner*, N.Y. TIMES (Mar. 30, 2014), <http://www.nytimes.com/2014/03/31/world/asia/malaysia-airlines-flight-370.html> (“With no trace of Malaysia Airlines Flight 370 more than three weeks after it disappeared, the international search effort intensified Monday, with 10 planes and 10 ships expected to scour the latest search area . . .”).

10. See JAMES S. LIEBMAN ET AL., *A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973–1995* 6 (2000).

11. Tom Zimpleman, *The Ineffective Assistance of Counsel Era*, 63 S.C. L. REV. 425, 442 (2011). Zimpleman predicts successful claims are likely to decrease in the future though. See *id.* at 432.

12. See Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059, 1065 (2009) [hereinafter *Prosecutorial Shaming*].

13. *Id.* at 1085, 1104.

14. See James S. Liebman & Peter Clarke, *Minority Practice, Majority’s Burden: The Death Penalty Today*, 9 OHIO ST. J. CRIM. L. 255, 337 n.415 (2011) (describing the time on death row); see also Nancy J. King et al., *Final Technical Report: Habeas Litigation in U.S. District Courts: An Empirical Study of Habeas Corpus Cases Filed by State Prisoners Under the Antiterrorism and Effective Death Penalty Act of 1996* (Executive Summary), Nat’l Crim. Just. Reference Service 7 (Aug. 2007), <http://www.ncjrs.gov/pdffiles1/nij/grants/219558.pdf> (“Capital cases filed in 2000, 2001, and 2002 have averaged 3.1 years or 37.9 months.”).

15. See Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 924 (2006).

16. See Margaret Vandiver, *The Impact of the Death Penalty on the Families of Homicide Victims and of Condemned Prisoners*, in *AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT* 613, 621 (James R. Acker et al. eds., 2d ed. 2003).

17. See Corinna Barrett Lain, *The Virtues of Thinking Small*, 67 U. MIAMI L. REV. 397, 408–09 (2013) (explaining that cost played a factor in the decision of five states to repeal their death-penalty statutes and noting that Illinois, New Jersey, and New York collectively spent more than \$500 million on capital punishment without any executions to show for it).

18. There are certainly other objections to the death penalty beyond those I identify in this paper. Notably, this symposium specifically excluded the question of innocence, so I leave that aside here.

discrimination¹⁹ and geographic arbitrariness²⁰ of capital punishment within states—that occur because of local control of death penalty charging decisions.

That such tremendous problems continue to exist over four decades after the Court first struck down the death penalty as unconstitutional suggests that it might be time to end our experiment with capital punishment.²¹ Certainly, as a matter of pure utility, the cost of capital punishment—arbitrariness, discrimination, and actual dollars spent—appears to be vastly greater than the benefits (primarily questionable claims of deterrence) it tangibly provides to society.²² Even leaving aside the problem of innocence, capital punishment seems to be the classic example of a disastrous public policy.

Yet, the public is often willing to pay a lot of money for flawed public programs that convey psychological benefit.²³ Indeed, we need look no further than the vast public support for spending tens, or even hundreds of millions of dollars to find an airplane that has almost certainly sunk to the bottom of the ocean and from which no human remains are likely to be recovered.²⁴ While capital punishment is less popular than in the recent past, it still enjoys considerable nationwide support (and robust support in many southern states).²⁵ Despite the views of the elite then, perhaps America's experiment with the death penalty should continue.

If the experiment is to continue, though, America will need to change its approach to capital punishment. Dramatic reversal rates in capital cases should not be acceptable.²⁶ Nor should we tolerate racial discrimination²⁷ or defendants facing the death penalty because they committed their crimes in Philadelphia as opposed to Pittsburgh, or Houston as opposed to a small Texas

19. See, e.g., David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1661 (1998).

20. See Adam M. Gershowitz, *Imposing a Cap on Capital Punishment*, 72 MO. L. REV. 73, 93–96 (2007) [hereinafter *Imposing a Cap on Capital Punishment*] (noting intrastate arbitrariness); 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, 871–72 (2007) [hereinafter *Pay Now, Execute Later*] (noting intrastate arbitrariness); Robert J. Smith, *The Geography of the Death Penalty and Its Ramifications*, 92 B.U. L. REV. 227, 228–30 (2012) [hereinafter *The Geography of the Death Penalty*] (documenting the narrow group of counties seeking the death penalty).

21. See *Furman v. Georgia*, 408 U.S. 238, 239 (1972) (per curiam).

22. See generally Jeffrey Fagan, *Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment*, 4 OHIO ST. J. CRIM. L. 255 (2006) (discussing recent deterrence research).

23. Cf. Ray Sanchez, *Nearly 80% of Americans Think No One Survived Flight 370, CNN Poll Finds*, CNN (May 6, 2014, 8:18 PM), <http://www.cnn.com/2014/05/06/world/asia/malaysia-airlines-plane-poll/> (discussing how the public wants to spend a lot of money on searching for an airplane that likely cannot be found).

24. See *id.* (explaining that although 79% of people thought no survivors would be found, nearly 70% favored continuing to search for the plane).

25. See Jeffrey M. Jones, *U.S. Death Penalty Support Lowest in More Than 40 Years*, GALLUP (Oct. 29, 2013), <http://www.gallup.com/poll/165626/death-penalty-support-lowest-years.aspx>; see also Ross Ramsey, *UT/TT Poll: Texans Stand Behind Death Penalty*, TEX. TRIB. (May 24, 2012), <http://www.texastribune.org/2012/05/24/uttt-poll-life-and-death/> (noting that 73% of Texans support the death penalty).

26. See *supra* note 10 and accompanying text.

27. See *supra* note 19 and accompanying text.

county without the resources to seek the death penalty.²⁸ And horror stories about ineffective assistance of counsel and prosecutorial misconduct four decades after the reinstatement of capital punishment is nothing short of appalling.²⁹

There is one plausible solution that might solve many of the problems with capital punishment. Just as we do not send the local police and prosecutors to investigate an air crash, we should not send local authorities to deal with a death-penalty case. Instead, final capital charging decisions and the litigation of all death-penalty cases should be handled by an elite unit of national prosecutors, investigators, and defense attorneys who are responsible for all of the nation's cases.

I have previously proposed that states abolish counties' roles in the death penalty and instead run the death-penalty system at the state level.³⁰ Here, I go a step further and suggest a national strategy for capital punishment.³¹ Local prosecutors should make the initial decision to label a case as "potentially capital." Thereafter, they would forward the case to the national death-penalty team—an NTSB for capital punishment—that would decide whether to seek death and, if so, would then handle all aspects of the case from pretrial discovery to the last clemency petition. An NTSB for capital punishment would insulate charging decisions from the influence of politics, money, and subconscious racial discrimination. An elite nationwide group of prosecutors and defense attorneys would also drastically decrease the number of meritorious claims of prosecutorial misconduct and ineffective assistance of counsel that bog down the current capital-punishment system. An NTSB approach would lead to less arbitrary charging decisions, fairer trials, and shorter appellate processes with fewer reversals.³²

This Essay proceeds in three parts. Part I offers a brief explanation of the flaws in the search for Malaysian Flight 370 and draws a comparison with American capital punishment.³³ Part I then describes how the NTSB operates and posits that it would not have made the same threshold mistakes as Malaysian authorities.³⁴ Part II then briefly reviews the deep flaws present in a system allowing local control of the death penalty.³⁵ In particular, Part II discusses threshold decisions about charging leading to arbitrariness, racial discrimination, and years of appeals and habeas petitions built around those

28. See *supra* note 20 and accompanying text.

29. See *supra* notes 11–12 and accompanying text.

30. See generally Adam M. Gershowitz, *Statewide Capital Punishment: The Case for Eliminating Counties' Role in the Death Penalty*, 63 VAND. L. REV. 307 (2010) [hereinafter *Statewide Capital Punishment*] (advancing the notion that counties should not participate in the death penalty administration process).

31. See *infra* Parts I–IV.

32. See *infra* Part III.A.2.

33. See *infra* Part I.A.

34. See *infra* Part I.B–C.

35. See *infra* Part II.

initial mistakes.³⁶ Part III then explains how an elite national death-penalty unit—an NTSB for capital punishment—could create a functional death-penalty system.³⁷ Part III explains why, in an era of dwindling numbers of capital cases, states should be eager to voluntarily opt into a nationwide capital-punishment system.³⁸

I. THE SEARCH FOR FLIGHT 370 AND THE NTSB

A. *The Flawed Response by Malaysia and the Analogy to American Capital Punishment*

Entire books will be written about the mysterious disappearance of Flight 370 and the flawed search for it. I want to focus on four issues here—competence, politics, poor relations with victims’ families, and cost—and draw a comparison to American capital punishment.

