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SHRINKING THE ACCOUNTABILITY DEFICIT IN CAPITAL CHARGING

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Chapter 27: Shrinking the Accountability Deficit in Capital Charging

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ABSTRACT

The price of capital trials, appeals, and clemency proceedings have skyrocketed since the U.S. Supreme Court lifted its moratorium on the death penalty, but this has not translated to more reliable case outcomes—the rate of serious reversible error and wrongful convictions has steadily increased during the same time period. The overly aggressive use of the death penalty by prosecutors has not only been convincingly linked to these high reversal rates, but may also increase crime, decrease the likelihood of arrests for homicides, and lead to heightened risks of miscarriages of justice for non-capital defendants. It follows that limiting hawkish prosecutorial decision-making in potentially capital cases may be particularly effective in reducing the prevalence of error and reducing unnecessary expense. Curbing the virtually unfettered discretion of prosecutors is not a new idea, but extant proposals tend to suffer from shortcomings that are likely to render them impractical or ineffective. Any viable legal intervention must increase prosecutorial accountability for inadequate charge-screening in capital cases while still permitting prosecutors to retain discretion in seeking the death penalty. This essay describes a reform that consists of two primary components: (1) an advisory (i.e., non-binding) opinion from a reviewing authority assessing the appropriateness of a prosecutor's decision to seek the death penalty in a case based on the totality of evidence, and (2) financial and administrative cost-shifting mechanisms capable of disincentivizing prosecutorial overreaching in capital charging.

INTRODUCTION

Contemporary capital punishment practices continue to face sharp criticism from both legal analysts and officials in every branch of government. Nearly a decade ago, the American Law Institute (ALI) withdrew its endorsement of the death penalty framework it had developed and promoted for over forty years (ALI 2009; Steiker & Steiker 2014). The ALI disavowed contemporary capital punishment systems, many of which were directly modeled after the ALI's

prototype death penalty statute, “in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment” (ALI 2009). Current U.S. Supreme Court Justices Stephen Breyer and Ruth Bader Ginsburg recently raised concerns over the fair administration of the death penalty (*Glossip v. Gross*, 135 S. Ct. 2726 (2015)), and former Justice John Paul Stevens, who retired from the Court in 2010, expressly condemned the practice (Stevens 2010). The governors of Illinois (Johnson 2000), Maryland (Clines 2002), and New Mexico (Associated Press 2009), just to name a few, have openly expressed concerns over the unlawful and error-prone operation of their state capital punishment systems. Numerous prosecutors and law enforcement officials, including chiefs of police, have also advocated for the abolition of the death penalty, citing an unacceptable risk of error and excessive cost (Abbott 2008; Dieter 2009; Samuels 2008).

In addition to legal, political, and academic elites, national opinion poll data reveal that public support for the death penalty is at its lowest point in several decades (Newport 2011; Stewart 2011). Public perception of the capital punishment system has been influenced, in part, by a voluminous scholarly literature that consistently reveals not only rampant arbitrariness and capriciousness (i.e., the death penalty is not reserved for the “worst-of-the-worst” as the U.S. Constitution requires), but also racial/ethnic, gender, and geographic bias in capital charging, sentencing, and reversals on appeal (Alesina & Ferrara 2014; Gelman et al. 2004; Radelet & Borg 2000; Thaxton 2018).

These problems of arbitrariness, discrimination/bias, wrongful convictions, and cost are also interrelated. Jurisdictions with the highest reversal rates for trial error, *inter alia*, impose death

sentences at the highest rates and in cases that are not highly aggravated (i.e., where the culpability level is relatively low). These jurisdictions also have trial judges who are subject to popular (and often highly partisan) elections (Gelman et al. 2004; Liebman et al. 2000).¹ The constellation of these factors, coupled with the fact that approximately a dozen counties in the U.S. are responsible for the vast majority of death sentences (and even fewer are responsible for the vast majority of actual executions), reveal that a minority of “death-prone” jurisdictions are disproportionately responsible for the miscarriages of justice observed in our capital charging-and-sentencing system (Liebman & Clarke 2011; Smith 2012; Steiker & Steiker 2005). This small group of jurisdictions also imposes significant costs on the majority of jurisdictions that do not actively pursue the death penalty, including more crime, fewer arrests for murder, and heightened risks of miscarriages of justice for non-capital defendants (Liebman & Clarke 2011).

Discouraging the overly aggressive use of the death penalty by prosecutors may be the most effective (and efficient) way to reduce the overall prevalence of error in capital charging-and-sentencing systems, as well as unnecessary expense. Prosecutorial overreaching in the capital context primarily results from both electoral politics (MacFeely 2000; McCannon 2013; Wright 2009) and prosecutors’ desire to incentivize defendants’ waiver of their right to trial via plea-bargaining in exchange for withdrawal of the capital charge (Thaxton 2013). Analysts have suggested numerous reforms aimed at either explicitly restricting the breadth of prosecutorial discretion or better illuminating and regulating prosecutors’ discretionary choices. While some of these proposals specifically focus on capital charging-and-bargaining dynamics, the vast majority apply to charging-and-bargaining more broadly.