First, the Malaysian response smacked of incompetence. Malaysian authorities failed to understand all of the available radar data and began searching on the eastern coast of Malaysia.³⁹ During this most crucial time period after the plane’s disappearance—when there was the best chance to see debris floating on the ocean and to locate the black box before its signal disappeared—Malaysian authorities directed the international community to look in the wrong place.⁴⁰ Over five days passed before Malaysian authorities redirected the search.⁴¹

Incompetence is also one of the main criticisms of the players in the American death-penalty system. An alarming number of defendants receive ineffective assistance of counsel.⁴² Scholars have long observed that the quality of lawyering plays an outsized role in determining who receives the death penalty and who escapes with their lives.⁴³ A small number of ineffective defense attorneys are conscious of their poor performance but are simply too lazy to make a better effort.⁴⁴ In many more cases, however, the defense

36. See *infra* Part II.

37. See *infra* Part III.A.1.

38. See *infra* Part III.B.

39. See Bradsher & Forsythe, *supra* note 3.

40. *Id.*

41. *Id.*

42. See LIEBMAN ET AL., *supra* note 10, at 5. In Professor James Liebman’s study of capital reversals from 1973 to 1995, ineffective assistance of counsel was the most common reason for state post-conviction reversal. *Id.*

43. 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).

44. For example, consider the infamous Joe Cannon in Harris County, Texas, who boasted of hurrying through capital cases like “greased lightning.” 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, 789.

attorneys are over-burdened or under-trained and thus unintentionally provide poor legal representation.⁴⁵

The same incompetence criticism can be pinned on lawyers on the other side of the courtroom who engage in prosecutorial misconduct. As I have argued elsewhere, much prosecutorial misconduct is accidental, with prosecutors failing to disclose exculpatory evidence (or committing other errors) because they are over-burdened with huge case loads or because they fail to recognize *Brady* material due to a lack of training and experience.⁴⁶ Thus, first and foremost, Malaysia's bungled response to the missing plane shares some of the hallmarks of incompetence that we see in the American death-penalty system.

Second, politics undoubtedly played a role in the flawed response to the plane's disappearance. Malaysian authorities did not initially realize the plane had disappeared until being alerted to that fact by Vietnamese officials.⁴⁷ Malaysian military installations also failed to track the plane as it traveled through their airspace.⁴⁸ Both of those mistakes were embarrassing, and the Malaysian government did not want to reveal the holes in its radar and defense capabilities.⁴⁹ The Malaysian government thus kept valuable information hidden and failed to reveal for a week that its military radar had spotted the jet flying west and away from the area where the initial international search efforts were being undertaken.⁵⁰ The *New York Times* reported that "some analysts say Malaysian leaders might have feared the announcement would reveal ineptitude by the military, since it would appear that crew members watching the radar had failed at their jobs."⁵¹ This likely explains why Malaysian authorities were slow to accept international assistance in the search.⁵²

Of course, politics plays a huge role in capital cases as well. The worst offenders are often not the ones sentenced to death. In some truly egregious

45. See, e.g., Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 703 (2007) ("Some trial attorneys admit to routinely providing ineffective assistance to their clients. These attorneys simply do not have the time to investigate all of the cases, research all of the issues, and prepare adequately for all of the trials that come their way." (footnote omitted)).

46. See Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 282–85 (2011).

47. See Chris Buckley & Michael Forsythe, *17-Minute Delay Found in Reporting Missing Plane*, N.Y. TIMES (May 1, 2014), <http://www.nytimes.com/2014/05/02/world/asia/malaysia-calls-for-better-tracking-of-flights.html>.

48. See *id.*

49. See Edward Wong, *Search for Lost Jet Is Complicated by Geopolitics and Rivalries*, N.Y. TIMES (Mar. 26, 2014), <http://www.nytimes.com/2014/03/27/world/asia/geopolitical-rivalries-jet.html> [hereinafter Wong, *Search for Lost Jet is Complicated*].

50. See *id.*

51. *Id.*

52. See Michael S. Schmidt & Scott Shane, *As U.S. Looks for Terror Links in Plane Case, Malaysia Rejects Extensive Help*, N.Y. TIMES (Mar. 16, 2014), <http://www.nytimes.com/2014/03/17/world/asia/as-us-looks-for-terror-links-in-plane-case-malaysia-rejects-extensive-help.html>.

cases, prosecutors make the calculated political decision not to seek the death penalty because the financial cost would be exorbitant.⁵³ Faced with the prospect of having to raise taxes to pay for a death-penalty trial, some prosecutors choose the less expensive path and forego the option to seek death.⁵⁴ On the opposite end of the spectrum, some prosecutors likely seek the death penalty in marginal cases to create a reputation for being tough on crime in order to secure their reelection or move up the ladder to a higher office.⁵⁵ Indeed, a few prosecutors—such as former Philadelphia district attorney Lynne Abraham—seek the death penalty in every case in which it is plausibly available rather than making a nuanced effort to seek death in only the most egregious cases.⁵⁶ And some prosecutors who fall in the middle of the spectrum—people with the very best of intentions—are occasionally influenced by local news coverage, public opinion, and unconscious racial bias in some death-penalty filings.⁵⁷

Third, the Malaysian authorities did a terrible job dealing with the families of the passengers. Because of the trickle of information, family members believed the Malaysian government was hiding something.⁵⁸ Just one week after the plane's disappearance, *The New York Times* reported that “[t]o say many [family members] are exasperated, astounded or fed up with the way the Malaysian authorities have handled the investigation and search efforts is an understatement. Last week, people . . . lobbed plastic water bottles at Malaysia Airlines executives.”⁵⁹ A few weeks later, a group of family members “presented a Malaysian diplomat with a scathing statement saying that the families would regard Malaysian leaders and the state-controlled operator of the flight, Malaysia Airlines, to be ‘murderers’ if it emerged that missteps had led to the deaths of their loved ones.”⁶⁰

Although not nearly as pronounced, family members often feel victimized by the criminal-justice process in capital cases. As Professor Stephanos Bibas has explained, there is a great gulf between the knowledge held by insiders and outsiders in the criminal-justice system.⁶¹ Handicapped by a lack of knowledge

53. See Carol S. Steiker & Jordan M. Steiker, *Miller v. Alabama: Is Death (Still) Different?*, 11 OHIO ST. J. CRIM. L. 37, 46–47 (2013).

54. See *infra* notes 122–28 and accompanying text.

55. Richard C. Dieter, *Killing for Votes: The Dangers of Politicizing the Death Penalty Process*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/node/379> (last visited Oct. 25, 2014).

56. See, e.g., Tina Rosenberg, *The Deadliest D.A.*, N.Y. TIMES (July 16, 1995), <http://www.nytimes.com/1995/07/16/magazine/the-deadliest-da.html> (discussing how over half of Pennsylvania's death row inmates came from Philadelphia, where the long-time district attorney sought the death penalty as often as possible).

57. See Jonathan DeMay, *A District Attorney's Decision Whether to Seek the Death Penalty: Toward an Improved Process*, 26 FORDHAM URB. L.J. 767, 770 (1999).

58. See Wong, *Tension is Growing*, *supra* note 8.

59. *Id.*

60. Keith Bradsher et al., *Malaysia Says Missing Plane Sent One Last Partial Signal*, N.Y. TIMES (Mar. 25, 2014), <http://www.nytimes.com/2014/03/26/world/asia/malaysia-flight-370.html>.

61. See Bibas, *supra* note 15, at 920–31.

about how the system works, average citizens often feel aggrieved by the lack of information they receive from prosecutors and how the reality of the process differs from the inaccurate impression of the system they may have from television, movies, or other limited data points.⁶² The sheer length of capital cases also leaves victims feeling violated as the terrible memories of the crime are dredged up with every new appeal and habeas petition.⁶³ Of course, any process that protects the rights of criminal defendants will necessarily result in anger by victims' families. But the sheer scope of appeals and habeas petitions—to say nothing of reversals and retrials based on avoidable problems such as prosecutorial misconduct and ineffective assistance of counsel—is unnecessarily jarring to victims' families.⁶⁴ At bottom, transparency and information flow are lacking in the current capital-punishment system in the United States.⁶⁵

Fourth and finally, the issue of cost is a significant point of comparison between the search for Flight 370 and American death-penalty cases. The search for Flight 370 has already cost tens—perhaps hundreds—of millions of dollars.⁶⁶ Civilian and military ships and planes from more than a dozen countries spent weeks scouring thousands of miles of ocean searching for the plane.⁶⁷ Each ship and plane was operated by numerous highly trained workers who stopped performing other tasks so that they could participate in the search.⁶⁸ And, as noted above, for at least one week these military and civilian personnel were wasting their time by searching the wrong area because of the obvious missteps of the Malaysian government.⁶⁹

The comparison to American capital punishment is obvious. States spend millions of dollars to run dysfunctional capital-punishment systems.⁷⁰ It costs far more to utilize the death penalty than to impose life imprisonment.⁷¹ And many of those costs are avoidable. Years of appellate and post-conviction litigation focused on ineffective assistance of counsel and prosecutorial misconduct could be avoided if states properly trained and supervised lawyers up front.⁷² Just as the sailors on military vessels would not have wasted their time on the wrong search area if the Malaysian authorities had not withheld

62. *See id.* at 924–25.