This essay suggests a relatively modest reform that may be especially effective in shifting some of the financial and administrative costs of inadequate charge screening, while still allowing prosecutors to retain discretion in seeking the death penalty. The proposal consists of two key components: (1) an advisory (i.e., non-binding) opinion from a reviewing authority assessing the appropriateness of a prosecutor's decision to seek the death penalty in a case based on the totality of evidence and (2) financial *and* administrative cost-shifting capable of disincentivizing "hawkish" prosecutorial behavior with respect to capital charging.² Specifically, a prosecutor who disregards the screening authority's negative recommendation would subject his/her jurisdiction to a hefty surcharge; the jurisdiction would have to pay a percentage of the direct and (state) collateral review court costs in any case in which the capital conviction or sentence is ultimately reversed.³ Prosecutors rejecting the screening authority's negative recommendation and ultimately disposing of the case via a plea agreement would make the jurisdiction liable for a larger percentage of the pre-trial costs and trial costs (if a plea agreement is reached after the trial commences) in states that have split-funding arrangements. Administrative cost-shifting would come in multiple forms, including the collection and dissemination of information about prosecutors' record of reversals and the requirement that local prosecutors to serve as co-counsel, of-record, in all appellate proceedings at the state and federal level. The proposal requires additional manpower and expense, but the infrequency of potential capital murder cases, relative to other serious violent felonies, makes the proposal manageable.⁴ The proposed reform is modeled, to an extent, after the federal death penalty system's requirement that federal prosecutors obtain approval from the Attorney General to pursue the death penalty (U.S. DOJ 2001). However

there are several important points of departure from the federal system's framework that constitute potential improvements over both the federal model and other models that have been proposed to reduce or eliminate prosecutorial over-charging.

The essay proceeds in three parts. Part I discusses the Court's attempted regulation of the capital punishment process to minimize the risk of legal error. The Court's efforts have been famously described as "Slow Dancing with Death" because the Court has continually struggled with reconciling its seemingly inconsistent constitutional requirements of (a) reserving the death penalty for only the worst-of-the-worst offenders and (b) requiring individualized charging-and-sentencing determinations that permit legal actors broad discretion in seeking and imposing the death penalty (Banner 2002; Foley 2003; Liebman 2007).⁵ The Court's failure to clearly articulate and enforce the legal standards it has set forth leaves many state-level criminal justice actors — primarily prosecutors — with insufficient guidance as to how to adhere to the substantive dictates of the Eighth Amendment requirements for the use of the death penalty: limiting its application to those defendants who not only commit the most heinous crimes, but who are also least deserving of mercy from both a moral and legal standpoint. Indeed, as many prosecutors struggle to hack through the doctrinal thicket, their use of the death penalty has become increasingly motivated by, or susceptible to, political, financial, and administrative pressures, despite the Court's explicit (though inconsistently enforced) signaling that such practices are unconstitutional.

Part II provides a description of the sources of error in the administration of capital punishment and the reasons for their persistence, and then summarizes recent research focused on detecting those errors in death penalty cases. Part III presents a proposal targeted at curbing prosecutorial

overreaching in capital cases. The proposal develops several cost-shifting mechanisms that should discipline prosecutors' use of the death penalty by having them internalize more of the costs associated with the hawkish use of capital punishment.

I. THE COURT, THE CONSTITUTION, AND THE RATIONALIZATION OF THE CAPITAL CHARGING-AND-SENTENCING PROCESS

In *Furman v. Georgia*, 408 U.S. 238 (1972), the Court held, five-to-four, that all existing capital punishment statutes (including the federal death penalty statute) were unconstitutional as applied, because they failed to articulate any principled basis for decision makers to distinguish those limited number of defendants sentenced to death from the thousands of other similarly situated defendants who were not subject to the death penalty. All nine Justices wrote separate opinions in *Furman*, leaving the ruling without a clear holding; nevertheless, the concern over the arbitrary imposition of the death penalty was echoed by every Justice on the Court. The concurring opinions authored by Justices Stewart and White provided the narrowest ground for agreement, and therefore were deemed controlling (Baldus et al. 1990). Justices Brennan, Douglas, Marshall, Stewart, and White all agreed that defendants who were under the sentence of death at that time of the Court's ruling should have their death sentences vacated, in significant part, because of the risk of arbitrariness. Brennan viewed the death penalty as "little more than a lottery system;" Douglas explained that equality in the administration of the death penalty was the key consideration for the Court; Marshall noted that convicted murderers are seldom sentenced to death; Stewart famously noted that "death sentences are cruel and unusual in the same way that being struck by lightning

is cruel and unusual;” and White lamented that there was no principled way to distinguish those who received the death penalty from those who did not.

Furman’s holding came as a shock to many legal analysts because a year earlier, in *McGautha v. California*, 402 U.S. 183 (1971), Justice Harlan, writing for the majority of the Court, believed that it was impossible to develop a legal formula capable of distinguishing the worst-of-the-worst cases from the vast majority of murder cases that were not capitally prosecuted, and as a result, the unstructured sentencing authority of juries did not violate defendants’ *due process* rights. In contrast, *Furman* deemed the broad, unbridled discretion afforded to both prosecutors and capital juries as violative of the Eighth Amendment’s prohibition against cruel and unusual punishment, but the Court’s ruling left open the door for states to devise their own statutes that would, ostensibly, pass constitutional muster (Baldus et al. 1990; Haines 1996).

When the Court later approved the modified guided-discretion death penalty statutes in *Gregg v. Georgia*, 428 U.S. 153 (1976), *Jurek v. Texas*, 428 U.S. 262 (1976), and *Proffitt v. Florida*, 428 U.S. 242 (1976), and invalidated the mandatory death penalty statutes in *North Carolina v. Woodson*, 428 U.S. 280 (1976) and *Roberts v. Louisiana*, 428 U.S. 325 (1976), it underscored that not only must the death penalty be reserved for the worst-of-the-worst offenses, but even among that limited group of persons, the death penalty is only permissible for the most culpable offenders. The *Gregg* Court expressly recognized that the primary concern in *Furman* was the arbitrary and capricious manner in which defendants were being condemned to death.⁶ The Court was also confident that the guided-discretion statutes enacted after *Furman* would result in greater consistency in the administration of the death penalty.

The Court's assumption, made without an evidentiary basis, that the heightened procedural regulation approach to capital punishment would satisfy the Eighth Amendment was unfortunate but unsurprising considering the fact that Georgia's statute, which was approved in *Gregg*, was closely modeled on "an untested innovation in 1962" by ALI (ALI 2009: 4). Neither the ALI, the state of Georgia, nor the Court had any reliable evidence as to whether the guided-discretion statute presented to the Court in *Gregg* was capable of eliminating or sufficiently reducing the rampant arbitrariness (and potential bias) in death penalty charging-and-sentencing practices that the Court found unconstitutional in *Furman*. Compounding the problem is the fact that, in the years since, the Court has both refused to carefully police adherence to the general dictate of *Furman* and refused to test *Gregg*'s assumption that the guided-discretion statutes would result in rational and consistently imposed death statutes (Smith 2012: 249). Instead, the Court has continually focused its attention on whether state statutes sufficiently narrowed the class of death-eligible defendants (e.g., *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Walton v. Arizona*, 497 U.S. 639 (1990), what types of evidence the trier-of-fact was allowed to consider and how it could be considered (e.g., *Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Walton v. Arizona*, 497 U.S. 639 (1990); *Smith v. Texas*, 543 U.S. 37 (2004); *Kansas v. Marsh*, 548 U.S. 163 (2006), and which crimes and defendants were beyond the reach of the death penalty (e.g., *Coker v. Georgia*, 433 U.S. 584 (1977); *Eberheart v. Georgia*, 433 U.S. 917 (1977); *Tison v. Arizona*, 481 U.S. 137 (1987); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Roper v. Simmons*, 543 U.S. 551 (2005); *Kennedy v. Louisiana*, 554 U.S. 407 (2008)).

II. PREVALENCE AND SOURCES OF CAPITAL ERROR

One of the strongest criticisms of the death penalty is that innocent people may have been wrongly executed. Not a single criminal justice official has gone on record admitting a wrongful execution (Radelet & Bedau 1998), but the lack of a formal admission is unsurprising, considering the professional, legal, and financial repercussions of such a revelation for the states and localities in which the wrongfully convicted are executed (Kirchmeier 2006). Prosecutors also have very little incentive to refrain from wrongdoing in murder cases because such misconduct has been treated with significant leniency (Rosen 1987; Scheck et al. 2000; Weinburg 2003).⁷ These obstacles notwithstanding, scholars have produced compelling evidence that at least 22 innocent persons came within 72 hours of being executed and 23 persons believed to be innocent were executed (Bedau & Radelet 1987; Radelet et al. 1992). Relatedly, the risk of mistaken executions has not appeared to dissipate over time. From 1973-2014, there were 150 death row inmate exonerations, or roughly one exoneration for every nine executions (Dieter 2015; Gross et al. 2005).

While concern over the wrongful conviction of factually innocent individuals has garnered the most media attention and public scrutiny over the last several decades, other types of legal errors are highly prevalent in the capital charging-and-sentencing process (Radelet & Borg 2000). Two comprehensive studies on appellate review of capital cases reveal rampant *reversible* (i.e., harmful) error. Over two-thirds of the approximately 4,500 death sentences imposed from 1973-1995 that received appellate review were overturned (Liebman et al. 2000). Moreover, three rounds of inspection were necessary to detect a significant portion of the mistakes (Liebman et al.