63. *See* Adam M. Gershowitz, *Rethinking the Timing of Capital Clemency*, 113 MICH. L. REV. (forthcoming 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2323570.

64. *See id.*

65. Professor Bibas has made this point effectively with respect to the criminal-justice system generally. *See* STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 51 (2012) (“Secrecy and opacity weaken citizens’ trust in the law and may also make them feel distant and alienated.”).

66. *See* Semple, *supra* note 9.

67. *See id.*

68. *See* Wong, *Search for Lost Jet is Complicated*, *supra* note 49.

69. *See id.*

70. *See* Sherod Thaxton, *Leveraging Death*, 103 J. CRIM. L. & CRIMINOLOGY 475, 545–48 (2013).

71. *See id.* at 541–44.

72. *See id.* at 549 (stating that, “unless [prosecutors] are required to internalize more of the costs of making poor screening decisions,” the threat of the death penalty will continue to be used inefficiently).

valuable information, so too would appellate judges, clerks, appointed appellate attorneys, and other players in the criminal-justice system not have wasted their time if death-penalty trials were properly handled at the outset.⁷³

In sum, the bungled response to Flight 370's disappearance looks a lot like the dysfunctional capital-punishment system in the United States. Both were (and are) costly and ineffective, while leaving the victims feeling aggrieved.

B. How Might Things Have Been Different if the NTSB Had Been in Charge?

If Flight 370 had disappeared in the United States, the NTSB would have been in charge of the investigation.⁷⁴ Originally, the NTSB was an independent agent in the Department of Transportation, but it eventually became completely independent of even that department.⁷⁵ The NTSB has jurisdiction over all aviation accidents, and it handles selected accidents involving other modes of transportation.⁷⁶ Approximately 80% of the NTSB's work involves aviation accidents. In an average year, this amounts to roughly 2,000 total incidents.⁷⁷

Although the NTSB is "[o]n call 24 hours a day, 365 days a year" and travels to the site of an accident immediately,⁷⁸ it employs a relatively lean staff of roughly 400 people.⁷⁹ It is able to work with a small staff because it taps into a network of experts from other governmental agencies as well as the private sector.⁸⁰ These parties are (with the exception of the Federal Aviation Administration (FAA)) involved in investigations by invitation only and are selected for their strong competence across a wide array of areas.⁸¹

The NTSB is exclusively engaged in forensic analysis and, unlike many other governmental agencies, has no regulatory portfolio.⁸² It focuses exclusively on accident investigations and safety recommendations.⁸³ It is thus insulated from politics and able to appear and actually be objective.⁸⁴ Because

73. Compare Wong, *Search for Lost Jet is Complicated*, *supra* note 49 (explaining that Malaysian officials did not announce that military radar had spotted the plane flying in a different direction than where search efforts were concentrated until a week after the plane disappeared), with Thaxton, *supra* note 70, at 549 (discussing the costs of poor prosecutorial decision making).

74. See *History of the National Transportation Safety Board*, NAT'L TRANSP. SAFETY BOARD, <http://www.nts.gov/about/history.html> (last visited Oct. 25, 2014) [hereinafter *History of the NTSB*].

75. See 49 U.S.C.A. § 1111(a) (West 2007).

76. See *History of the NTSB*, *supra* note 74.

77. See *The Investigative Process at NTSB*, NAT'L TRANSP. SAFETY BOARD, <http://www.nts.gov/investigations/process.html> (last visited Oct. 25, 2014).

78. See NAT'L TRANSP. SAFETY BD., ANNUAL REPORT TO CONGRESS 5 (2012) [hereinafter ANNUAL REPORT], available at http://www.nts.gov/doclib/agency_reports/2012Annual%20Report.pdf.

79. Eric Fielding et al., *The National Transportation Safety Board: A Model for Systemic Risk Management*, 9 J. INVESTMENT MGMT. 17, 21–22 (2011).

80. *Id.* at 17.

81. *Id.* at 21.

82. *Id.* at 17, 19.

83. See ANNUAL REPORT, *supra* note 78, at 5.

84. See Fielding et al., *supra* note 79, at 19.

of its core competency and its insulation from politics, the NTSB is perceived to be one of the best functioning governmental agencies.⁸⁵

It is, of course, impossible to say whether the NTSB would have been able to succeed in finding Flight 370 where Malaysian authorities failed. Perhaps the clues were simply missing and no one would have been able to locate the plane in the days after its disappearance. It stands to reason, however, that the NTSB would have had a better chance of finding the plane. The NTSB has handled over 140,000 aviation accidents in its history, including numerous major air crashes.⁸⁶ The NTSB would have been able to quickly draw on its “party system” to engage radar experts to interpret the data.⁸⁷ While it took Malaysian authorities weeks to find and interpret the radar data, the NTSB would have been in a position to crunch the data more quickly.⁸⁸ Additionally, because it is an independent agency, the NTSB would have been insulated from politics and able to direct the search based on where the evidence led.⁸⁹ The same cannot be said for the Malaysian authorities.

C. *The Comparison of the NTSB and a National Capital-Punishment Group*

Although I will leave for Part III the details of how an NTSB for capital punishment could be implemented, at this stage it is worth briefly tying together the benefits an NTSB approach would bring to capital-case handling.

First, and quite obviously, the NTSB is skilled at air traffic accident investigations because it conducts a lot of them.⁹⁰ There is every reason to believe that assigning dozens of capital cases to the same group of prosecutors and defense lawyers would likewise be beneficial. Capital-jury selection, portrayal of aggravating circumstances, witness examination, and mitigation development by defense attorneys are all skills peculiar to capital litigation and are crucial to successful defense and prosecution of death-penalty cases.⁹¹ The more one practices a technique, the better one becomes at it. It thus stands to reason that prosecutors and defense lawyers who focus exclusively on these and other capital trial skills will become experts at them.

Moreover, capital-punishment law is complicated.⁹² Lawyers who handle an occasional capital case are unlikely to understand the nuances of

85. *See id.*

86. ANNUAL REPORT, *supra* note 78, at 5.

87. *See* Fielding et al., *supra* note 79, at 21.

88. *See* Bradsher, *Hunt for Malaysian Jet*, *supra* note 2.

89. *See* Fielding et al., *supra* note 79, at 19–21.

90. *See History of the NTSB*, *supra* note 74.

91. *See generally* John H. Blume et al., *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation*, 36 HOFSTRA L. REV. 1035 (2008) (detailing the importance and skill of making the “case for life”).

92. The leading death penalty casebooks stand at roughly 1,000 pages. *See, e.g.*, RANDALL COYNE & LYN ENTZEROTH, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS (4th ed. 2012); NINA RIVKIND & STEVEN F. SHATZ, CASES AND MATERIALS ON THE DEATH PENALTY (3d ed. 2009).

death-penalty law to the same extent as an expert who is versed in Eighth Amendment law and whose sole job it is to handle capital cases.

One might object here that there are already skilled death-penalty lawyers in some jurisdictions, and that, in any event, understanding the state death-penalty statute and local rules of practice are just as important as being versed in Eighth Amendment precedent. Both of those objections are true. The problem, of course, is not that there are no skilled prosecutors or defense attorneys handling capital cases today.⁹³ The problem is that some capital cases are handled by incompetent defense lawyers and overzealous prosecutors.⁹⁴ This reality merely reinforces the value of an NTSB approach. Recall that the NTSB has a modest staff of 400 employees and that it utilizes a party system to draw on a vast network of experts to assist based on the type of accident and investigation.⁹⁵ The same could be true in the capital context. A party system would enable the NTSB group of capital litigators to draw on a top-notch group of local prosecutors and criminal defense attorneys while circumventing the unskilled lawyers who would otherwise handle capital cases because they are the local prosecutors in the jurisdictions or are favorites of the judge who hands out court appointments.

Second, when prosecutors see a lot of capital cases, they are better able to put them in perspective and assess the worst cases in which death might be merited as opposed to simply bad cases in which life imprisonment would be more appropriate.⁹⁶ Thus, a national unit that looks at most of the nation's worst homicides would be in the best position to deliver what the Supreme Court has long elusively sought: to limit the death penalty to the worst of the worst.⁹⁷ As noted in Part II, the current system of local control of capital punishment has given us the exact opposite outcome in which geographic arbitrariness is rampant.⁹⁸

Third, an elite, national capital-punishment group would be insulated from politics. One of the NTSB's best attributes is that it is independent and can make its accident determinations based exclusively on the evidence without interference from political leaders, business executives, or the public, all of

93. For instance, in Harris County, Texas—which long had a poor reputation for capital-defense lawyers—almost all knowledgeable prosecutors and criminal defense attorneys would point to Robert Morrow (who has handled dozens of capital cases) as an extremely effective capital defense lawyer. *See* Lise Olsen, *Attorneys Overworked in Harris County Death-Row Cases*, HOUS. CHRON. (May 25, 2009), <http://www.chron.com/news/Houston-texas/article/attorneys-overworked-in-harris-county-death-row-1727249.php> (“Morrow uses a team of legal interns and lawyers involved in a mentorship program to help with his assignments and specializes almost exclusively in capital work.”). The NTSB group could wisely draw on his expertise, while ignoring other defense attorneys who might be favorites of local judges but who are known not to be as skilled.

94. *See supra* notes 11–12 and accompanying text.

95. Fielding et al., *supra* note 79, at 18–21.

96. *See New Voices: Prosecutors Ambivalent About the Death Penalty*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/node/2246> (last visited Oct. 25, 2014).

97. *See Statewide Capital Punishment, supra* note 30, at 331.

98. *See infra* Part II.

whom have vested interests.⁹⁹ Local prosecutors are subjected to considerable political pressure in their capital charging decisions.¹⁰⁰ Prosecutors must stand for reelection and the surest way to cause themselves political damage is to go “soft” on a murder suspect.¹⁰¹ A spate of news coverage about a case might affect prosecutorial decision-making.¹⁰² District attorneys also might be more likely to seek death when the victim is a well-regarded member of the community (or, perhaps subconsciously, when the victim is white).¹⁰³ A national panel of prosecutors will not face these political pressures. A group of NTSB prosecutors would be diverse and drawn from across the country. The odds of a local bias affecting charging decisions would therefore be very low.

To fully appreciate the benefits of an elite, national capital-punishment unit, it is worth comparing them to the current state of affairs. In the next section I explain what local control of capital punishment has wrought in the United States.¹⁰⁴

II. THE FAILURE OF LOCAL CONTROL OF THE DEATH PENALTY

Capital punishment is controlled locally in the United States.¹⁰⁵ While the governing law is provided by *state* death-penalty statutes, it is actually *local* prosecutors who have complete control over whether to seek the death penalty.¹⁰⁶ And local prosecutors are responsible for litigating capital cases at trial.¹⁰⁷ Thus, while local prosecutors often hand over control to state attorneys general at the appellate stage, the vast majority of critical death penalty decision-making is done at the local level.¹⁰⁸

To be sure, there are benefits of local control of charging and punishment generally and capital punishment specifically. As Professor Stephen Smith has explained, local control “make[s] the enforcement of criminal law more responsive to the values, priorities, and felt needs of local communities.”¹⁰⁹ This makes sense at a global level, of course, as we often

99. See Fielding et al., *supra* note 79, at 21.

100. See William W. Berry III, *Ending Death by Dangerousness: A Path to the De Facto Abolition of the Death Penalty*, 52 ARIZ. L. REV. 889, 920 (2010).

101. See James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2078–80 (2000) (“Local law enforcement is under tremendous pressure to solve the crime and punish the perpetrator, harshly. If the sheriff and district attorney do so, they can run for office on their success; if they *fail*, they risk being run out of office at the next election.” (footnote omitted) (emphasis in original)); DeMay, *supra* note 57, at 785–86.

102. See Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 VA. L. REV. 283, 311–12 (2008).

103. See *McCleskey v. Kemp*, 481 U.S. 279, 286–87 (1987) (discussing the Baldus study).

104. See *infra* Part II.

105. See *Pay Now, Execute Later*, *supra* note 20, at 862.

106. See *id.* at 862–63.

107. See *id.* at 862.

108. See *id.* at 862–63, 891.

109. Stephen F. Smith, *Localism and Capital Punishment*, 64 VAND. L. REV. EN BANC 105, 110 (2011) [hereinafter *Localism and Capital Punishment*].

locally elect our judges and prosecutors, and venue rules typically ensure that crimes are prosecuted where they occurred.¹¹⁰ The conscience of the community is surely relevant in determining whether and how severely a local crime should be punished.¹¹¹

The problem, however, is that local control of capital punishment has proven to be an abject failure. Capital punishment is geographically arbitrary within states.¹¹² Local prosecutors frequently engage in reversible error at trial.¹¹³ In their charging decisions, these prosecutors likely allow some subconscious racial bias to slip in, resulting in a disparate number of minority defendants being sentenced to death.¹¹⁴ And local defense attorneys are found to be ineffective far too often.¹¹⁵ A tremendous amount of scholarly literature supports each of these assertions, so I will sketch them only briefly.

Geographic Arbitrariness: The death penalty is geographically arbitrary within states. In Tennessee, capital charges are brought much more often in Memphis than in Nashville.¹¹⁶ In Ohio, prosecutors in Cincinnati seek the death penalty much more often than in Columbus, even though the former has a considerably smaller population.¹¹⁷ In Georgia, a murder in Clayton County is “13 times more likely to bring death-penalty prosecution than a similar crime a few miles away in Fulton.”¹¹⁸ In Pennsylvania, death row is filled with inmates from Philadelphia County—seventy-three as of June 1, 2014—but has only seven from comparably sized Allegheny County, which is home to Pittsburgh.¹¹⁹ And in Texas—the supposed capital of capital punishment—most counties never actually sentence anyone to death.¹²⁰ As I explained in 2010,

Harris County, which is home to the nation’s fourth-largest city (Houston), accounts for 16 percent of Texas’s population, but 28 percent of its death sentences. When three additional counties—Bexar, Dallas, and Tarrant—are added to Harris County, those four localities account for 51 percent of

110. See *id.* at 110–11.

111. See *id.* at 111. Of course, even under my NTSB proposal with nationwide prosecutors and defense attorneys, local juries would still make the ultimate decision on life and death. See *infra* Part III.A.1–2.

112. See *supra* note 20. The death penalty is obviously geographically arbitrary among states as well. See *Statewide Capital Punishment*, *supra* note 30, at 312 n.21.

113. See, e.g., LIEBMAN ET AL., *supra* note 10, at 5.

114. See Angela J. Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, 39 COLUM. HUM. RTS. L. REV. 202, 202–32 (2007); Peggy Nicholson, *The Public Outrage Phenomenon and Limits on Remediating the Effect of Implicit Racist Attitudes on Capital Charging Decisions*, 18 VA. J. SOC. POL’Y & L. 133, 133–51 (2010).

115. See, e.g., LIEBMAN ET AL., *supra* note 10, at 5.

116. See *Imposing a Cap on Capital Punishment*, *supra* note 20, at 95–96.

117. See *id.* at 95.

118. Bill Rankin et al., *An AJC Special Report: A Matter of Life or Death: Death Still Arbitrary*, ATLANTA J.–CONST., Sept. 23, 2007, at A1.

119. See *Execution List*, PA. DEPARTMENT CORRECTIONS, <http://www.cor.pa.gov/Administration/General%20Information/Documents/Death%20Penalty/Current%20Execution%20List.pdf> (last visited Oct. 26, 2014).

120. *Statewide Capital Punishment*, *supra* note 30, at 308.