2000).⁸ These errors placed many defendants at risk for wrongful conviction because 82% of death sentences overturned resulted in a sentence less than death upon retrial (Liebman et al. 2000), and 7% were found to be innocent of a capital crime (Gelman et al. 2004; Liebman 2000).⁹ A recent study of 368 capital habeas petitions filed in federal court from 2000-2002 — constituting 60% of all capital habeas filings during that period — discovered that capital habeas petitions had seven times as many claims of trial error as non-capital petitions and were *thirty-five* times more likely to be granted relief (King & Hoffmann 2011: 147). The most common reasons for reversal in both capital and non-capital murder cases are: eyewitness error, prosecutorial and police misconduct, false or coerced confessions, ineffective assistance of counsel, and perjury (Gross 1996). Error rates were greatest in jurisdictions that impose death sentences at higher rates, have trial judges subject to highly partisan popular elections, and impose death sentences in cases that are not highly aggravated (Gelman et al. 2004).

But judicial politics cannot account for these high reversal rates. Ninety percent of death penalty reversals were granted by judges who were elected in jurisdictions with strong support for the death penalty, and therefore potentially subject to retaliation by the electorate, and more than half of the remaining reversals were granted by federal judges appointed by Republican presidents with strong law-and-order agendas (Gelman et al. 2004: 222). Furthermore, judges hearing cases at the state post-conviction stage often reverse death sentences that were imposed in *their own* court at the trial stage, despite strong incentives to approve capital verdicts absent clear flaws with a demonstrable capacity to skew the outcome (Liebman 2002). As William Stuntz (2011) has explained, the limitations on police and prosecutors established by the Bill of Rights are easy to

evade, and the promise of the Equal Protection Clause was never delivered. In fact, 60% of defendants sentenced to death had their errors deemed “harmless/non-prejudicial” at one of the three stages of review (Liebman 2002: 80). The U.S. Supreme Court has only identified a small class of errors, called structural errors, that it has deemed to be harmful *per se* because such errors are related to fundamental rights involving the actual framework in which the trial operated, and not simply the process itself (*Arizona v. Fulminante*, 499 U.S. 279 (1991)). In contrast, the prejudicial impact of all non-structural errors is assessed on a case-by-case basis against the totality of the evidence (*Chapman v. California*, 386 U.S. 18 (1967)). Moreover, collateral review of constitutional non-structural error is currently governed by a different (and more government-friendly) standard than direct appellate review, permitting the government to demonstrate, more easily, that the alleged error was harmless (*Brecht v. Abrahamson*, 507 U.S. 619 (1993)).

This distinction between automatic reversal for structural errors and harmless error review for non-structural errors was recently muddled by the Court in *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017). According to *Weaver*, a structural error analysis is contingent upon how and when the claim of error is raised. When a defendant fails to preserve a claim of structural error by making a timely objection during trial, and later attributes this failure to ineffective assistance of counsel, the non-structural constitutional error standard governs. In other words, to prevail, the defendant must show, but for counsel’s unprofessional errors, there is a reasonable probability that the outcome of the trial would have been different *because of the presence structural error*. In contrast, had defendant’s counsel raised a timely objection to the structural error at trial, the defendant would not have been required to show the actual effect of the structural error, rather the defendant

would have been entitled to automatic reversal.¹⁰

III. SURVEYING THE REFORM LANDSCAPE

Analysts have suggested numerous reforms aimed at either explicitly restricting the breadth of prosecutorial discretion or better illuminating and policing prosecutors' discretionary choices. While some of these proposals specifically focus on capital charging-and-bargaining dynamics (Hoffman et al. 2000; Liebman 2002; Schornhorst 1987), the vast majority apply to charging-and-bargaining more broadly (Barkow 2009; Bar-Gill & Ben-Shahar 2009; Bibas 2009, 2011; Bowers 2008; Dervan 2011; Fairfax 2009; Gazal-Ayal 2005; Gold 2011; Misner 1996; Stuntz 2004). The proposals can generally be categorized as *external* or *internal*.

A. *External Reforms*

External reforms highlight the intervention of legislatures, judges, community organizations, voters, victims and their families (Bibas 2009). These proposals often take the form of narrower crime definitions (Bowers 2008; Sharon 2011), limits on plea bargaining discounts (Dervan 2011; Gazal-Ayal 2005), elimination of statutory minimums (Bowers 2008; Schulhofer 1992; Stuntz 2001), compulsory broad pre-trial discovery requirements (Liebman 2000, 2002), external review of pleas and sentences (Hoffman et al. 2000; Horowitz 1997; Stuntz 2004), stricter reporting requirements of discretionary choices (Misner 1996; Liebman 2002), stronger and consistent disciplinary actions for prosecutorial misconduct (Gershowitz 2009; Gross 1996; Scheck et al. 2000; Weinburg 2003), improved funding and training for defense counsel (Bibas 2009, 2012;

Liebman 2002), the creation of a *statewide* elite capital punishment team to litigate all capital cases across the state (Smith 2011), the creation of a *national* elite capital punishment team to litigate capital trials across the nation (Gershowitz 2014), imposing a ceiling on the number of capital prosecutions that can be sought in each jurisdiction (Gershowitz 2007a), and requiring prosecutors to post a “bond” when pursuing a capital case that would be returned to the jurisdiction if the case is not overturned on appeal (Gershowitz 2007b; Misner 1996). These proposals have been characterized as naïve for being too “blunt,” ignoring history, and neglecting how institutional cooperation and competition typically create strong incentives for legislatures and judges to maximize prosecutorial discretion in order to minimize costs and workloads (through plea bargaining) while still appearing tough on crime (Misner 1996: 765; Rosen 1987: 773-42; Stuntz 2001: 523).