Texas's death sentences, but only 40 percent of its population. Adding the death sentences from fourteen additional counties accounts for roughly 75 percent of Texas's total death sentences. By contrast, there are more than 130 Texas counties that have never sent an inmate to death row in the last three decades.¹²¹

Recent empirical evidence confirms that geographic arbitrariness is, at least in part, due to finances. A recent empirical study by Professor Goelzhauser found that “larger prosecutorial budgets are associated with an increase in the probability of a prosecutor seeking death against a defendant in a death-eligible case.”¹²² Although many prosecutors remark that cost is never a factor in deciding whether to seek the death penalty,¹²³ more honest prosecutors readily acknowledge the influence of money, even in Texas.¹²⁴ For instance, in a 2005 triple-murder case in Brownsville, Texas, the prosecutor agreed to a life sentence because “the plea deal was better than a costly fight for a death sentence that might later be commuted to life. He estimated such a trial and appeals would cost \$6 million.”¹²⁵ Or consider a 2011 case from Anderson County, Texas, in which the prosecutor explained that it was “an effective usage of the county's funds” not to seek the death penalty.¹²⁶ In an even more recent case from Walker County, Texas, the local judge and county commissioners speculated openly in the media about the \$500,000 price tag for a capital trial and whether seeking death in that case was worth the cost.¹²⁷ The same calculations are made in other states besides Texas.¹²⁸

The best evidence of intra-state arbitrariness of the death penalty may be the egregious cases in which smaller counties fail to seek the death penalty. For example, prosecutors in Navarro County, Texas—population 48,000¹²⁹—

121. *Id.* at 316 (footnotes omitted).

122. Greg Goelzhauser, *Prosecutorial Discretion Under Resource Constraints*, 96 JUDICATURE 161, 167 (2013).

123. *See, e.g., Prosecutor: Death Penalty Hinges on Justice, Not Money*, SEATTLE TIMES (June 19, 2000, 12:00 AM), <http://community.seattletimes.nwsource.com/archive/?date=20000619&slug=4027575> (“Spokane County Prosecutor Steve Tucker says money won’t be a factor in his decision whether to pursue the death penalty against Robert Yates Jr. in eight serial killings.”). In an interesting comparison, officials from around the world similarly remarked that cost was not an issue in the search for Malaysian Flight 370. *See* Demetri Sevastopulo, *Length of Search for Missing Flight MH370 Raises Cost Fears*, FIN. TIMES (Mar. 24, 2014, 1:54 PM), <http://www.ft.com/cms/s/0/b849532a-b347-11e3-b09d-00144feabdc0.html#axzz3HGKsYooc>.

124. Lynn Brezosky, *Mother Pleads Guilty in Triple Murder*, ASSOCIATED PRESS (July 1, 2005), <http://madmax.lmtonline.com/textarchives/070105/s16.htm>.

125. *Id.*

126. *See* Paul Stone, *Death Penalty Won’t Be Sought in Murder Case*, PALESTINE HERALD-PRESS (Sept. 20, 2011, 6:30 AM), http://www.palestineherald.com/news/local_news/article_86e7b4ba-758d-5980-a3e8-70918a1e39f1.html.

127. *See* Cody Stark, *Murder Trial Could Be Costly*, HUNTSVILLE ITEM (July 23, 2012, 6:25 PM), http://www.itemonline.com/news/local_news/article_0690bd55-9def-5898-89ba-9d30b178a0c3.html.

128. *See, e.g., Rankin et al., supra* note 118 (quoting the district attorney from Muscogee County, Georgia, for the point that “it is too costly to seek death in every case”).

129. *See* U.S. Census Bureau, *State and County QuickFacts, Navarro County, Texas*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/48/48349.html> (last updated July 8, 2014, 6:46 AM).

allowed a defendant to plead to life imprisonment without parole for the sexual assault and murder of a six-year-old girl.¹³⁰ Or consider the Indiana case in which prosecutors from Pike County—with a population of 13,000—did not “seek the death penalty for [defendants] who kidnapped a woman and drove over her body . . . thirty times while she was still alive.”¹³¹ According to the victim’s mother, the prosecutor explained that “the county could not seek the death penalty because it was too expensive.”¹³² Other examples abound.¹³³

In sum, there are wide variations within states in capital charging, and these variations appear to be based on cost and finances. Large and wealthy counties seek death. Smaller and poorer counties do not. It is very hard to offer a legitimate justification for such a system.

Prosecutorial Misconduct: In his landmark study of capital cases from 1973 to 1995, Professor James Liebman and his colleagues found that a considerable percentage of capital cases were reversed for prosecutorial misconduct.¹³⁴ Among the most prevalent were *Brady* violations for failure to disclose evidence, which accounted for nearly 20% of reversible error in capital cases.¹³⁵ Capital cases are also reversed frequently for *Batson* violations when prosecutors impermissibly strike jurors based on race or gender.¹³⁶ And prosecutors are occasionally found to have engaged in improper pretrial publicity and presenting false evidence in capital cases.¹³⁷

The high reversal rate for prosecutorial misconduct is not surprising, as trying a capital case consistent with the rules of evidence, state statutes, and the Eighth Amendment is difficult. Some prosecutorial error is the result of flagrant misconduct by prosecutors who are either inherently unethical¹³⁸ or well-intentioned but bend the rules in hopes of achieving what they think is justice for the brutal murder cases they are handling.¹³⁹

130. See Janet Jacobs, *Small Town Tragedy*, CORSICANA DAILY SUN (Feb. 14, 2009, 10:21 PM), http://www.corsicanadailysun.com/archives/article_a720c108-ed9d-5147-9c2d-0756f1cefef6.html.

131. *Statewide Capital Punishment*, *supra* note 30, at 320 (citing Tim Sparks, *Cost of Death-Penalty Trial Can Tip Decision*, FORT WAYNE J. GAZETTE, Oct. 25, 2001, at 1).

132. *Id.*

133. See, e.g., *Statewide Capital Punishment*, *supra* note 30, at 320–21.

134. See LIEBMAN ET AL., *supra* note 10.

135. See *id.* at 5.

136. See Sheri Lynn Johnson, *Wishing Petitioners to Death: Factual Misrepresentations in Fourth Circuit Capital Cases*, 91 CORNELL L. REV. 1105, 1108 n.5 (2006) (describing *Batson* as one of the most commonly litigated issues in death-penalty cases); *Prosecutorial Shaming*, *supra* note 12, at 1080–84 (discussing fifteen cases between 1997 and 2007 in which courts reversed or strongly suggested that reversal was appropriate for *Batson* violations).

137. See Jeffrey L. Kirchmeier et al., *Vigilante Justice: Prosecutor Misconduct in Capital Cases*, 55 WAYNE L. REV. 1327, 1342–46, 1359–64 (2009).

138. See, e.g., *United States v. Sterba*, 22 F. Supp. 2d 1333, 1338 (M.D. Fla. 1998) (describing the same prosecutor’s conduct in a non-capital case as “patent[ly] disingenuous[.]”); *Ruiz v. State*, 743 So. 2d 1, 4 (Fla. 1999) (per curiam) (noting “egregious misconduct” in argument to the jury in a death-penalty case).

139. Maurice Possley & Ken Armstrong, *Part 2: The Flip Side of a Fair Trial*, CHI. TRIB. (Jan. 11, 1999), <http://www.chicagotribune.com/news/watchdog/chi-020103trial2-story.html> (describing how the prosecutor “portrays himself as a well-intentioned prosecutor who lost control in the heat of battle, driven to win by a complex blend of factors, including appeasing the family of a victim, earning accolades of fellow

Other misconduct is surely accidental because prosecutors are overworked and undertrained.¹⁴⁰ The lack of expertise is particularly problematic in death-penalty cases because prosecutors who only occasionally handle capital cases are handicapped compared to prosecutors who repeatedly try death-penalty cases.¹⁴¹ The lack of training or case pressures may even lead prosecutors to unintentionally allow the race of the defendant or victim to influence their charging decisions.¹⁴²

Any effort to tally the amount of prosecutorial misconduct is likely to be underinclusive, as many cases of misconduct will be sufficiently well hidden (either intentionally or not) and will never see the light of day.¹⁴³ Nevertheless, we know from newspaper accounts that prosecutorial misconduct is all too common. For instance, an analysis by *The Chicago Tribune* found over 360 homicide cases in which courts threw out criminal charges because prosecutors failed to turn over exculpatory evidence or knowingly used false evidence.¹⁴⁴

Ineffective Defense Counsel: Perhaps no other issue related to the death penalty has received as much attention as the poor lawyering provided to capital defendants. The story is very similar to the pervasive indigent defense crisis in non-capital cases.¹⁴⁵ Defense lawyers are undertrained, under-resourced, and overworked.¹⁴⁶ Some are competent but lack the time and money to put on a good defense.¹⁴⁷ Others are simply incompetent.¹⁴⁸ In addition to traditional trial mistakes, capital defense counsel often perform ineffectively at the

prosecutors and ‘getting the bad guy’”).

140. See Gershowitz & Killinger, *supra* note 46, at 283–85.

141. See Steve Brewer, *County Has Budget to Prosecute with a Vengeance*, HOUS. CHRON. (Feb. 4, 2001), <http://www.chron.com/news/article/County-has-budget-to-prosecute-with-a-vengeance-2009544.php> (quoting a veteran Harris County prosecutor as saying, “[W]e just do so damn many more of [these death penalty cases] than anyone else You could go into any district attorney’s office in this state and not find as many lawyers with capital prosecution experience.”).