Perhaps the most consistently advocated legal reform addressing the breadth of prosecutorial discretion in capital charging is the narrowing of capital statutes. Narrowly defining death eligibility, proponents of this approach argue, will render capital charging more consistent with the spirit of *Furman*. For example, some have argued that (1) capital statutes should be restricted to only encompass between five to ten percent of murders, (2) statutory aggravating factors that are only responsible for a very small percent of death sentences should be excised, (3) the motivation behind statutory aggravators that focus on defendant and victim characteristics independent of the circumstances of the crime should be subject to closer scrutiny, and (4) capital statutes that result in the death sentencing of less than 20 percent of death eligible murderers should be invalidated (Sharon 2011; Shatz & Rivkind 1997).¹¹

Proposals focusing on narrowing the pool of eligible offenders for the death penalty suffer from several important shortcomings. First, they ignore the Supreme Court's repeated refusal over the past four decades to establish firm culpability thresholds for capital cases. In *Zant v. Stephens*, 462 U.S. 862 (1983), for example, the Court explicitly held that the purpose of aggravating factors in capital statutes is to narrow the class of death eligible cases, not to channel discretion at the penalty phase. Scholars have agreed with the Court's reasoning: such efforts would simply replicate line drawing problems (Kennedy 1988: 1431-33). In fact, both the U.S. Supreme Court and state supreme courts have approved of juries at the penalty phase considering additional aggravating circumstances not enumerated in the applicable capital statute when at least one statutorily defined element has been proven beyond a reasonable doubt (*Wainwright v. Goode*, 464 U.S. 78 (1983)). Second, precisely crafted capital statutes may reduce the ability of prosecutors to pursue the death penalty in marginally aggravated cases — which should have some impact on error rates — but they largely fail to address other common types of error (e.g., racial bias, availability of defenses, suppression of exculpatory/impeachment evidence, etc.) (Forst 2004; Gross 1996; Lanier & Acker 2004; Natapoff 2006; Radelet et al. 1992; Scheck et al. 2000; Shatz & Rivkind 1997). Third, these narrowing proposals fail to link the exercise of prosecutorial discretion to fiscal accountability, which is much more likely to resonate with legislators, judges, and voters (Thaxton 2013). Finally, these proposals assume that criminal law actual drives criminal punishment, when in fact there is good reason to believe the opposite. In our current system, “law on the streets” may remain unchanged even as substantive law changes dramatically (Stuntz 2001). And this may be particularly true in the capital charging-and-sentencing context. Empirical studies

consistently reveal that “legal rules” only explain a modest proportion of variation in actual charging and sentencing outcomes in death penalty cases (Berk et al. 1993; Nakell & Hardy 1987; Thaxton 2017).¹² According to Black (1984: 20), legal rules are important under two conditions: when cases are socially similar or when the potential punishment is trivial. Legal doctrines and facts are often ambiguous with uncertain applications, and legal officials frequently disregard the written law, so the predictive power of rules is questionable. In discussing prosecutorial discretion, Ramsey (2002: 1318) explains that “discretion can never be completely formulaic. Holes will exist even in the tightest net of legal and ethical rules — holes that must be filled by the attorney’s own judgment.”

Criticisms notwithstanding, certain of these proposals — with slight modifications — may gain traction in the capital context due to the current political climate, as legislators and judges reevaluate criminal justice priorities in the face of serious budget and manpower constraints. Such reforms may also be consistent with much of the Court’s death penalty jurisprudence for the past four decades, which has underscored that death is qualitatively different from all other forms of punishment and requires extraordinary procedural protection against error (see, generally, *Furman v. Georgia*, 408 U.S. 238 (1972); *Kennedy v. Louisiana*, 554 U.S. 407 (2008)).

B. Internal Reforms

Internal proposals concentrating attention on policies and practices within prosecutor offices — such as intra-office guidelines pertaining to non-compulsory pre-trial discovery rules, limits on bargain “discounts,” cooling off periods for more serious crimes, default rules that benefit

defendants when plea agreement terms are ambiguous, and heightened training/supervision of “front-line prosecutors” — have become increasingly popular (Barkow 2009; Bibas 2009, 2011; Liebman 2002; Meares 1995; Misner 1996). Yet it remains unclear just how effective many of these proposed reforms would be for non-routine cases with high political and financial stakes, such as murder cases. High profile cases are typically subject to greater internal scrutiny/review by supervisory staff, and prosecutors have less incentive (and less leeway) to offer substantial bargaining discounts. The reduced desire or ability of prosecutors to grant defendants large sentence discounts for crimes that are subject to high penalties, especially high mandatory minimums, is likely to lead these defendants to test their chances at trial, irrespective of departmental policies aimed at curbing gross prosecutorial overreaching (White 2006). This may be especially true in the capital context because the central contested issue is not the probability of conviction; rather it is the likelihood of a death sentence or sentence greater than the statutory minimum at the penalty phase, and perhaps even the expected likelihood of execution (Alschuler 2009; Ehrhard-Dietzel 2012).

Useful reforms therefore must raise the costs of making foreseeable errors in capital charging (Misner 1996; Stuntz 2001). Current capital charging-and-sentencing systems make trial error virtually costless to prosecutors — and to a lesser extent the capital defense bar¹³ — because proper feedback mechanisms from appellate and post-conviction stages to trial actors are nearly non-existent. Professor James Liebman (2002: 324-25) has explained that “[t]rial-level actors benefit from the mistakes, but do not internalize the costs of those mistakes. The psychological benefit of each death sentence is high, but the cost of each mistake is low.” Defeats at trial are vivid in the

minds of the public, so prosecutors and police have strong incentives to search for ethically suspect ways to win marginal cases,¹⁴ while knowing that low-status “front-line” attorneys in the Attorney General’s office will be blamed for reversals and neither themselves nor other local officials will be required to answer to the full electorate for the cost of error correction (which is currently subsidized by state and federal governments) (Alarcon & Mitchell 2010; Liebman 2002). “Capital cases get off track from the start,” according to Liebman (2002: 324), “where a capital conviction or sentence is a stretch given the evidence and the mitigating circumstances.” By adequately discouraging poor screening decisions with respect to guilt *and* punishment, we could substantially reduce not only high error correction costs (Bowers 2008: 1179; Gazal-Ayal 2005: 2306), but also the greater expense associated with pre-trial and trial stages of capital cases (Thaxton 2013).

C. A “Frugal” Proposition

In an effort to avoid several of the aforementioned shortcomings of existing proposals aimed at curbing prosecutorial overreaching in capital cases, I propose a modest reform that may be especially effective in shifting some of the costs of inadequate charge screening, while still allowing prosecutors to retain discretion in seeking the death penalty. As noted earlier, my proposal requires an additional layer of (non-binding) review of death charging decisions, and pairs this review with *financial* and *administrative* cost-shifting mechanisms. Also recall that my suggested disincentives for prosecutorial overreaching in capital cases take the form of holding jurisdictions financially liable for appellate costs (direct and collateral review) and holding prosecutors administratively responsible for litigating these cases, as counsel of record, on appeal.

These cost-shifting mechanisms are triggered when the prosecutor rejects the non-binding negative recommendation of an external capital charging screening committee. Some additional manpower and expense are required, but the proposal should be feasible due to the infrequency of potential capital murder cases, relative to other serious violent felonies.

The proposed reform is modeled after the federal death penalty system's requirement that federal prosecutors submit information on *all* death eligible cases, irrespective of the prosecutor's intent seek the death penalty in those cases, and obtain prior approval from the Attorney General to pursue the death penalty (the "federal protocol").¹⁵ The federal protocol was adopted in 1995 following the enactment of the Federal Death Penalty Act of 1994 (18 U.S.C. § 3591 (1994)). According to the Justice Department, it was "designed to promote consistency and fairness," but the focus was on the detection and elimination of racial/ethnic bias in the imposition of the death penalty, and not on arbitrariness (U.S. DOJ 2001). While the effectiveness of the federal protocol in eliminating racial/ethnic disparities in the imposition of the death penalty at the federal level has been subject to debate,¹⁶ this system provides a promising model to help reduce prosecutorial overreaching in state capital cases, especially when coupled with appropriate financial (dis)incentives.

1. Data Collection

Under my proposed reform, district attorney offices would be required to keep records on all cases that either result in an indictment for a death eligible offense or could have been indicted for a death eligible offense based on the facts of the case. They would also have to regularly report