142. See *supra* note 103.

143. See Angela J. Davis, *The Legal Profession’s Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 278–79 (2007).

144. See Ken Armstrong & Maurice Possley, *Part I: The Verdict: Dishonor*, CHI. TRIB. (Jan. 11, 1999), <http://www.chicagotribune.com/news/watchdog/chi-020103trial1-story.html>.

145. See Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1057 (2006).

146. See Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 972–74 (2012). For instance, less experienced or less skilled defense attorneys fail to put enough emphasis on investigating mitigating circumstances that will be applicable at the sentencing stage of trial. See Sean D. O’Brien, *Capital Defense Lawyers: The Good, the Bad, and the Ugly*, 105 MICH. L. REV. 1067, 1075–76 (2007) (reviewing WELSH S. WHITE, *LITIGATING IN THE SHADOW OF DEATH: DEFENSE ATTORNEYS IN CAPITAL CASES* (2006)).

147. See, e.g., Stephen B. Bright, *The Right to Counsel in Death Penalty and Other Criminal Cases: Neglect of the Most Fundamental Right and What We Should Do About It*, 11 J.L. SOC’Y 1, 17–19 (2009–2010).

148. *Id.* at 19–20.

sentencing stage by failing to conduct an adequate investigation of possible mitigating circumstances a jury could rely on to spare the defendant's life.¹⁴⁹

The Supreme Court has taken a noticeable interest in the ineffectiveness problem. In a string of decisions in the early 2000s, the Court found defense lawyers' performance to be deficient for failing to conduct adequate mitigation investigations.¹⁵⁰ And at the end of that decade, the Court issued a flurry of additional decisions aimed at clarifying the standard for ineffectiveness.¹⁵¹ At the same time, training for capital defense attorneys has improved across the country.¹⁵² As Professor Scott Sundby has explained:

The need for a lawyer to be specially trained in capital defense is now widely recognized and has fostered the emergence of a professional capital defense bar. Some states that have had particularly troubling histories with incompetent capital representation, such as Georgia, North Carolina, and Virginia, have created statewide systems specifically devoted to capital representation.¹⁵³

There is thus cause for optimism on the ineffectiveness front. Many capital cases will be defended better than a generation ago, and the courts will be more willing to reverse those cases in which truly poor performance occurs. Both developments are helpful to capital defendants, although the optimism should be tempered. First, while many capital defendants may receive a better defense than they received a decade or two ago, some will continue to be represented by undertrained, overworked, or simply incompetent attorneys.¹⁵⁴ Second, those who receive ineffective representation will have a better chance of a reversal during the habeas corpus process. But this simply means continued reversal of death-penalty cases and costly retrials.

* * *

The common thread of these problems—geographic arbitrariness, prosecutorial misconduct, and ineffective defense counsel—is that they could be minimized in a death-penalty system run by an elite capital unit. One approach, as I have suggested previously, would be to have an elite statewide capital unit that handles all aspects of death-penalty prosecutions from charging

149. See Emily Hughes, *Arbitrary Death: An Empirical Study of Mitigation*, 89 WASH. U. L. REV. 581, 592 (2012) (discussing the importance of mitigation and its failure to reduce the arbitrariness of the death penalty).

150. See *id.* at 591–94.

151. See *id.* at 594–601.

152. Scott E. Sundby, *The Death Penalty's Future: Charting the Crosscurrents of Declining Death Sentences and the McVeigh Factor*, 84 TEX. L. REV. 1929, 1947 (2006).

153. *Id.*

154. See, e.g., Steve Fry, *Cheatham Defense Attorney Labeled Self 'Country Lawyer' Without Death Penalty Experience*, CJONLINE.COM (Apr. 15, 2014, 2:11 PM), <http://cjonline.com/news/2014-04-13/cheatham-defense-attorney-labeled-self-country-lawyer-without-death-penalty> (describing a recent Kansas Supreme Court decision reversing a capital case for ineffective assistance of counsel in which a “country lawyer” with no death penalty experience later admitted he was unqualified to handle the case).

straight through the last clemency appeal.¹⁵⁵ Another approach—one that takes account of the declining use of the death penalty—would be for states to form a consortium and opt into the equivalent of an NTSB for capital punishment.

III. AN NTSB FOR CAPITAL PUNISHMENT

How would an NTSB for capital punishment operate? There are at least two threshold problems. First, we would have to organize the institution and arrange for proper funding. Second, we would have to set a protocol for selecting the NTSB prosecutors, defense attorneys, and staff who would run the institution and travel around the country to handle capital cases. Both problems are obviously challenging. Part III.A offers a brief sketch of how an NTSB for capital punishment might be established.¹⁵⁶ Part III.B then turns to the reasons states should want to participate.¹⁵⁷

A. *The Logistics*

1. *Creating the Institution*

The starting point for an NTSB for capital punishment might come from state attorneys general. The National Association of Attorneys General includes attorneys general from around the country, and part of its core mission is to “foster interstate and state/federal cooperation on legal and law enforcement issues.”¹⁵⁸ The group is perhaps best known for the 1998 agreement in which forty-six states agreed not to sue the tobacco industry in exchange for a global settlement of more than \$200 billion.¹⁵⁹ In more recent years, state attorneys general continue to work together on a variety of issues from amber alerts to financial fraud.¹⁶⁰ Relying on these long-term working relationships, state attorneys general could take the first step to organize a consortium of states that assign capital charging decisions and litigation to a nationwide NTSB unit. The consortium could start with a modest number of states and accept additional participants in future years.

Once at least a few states agree to the existence of an NTSB for capital punishment, the next challenge will be properly funding the unit. Funding for the capital punishment unit would come from annual payments similar to insurance premiums. All states would pay a premium, in advance, to be part of

155. See *Statewide Capital Punishment*, *supra* note 30.

156. See *infra* Part III.A.

157. See *infra* Part III.B.

158. See *About NAAG*, NAT'L ASS'N ATT'YS GEN., http://www.naag.org/about_naag.php (last visited Oct. 26, 2014).

159. See Myron Levin & Henry Weinstein, *Last of 46 State Officials Sign Tobacco Accord*, L.A. TIMES (Nov. 21, 1998), <http://articles.latimes.com/1998/nov/21/news/mn-46130>.

160. See *Initiatives*, NAT'L ASS'N ATT'YS GEN., <http://www.naag.org/initiatives.php> (last visited Oct. 26, 2014).

the NTSB program. The amount of the payment would vary by state and would be based on the number of death-penalty cases that have been typically tried in the state over the last few years. Such data is already available from independent sources, and in any event, states entering the NTSB group would certainly be in possession of data about their numbers of death sentences.¹⁶¹ The idea here is that states should not pay any more to utilize the death penalty under an NTSB framework than they already pay under a local control model.

Once the NTSB group begins investigating and handling cases, funding should continue to operate similar to an insurance premium. If a large number of death-qualifying crimes occurred in a particular state in Year 1, the NTSB would handle those cases based on the merits, regardless of whether the costs exceed the premium paid by the state.¹⁶² Thereafter, in Year 2, the NTSB group would raise the premium for a state that had a larger-than-expected number of death-penalty cases or lower the premium for a state that had a smaller-than-expected number. Obviously, finding the correct premium might take some trial and error, but an actuary should be able to find the right baseline amount in short order.

Because states' participation in the NTSB for capital punishment would be voluntary, they would only continue to participate if they felt their money was being used efficiently and was a net benefit to their states. Moving forward, the NTSB unit would be incentivized to charge fair premiums. Indeed, the system could operate like a mutual insurance company in which participants receive a rebate or dividend if the NTSB group has remaining money at the end of the fiscal year or some other designated time period.

2. *Selection and Role of the Lawyers and Staff*

Once the NTSB unit is established and funded, the remaining problem will be to staff it and set protocols for how it will operate.

Selection Process: As I have argued elsewhere, it is crucial that the prosecutors and defense attorneys selected for an elite capital-punishment unit meet certain objective criteria.¹⁶³ In particular, the NTSB prosecutors and defense attorneys should have (1) considerable experience handling capital cases, (2) unblemished ethics records, (3) low rates of reversal in their capital and non-capital trials, and (4) no reversals for prosecutorial misconduct or ineffective assistance of counsel.¹⁶⁴

161. See, e.g., *The Geography of the Death Penalty*, *supra* note 20.

162. Unless specified otherwise, insurance policies cover multiple occurrences, even if the cost to the insurer ends up being much larger than expected when the premium was calculated. See 3 NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION § 16.09(3)(a) (Jeffrey E. Thomas & Francis J. Mootz, III eds., 2014).