this information to a separate agency (e.g., the state attorney general or the state administrative office of the court).¹⁷ This reporting requirement is not implausible — local police departments are required to regularly submit information on reported crimes and arrests, especially violent crime, to the state bureaus of investigation, who in turn submit this information to the Federal Bureau of Investigation (FBI) for its annual compilation of crime data (FBI 2011). The proposal would require more expansive pre-trial discovery for cases in which the prosecutor intends to seek the death penalty (Cook 2009; Liebman 2002; Schulhofer 1992), including, *inter alia*, candid assessments of evidentiary problems (especially problems with police investigations and eyewitnesses/confidential informants) and plausible defenses (e.g., insanity, self-defense, etc.) (Gazal-Ayal 2005).¹⁸ This would be akin to the federal protocol, where U.S. Attorneys' capital case submissions must be sent to the Criminal Division and include a death penalty evaluation form for each defendant charged with a capital offense, a detailed prosecution memorandum, copies of indictments, written materials submitted by defense counsel in opposition to the death penalty, and other significant documents and evidence as appropriate. While some scholars have cautioned that extensive discovery rights prior to trial create unnecessary risks to confidential informants, undercover officers, and witnesses (Bibas 2011), these risks can be minimized by preventing defense counsel from having access to these materials but still allowing the review committee to consider the totality of evidence. Defendants also might be asked to waive *Brady* claims and other discovery related claims in exchange for defense counsel having access to *Brady/Giglio*-relevant information at pre-screening conferences (Liebman 2002: 341).

2. Review Committee Composition

An important consideration is the actual composition of the review committee. Federal attorneys (and judges) are not subject to popular election, whereas the states' Attorneys General, district attorneys, and judges in the most active death penalty states are directly accountable to the electorate. Consequently, the federal review model may not be as robust when implemented at the state level. The lack of prosecutorial and judicial independence may pose significant problems for the fair administration of justice in the capital context (Bright & Keenan 1995); nonetheless, bills have been introduced in a small number of states that require review of prosecutorial discretion in pursuing the death penalty by the attorney general of the state (Murphy 2011). The non-binding nature of the recommendation — whether ultimately at the discretion of the attorney general or the review committee as a whole — may help guard against some of these concerns. Because constructing a committee of individuals who would be properly incentivized to reasonably identify marginal cases might be a difficult task, coordination at the federal level may be particularly meaningful in ensuring an unbiased reviewing body.

States could be made responsible for a percentage of federal post-conviction costs for all capital cases that are overturned at the federal level when the committee initially recommends pursuing the death penalty in a marginal case, perhaps with the exception of ineffective assistance of counsel claims (unless the ineffectiveness claim is tied to forfeiture doctrine/procedural default for important substantive issues). Expenses from federal post-conviction proceedings would most likely be in the form of a proportional reduction in federal assistance to states, but restrictions on sub-recipients to specifically target the relevant counties may be possible as well. The Court has held that the withholding of federal funds to states is generally permissible in the pursuit of general

welfare (see *South Dakota v. Dole*, 483 U.S. 203 (1987)). This proposal should have the ancillary benefit of encouraging trial judges to approve reasonable defense requests for funding of mental health and investigative experts for both guilt and penalty phases in order to minimize the risk of reversal on appeal.¹⁹

3. Substantive Case Review

My proposed system requires the capital review committee to meet with the district attorney in the relevant jurisdiction, front-line prosecutors who are responsible for the case, and defense counsel. Similar to the federal protocol, the committee must consider, *inter alia*, the prosecution's theory of liability, the strength of the evidence, statutory and non-statutory aggravation and mitigation,²⁰ the defendant's role in the capital offense, the defendant's willingness to plead guilty to a life or near-life term of imprisonment, and additional evidence this is probative of guilt and punishment (Federal Judicial Center 2010; Holder 2011). Defense counsel is also afforded the opportunity to present any arguments against pursuing the death penalty against her client. Defense counsel would also have access to the systemic data collected about death eligible cases, as well as cases that could have been eligible for the death penalty based upon their specific facts, but the prosecutor declined to pursue an indictment for a capital offense.

4. Recommendations & Ramifications

After full consideration of the evidence, the reviewing committee would make a non-binding recommendation to the prosecutor with respect to pursuing the death penalty.²¹ If the committee

recommends that the prosecutor not pursue the death penalty and the prosecutor still decides to go forward with the capital prosecution, the legislature would require the prosecutor's jurisdiction to pay a percentage of the state appellate court costs — at both direct appeal and state post-conviction — in any case in which the capital conviction or sentence is ultimately reversed (Liebman 2002: 341). If a prosecutor rejects the committee's recommendation and pursues a capital case that is ultimately disposed of by plea agreement, she would subject her jurisdiction to liability for a larger percentage of pre-trial and trial costs (incurred prior to the plea agreement) in states that have "split-funding" arrangements (e.g., statewide systems that subsidize county prosecution and public defender offices).²² Prosecutors would be prohibited from engaging in plea negotiations and threatening to seek the death penalty prior to seeking a recommendation from the review committee. This proposal could also easily incorporate the suggestion from other analysts that prosecutors be required to observe a "cooling off" period before seeking a recommendation for the death penalty (Bibas 2011; Liebman 2002).