163. See *Statewide Capital Punishment*, *supra* note 30, at 331–33, 335–36.

164. See *id.*

The objective criteria are necessary but not sufficient. The NTSB should survey lawyers and judges who have worked with the prospective hires, just as local bar associations conduct surveys about judicial candidates.¹⁶⁵ Equally important, the NTSB should interview applicants carefully and observe them in court.

Because the NTSB capital-punishment unit would be independent, it would have ultimate authority—without interference from judges, elected district attorneys, or public defenders who might be biased in favor of particular candidates for improper reasons—for deciding exactly who should be hired. The big-picture point is that the NTSB unit should seek out the lawyers who have a strong understanding of capital-punishment law, excellent litigation skills, and a reputation among all the players in the courthouse for being fair and thoughtful attorneys.

Operating the Unit: The NTSB capital-punishment unit should operate just like the actual NTSB. When a local prosecutor identifies a potentially capital case, that prosecutor would send the existing file to the NTSB capital unit. Once it has reviewed the file, the NTSB capital unit would establish a “Go Team” of prosecutors and investigators who would travel to the local jurisdiction to take over the investigation of the case. Depending on how thorough of a job the local authorities have done, the NTSB may not have to completely replicate the investigation. They will, however, have to undertake a fairly searching investigation to ensure that all inculpatory evidence helpful to the prosecution has been located, and perhaps more importantly, that all favorable *Brady* material has been identified and accounted for so that it can be turned over to the defense team.

Once all necessary investigation has been completed, the NTSB prosecutors will have to determine whether to seek the death penalty (and thus remove the case from local authorities) or decline capital charges (thus returning the case to local prosecutors so they could seek any sentence up to life-without-parole). At this point, a particular strength of the NTSB model should come into play. The NTSB prosecutors will not face the political pressures to seek the death penalty the way an elected prosecutor might. Nor will they be heavily influenced by financial concerns because there is no prospect that they will have to raise taxes or ask county commissioners to cut another department’s budget in order to pay for a capital prosecution. Additionally, the NTSB prosecutors will have the benefit of having seen many death-penalty cases, and these data points will help them to assess whether a case is truly deserving of the death penalty.¹⁶⁶

The charging decisions would be made at the NTSB’s home office, not in the local jurisdiction at the site of the crime. This would enable a few

165. *See id.* at 333.

166. By contrast, a small-town prosecutor who handles only a small number of homicides has insufficient information to make such a comparison.

important events to occur. First, the charging decision would be made by a committee of prosecutors, rather than by a single prosecutor who might have tunnel vision based on what was seen on the ground at the local jurisdiction.¹⁶⁷ Second, the investigating prosecutor would write a memorandum informing the charging committee of the facts necessary to make a capital charging decision. Importantly, the memorandum (and any subsequent oral discussion) should make no reference to (1) the race of the defendant, (2) the race of the victim, or (3) the county where the case came from.¹⁶⁸ Excluding these irrelevant factors from the discussion would make it less likely that they would have any effect on the charging decision. Third, before the charging committee could decide to seek the death penalty, it would have to listen to a presentation from the defense attorney as to why the case does not merit the death penalty.¹⁶⁹ Because defense counsel might have important mitigation (or even guilt stage) information that would undermine the prosecution, it is important for the committee to be aware of it (should the defense wish to share it) to avoid wasting considerable time and money on a case that might turn out to be much weaker than it initially appears.

If the charging committee does seek death, NTSB prosecutors and defense attorneys will try the case, likely without involvement from any local lawyers. Like the actual NTSB, however, the elite capital unit would utilize a party system that enables them to draw on experts from outside the capital unit. Thus, if a state's death-penalty statute were particularly complicated, or if the case called for a particular type of mitigation specialist, the NTSB might draw on local prosecutors or defense attorneys to assist in the trial. As with the actual NTSB, though, those outside parties would only be involved if they were specifically invited to participate by the NTSB capital unit.

In sum, the elite NTSB unit would conduct its own investigation of the crime, ensure that *Brady* material was turned over to the defense team, and then convene a committee to conduct a race-blind and geography-blind assessment of whether the death penalty was warranted. If the case was deemed death-worthy, an elite team of prosecutors and defense attorneys with vast experience and proven ethics would try the case in a way that was less likely to create wrongful death sentences and reversible error.

167. See generally John A. Horowitz, Note, *Prosecutorial Discretion and the Death Penalty: Creating a Committee to Decide Whether to Seek the Death Penalty*, 65 *FORDHAM L. REV.* 2571 (1997) (providing a more detailed description of this idea).

168. See Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 *FORDHAM URB. L.J.* 347, 411–12 (1999) (explaining that capital cases are presented to the United States Attorney General in a "race blind" format).

169. See *Statewide Capital Punishment*, *supra* note 30, at 340.

B. Why Would States Opt into a Nationwide System?

While a nationwide NTSB for capital punishment should be very effective, it obviously is not constitutionally required. Basic federalism dictates that states are free to run their own death-penalty systems, either at the state level or by delegating prosecutorial authority to counties.¹⁷⁰ States would thus have to choose to opt into an NTSB system.¹⁷¹ As explained below, there are good reasons for states to voluntarily join an NTSB system and cede control of their capital cases.

Political Incentives: Capital punishment is still popular in America, and politicians still benefit politically from advocating for the death penalty.¹⁷² This suggests that prosecutors—who are already known to be very territorial—will not want to cede control of their most high-profile cases.¹⁷³ Nevertheless, politicians (including elected district attorneys) do not like the heat that comes when the death-penalty system operates poorly.¹⁷⁴ And with over 140 death row exonerations—including sixty since the year 2000—there has been a lot of heat.¹⁷⁵ Moreover, as the public has learned about the enormous amount of money spent (and wasted) on failed capital prosecutions and appeals,¹⁷⁶ support for capital punishment has dropped to its lowest rate in four decades.¹⁷⁷ In the last decade, six states have abolished capital punishment, in large part based on concerns about cost and innocent defendants.¹⁷⁸

An NTSB for capital punishment allows politicians the best of both worlds. First, politicians can be vociferously in favor of capital punishment without having to internalize the costs of the prosecution. The politicians—including elected prosecutors—would merely be making public statements in support of the death penalty and would not actually have to make the difficult charging decision to seek death. The NTSB prosecutors would hopefully

170. See *Localism and Capital Punishment*, *supra* note 109, at 105.

171. *Id.*

172. See *supra* note 25 and accompanying text.

173. See Liebman & Clarke, *supra* note 14, at 347.

174. See, e.g., Alan Berlow, *The Texas Clemency Memos*, ATLANTIC (July 1, 2003, 12:00 PM), <http://www.theatlantic.com/magazine/archive/2003/07/the-texas-clemency-memos/302755/> (discussing the tremendous amount of negative media attention unleashed by the lack of review of Governor George W. Bush and his counsel, Alberto Gonzales, before denying clemency requests); R. Jeffrey Smith, *Gonzales's Clemency Memos Criticized*, WASH. POST (Jan. 6, 2005), <http://www.washingtonpost.com/wp-dyn/articles/A51773-2005Jan5.html>.

175. See *Innocence: List of Those Freed from Death Row*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row?scid=6&did=110> (last visited Oct. 26, 2014).

176. See *supra* note 17 and accompanying text.

177. See Damla Ergun, *New Low in Preference for the Death Penalty*, ABC NEWS (June 5, 2014, 7:00 AM), <http://abcnews.go.com/blogs/politics/2014/06/new-low-in-preference-for-the-death-penalty/>.

178. Hadar Aviram & Ryan Newby, *Death Row Economics: The Rise of Fiscally Prudent Anti-Death Penalty Activism*, 28 CRIM. JUST., no. 1, Spring 2013, at 33, 38–39; see *States with and Without the Death Penalty*, DEATH PENALTY INFO. CENTER, <http://deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Oct. 26, 2014).

ignore the politicians' bluster and decide whether to seek death based on the merits of the case.

Second, politicians could favor capital punishment as vocally as they like without having to shoulder responsibility for the litigation and outcome of the prosecutions. The NTSB prosecutors would handle the case with no involvement from local prosecutors or elected officials. If things went well, the elected officials would be happy (and perhaps even try to take credit). If the defendant was not sentenced to death, or if the death sentence was reversed on appeal, the elected prosecutor would not be responsible because he would have had no role in the trial or appeals. In sum, politicians would be able to retain the political benefits of the death penalty without risking the blame that comes from unsuccessful or reversed prosecutions.

Cost: In addition to naked political ambition, there is a good policy reason for states to enter into an NTSB approach. The number of death sentences in the United States has declined dramatically in the last fifteen years.¹⁷⁹ Throughout the 1980s and 1990s, states consistently sentenced 250 to 300 defendants to death per year in the United States.¹⁸⁰ Beginning around 2000, however, there was a precipitous decline.¹⁸¹ By 2010, the annual number of national death sentences declined to 109.¹⁸² And over the last few years, the number has fallen further, to roughly eighty per year.¹⁸³ There are now less than a third as many death sentences nationally as there were only fifteen years ago.¹⁸⁴

More noteworthy than the national trend is that some mass producers of death sentences have stopped sending inmates to death row. For years, Harris County, Texas was the leading producer of capital cases in the United States.¹⁸⁵ Harris County sought the death penalty in about fifteen cases per year and was frequently successful in procuring death sentences.¹⁸⁶ In 2012, however, Harris County did not send a single inmate to death row.¹⁸⁷ In 2013, it sent only one.¹⁸⁸ Other frequent users of capital punishment—Philadelphia County in Pennsylvania, Hamilton County in Ohio, Shelby County in

179. See *Death Sentences in the United States from 1977 by State and by Year*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008> (last visited Oct. 26, 2014) [hereinafter *Death Sentences by State and by Year*].

180. *Id.*

181. *Id.*

182. *Id.*

183. See *id.*

184. See *id.*

185. See, e.g., Scott Phillips, *Continued Racial Disparities in the Capital of Capital Punishment: The Rosenthal Era*, 50 HOUS. L. REV. 131, 132 (2012).

186. See *Imposing a Cap on Capital Punishment*, *supra* note 20, at 75 & n.13.

187. See *2012 Sentencing*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/2012-sentencing> (last visited Oct. 26, 2014).

188. See *2013 Sentencing*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/2013-sentencing> (last visited Oct. 26, 2014).

Tennessee, and San Diego County in California, to name just a few—have also seen a decline in death sentences.¹⁸⁹

The most stunning statistic might simply be that, in 2012 and 2013, only three counties in the United States sent more than two people to death row.¹⁹⁰ In 2012, there were only nine counties in the United States that sent more than one person to death row.¹⁹¹ In 2013, only thirteen counties had more than one death sentence.¹⁹² Put differently, in 2013, forty-five of the seventy-nine death sentences in the United States came from counties that sent only one inmate to death row.¹⁹³ In 2012, the number was even more stark, with fifty-one of the seventy-nine death sentences coming from counties that sent only one inmate to death row.¹⁹⁴

The data indicate that counties throughout the United States are mobilizing time and resources to have their prosecutors and defense lawyers learn the complicated law and strategy of death-penalty prosecutions so that they can handle one capital case every year or every few years.¹⁹⁵ And these are the counties that are actually seeking the death penalty.¹⁹⁶ The vast majority of counties, even in states that authorize the death penalty, almost never sentence anyone to death.¹⁹⁷ As Professor Robert Smith has documented, between 2004 and 2009, “[j]ust 10% of counties nationally returned even a single death sentence.”¹⁹⁸

Given that capital-punishment law is complicated, that very few counties seek the death penalty with any regularity, and that cases are frequently reversed for errors by prosecutors and defense attorneys, the idea of local prosecution seems undesirable. To put it simply, when there is a rare catastrophic event like an airplane crash, train derailment, or other complicated disaster, the local jurisdiction does not ask its local police department to spend time and money learning how to investigate the disaster. For rare and complicated events, we call upon specialists such as the NTSB.

Adopting an NTSB approach to capital punishment is far more sensible than local control. Under an NTSB approach, local prosecutors would not have to develop expertise in the state capital statute, Eighth Amendment jurisprudence, capital jury selection, presentation of aggravating circumstances, or other skills. Public defenders and appointed lawyers would not have to become experts in mitigation and the case for life, nor would they have to

189. *See id.*; *2012 Sentencing*, *supra* note 187.

190. *See 2012 Sentencing*, *supra* note 187; *2013 Sentencing*, *supra* note 188.

191. *See 2012 Sentencing*, *supra* note 187.

192. *See 2013 Sentencing*, *supra* note 188.

193. *See id.*

194. *See 2012 Sentencing*, *supra* note 187.

195. *The Geography of the Death Penalty*, *supra* note 20, at 229–30.

196. *Id.*

197. *Id.* at 228.

198. *Id.*

become versed in the statutory and constitutional law of capital punishment. All of this, by itself, is likely to save money.

An elite team of prosecutors and defense attorneys is also likely to produce fewer marginal death sentences that will be reversed on appeal. Fewer reversals will mean less wasted money. Capital punishment as currently operated is incredibly expensive. An NTSB approach to capital punishment should be far more cost effective than the current system of local control. And in a time of tight budgets, states have recently shown themselves to be willing to consider cost-saving approaches that would have been politically unpalatable only a few years ago.¹⁹⁹

IV. CONCLUSION

The use of capital punishment has declined dramatically in recent years.²⁰⁰ At present, there are only about eighty death sentences per year in the entire nation.²⁰¹ Even though litigating capital cases requires prosecutors and defense attorneys to understand complicated legal doctrine and master difficult litigation skills, responsibility for this complex, yet rare task is widely diffused among a large number of lawyers throughout the United States. Put differently, in almost all of the thirty-two states that have authorized the death penalty, capital cases are prosecuted at the county level.²⁰² In total, that puts prosecutors and defense attorneys in more than 2,200 total counties²⁰³ on call to potentially handle one of the roughly eighty cases in which death sentences are handed down each year in the United States.²⁰⁴ Some of these prosecutors and defense lawyers are excellent, but many others lack the time to study the law and the skill to conduct a clean trial.²⁰⁵ As a result of that lack of knowledge, experience, and skill, cases are reversed on appeal.²⁰⁶ Victims' families are further harmed by the emotional roller coaster.²⁰⁷ And vast amounts of money are wasted on appeals and retrials that could have been avoided if the case was handled correctly from the start.²⁰⁸

There is a better way. States should voluntarily opt into a nationwide capital-punishment system in which capital cases are handled exclusively—

199. See generally Nicole D. Porter, *On the Chopping Block 2012: State Prison Closings*, SENT'G PROJECT (Dec. 7, 2012), <http://www.sentencingproject.org/doc/publications/On%20the%20Chopping%20Block%202012.pdf> (explaining that states have closed prisons over the last few years).

200. See *Death Sentences by State and by Year*, *supra* note 179.

201. See *id.*

202. Very small states, such as Delaware, handle all criminal cases at the state level. See *Statewide Capital Punishment*, *supra* note 30, at 314 n.31.

203. See *Find a County*, NAT'L ASS'N COUNTIES, <http://www.naco.org/counties/pages/findacounty.aspx> (last visited Oct. 26, 2014).

204. See *Death Sentences by State and by Year*, *supra* note 179.

205. See *supra* Part II.

206. See *supra* Part II.

207. See *supra* note 16 and accompanying text.

208. See *supra* Part II.

from initial charging until acquittal or execution—by an elite unit of prosecutors and defense attorneys.²⁰⁹ The NTSB fulfills this role for transportation accidents. In a given year, the NTSB travels the country and investigates dozens of major accidents and roughly 200 less serious accidents.²¹⁰ With an NTSB for capital punishment, an elite team of national prosecutors would travel to locations where capital charges are justified and take over the investigations.²¹¹ If the NTSB unit decided to seek the death penalty, it would then handle the trial and appeals.²¹² An NTSB for capital punishment would minimize, if not eliminate, politics from charging decisions.²¹³ It would also limit reversals by minimizing valid claims of prosecutorial misconduct and ineffective assistance of counsel.²¹⁴

Even though there is a very long tradition of local control of prosecution in the United States, death truly is a different type of prosecution, and states should consider breaking from tradition. An NTSB for capital punishment would serve politicians' naked political instincts because they could be as pro-death penalty as they like without having to actually personally take responsibility for the handling and outcome of individual prosecutions.²¹⁵ And from a policy perspective, given that there are only eighty death sentences in the United States each year, it makes little sense for local prosecutors and defense attorneys to cling to control of complicated cases that could be better handled by an elite national unit.²¹⁶

209. *See supra* Part III.A–B.

210. *See* Fielding et al., *supra* note 79, at 31 (“With about 400 employees in an organization that investigated 13 major accidents, 10 international accidents, and 195 other accidents in fiscal year 2009 . . .”).

211. *See supra* Part III.A.2.

212. *See supra* Part III.A.2.

213. *See supra* Part III.B.

214. *See supra* Part II.

215. *See supra* Part III.B.

216. *See supra* Part III.B.