The proposed review of potential capital cases by screening committees seems plausible from a resource perspective. In fact, there is striking consistency in the proportion of death eligible cases that were noticed for the death between the federal government and several states. For example, in the five years between 1995 and 2000, federal prosecutors pursued the death penalty in 183 cases and, as required under the federal protocol, submitted information on 683 death eligible federal offenses (27% of death eligible cases) (U.S. DOJ 2001). During the same time period, Georgia prosecutors sought the death penalty in 256 of 957 death eligible cases (27%) (Paternoster 2007;

Thaxton 2009). In Maryland, from 1978-1999, 353 of 1,311 death eligible cases (27%) were noticed for the death penalty (Paternoster & Brame 2003). In the state of Washington, prosecutors sought the death penalty in 87 of 298 death eligible cases (29%) (Beckett & Evans 2016). Prosecutors in Harris County, Texas sought the death penalty in 129 of 504 death eligible cases (25.5%) from 1992-1999 (Phillips 2008).

The effectiveness of my proposed reform will largely turn on the ability of the financial and administrative cost-shifting to adequately disincentivize prosecutorial overreaching in potentially capital cases. The high costs of pursuing the death penalty, even in cases that are eventually resolved by plea agreement, has forced many state and local officials to reconsider the feasibility of maintaining the death penalty either in its current form or at all. Although precise assessments of the cost of capital punishment are lacking because of the diffusion costs, it is undeniable that capital cases are more expensive than comparable non-capital cases at every stage of the process (Thaxton 2013). Moreover, in the past decade, numerous state legislatures have introduced bills to abolish the death penalty or to significantly curtail its scope, in large part because of cost considerations. For example, the high cost of maintaining the death penalty figured prominently in the legislative debates resulting in the repeal of capital punishment in Delaware (2016), Illinois (2011), Maryland (2013), New Hampshire (2019), and New Mexico (2009). Evidence from Maryland suggests that each capital case costs, at minimum, \$1 million more than a non-capital case, even after taking into account differential imprisonment costs (Roman et al. 2009). Capital case trial costs were five times greater and appellate costs were four times more expensive than non-capital cases. In California, the difference between the *least expensive* capital murder trial and

the *most expensive* non-capital murder trial was \$1.1 million, but this figure did not include costs associated with federal review of state capital convictions (California Commission on the Fair Administration of Justice 2008). A comprehensive analysis of federal post-conviction review of death sentences in California suggests that these appeals add between \$635,000 and \$1.58 million to each capital case beyond state expenditures (Alcarcon & Mitchell 2012). Since Californians reinstated its death penalty in 1978, nearly \$4 billion has been spent on the death penalty and 13 condemned inmates have been executed (more than \$300 million per execution). Imprisoning condemned inmates on death row costs Californians an additional \$100,663 per inmate per year in 2010 (Alarcón & Mitchell 2011: S107). And while reliable data are not available at the state-level, an analysis of the federal system revealed that capital cases disposed by plea were over four times more expensive than the median non-capital cases, irrespective of methods of disposition (Gould & Greeman 2010). These figures suggest that, at a minimum, cost shifting from states to counties, and from the federal government to the state government (or other sub-state units), could potentially have a significant impact on capital litigation.

Both instituting and gauging the efficacy of administrative cost-shifting is more difficult. Trial courts are much better suited to the task of avoiding erroneous death sentences, yet the costs of legally invalid death sentences are borne by others (Liebman 2002). It is politically profitable for prosecutors to (over)produce death sentences because they benefit from death sentences and do not have to internalize the costs of these legal errors, irrespective of whether those convictions are obtained while violating the statutory and constitutional rights of defendants. For example, nearly 70% of death sentences imposed in the U.S. from 1973-1995 were overturned on appeal (Liebman

2000), with the cost of error correction falling on taxpayers, low-status front-line deputy state attorneys general handling direct and state collateral appeals, appellate court judges, the families and friends of victims who endure repeated delays and retrials, and wrongly condemned inmates (Liebman 2000; Vandiver 2003).

Consequently, more effective feedback to trial officials responsible for errors is a key component of curbing the undisciplined use of the death penalty. Identifying prosecutors, by name, whose mistakes cause reversals and requiring them to appear in the brief and in court as counsel of record in all appellate proceedings is an important first step (Liebman 2002). Relatedly, data must be collected across jurisdictions throughout the state on prosecutors' reversal rates of capital cases, and this information must be disclosed to the public and media via websites and court briefs. This is especially important for prosecutors who repeatedly breach their legal and ethical duties. The reputational ripple effects of administrative cost-shifting may be significant, particularly when coupled with the financial cost-shifting described earlier. Many prosecutors in the most active capital jurisdictions have professional and political aspirations that are undergirded by a "law and order" and "win at all costs" orientation, and career upward mobility is often closely tied to maximizing convictions, irrespective of foreseeable (and sometimes intentional) deficiencies that plague their cases.

Developing an infrastructure that not only requires the collection and dissemination of information about prosecutorial overreaching (and associated misconduct), but also requires prosecutors to participate in vertical representation at the appellate level — much in the same way that public defender offices that adopt a *vertical representation* model operate — holds the promise

of internalizing the costs of foreseeable mistakes.²³ My proposal also offers the potential ancillary benefit of an educative effect: by meaningfully participating in direct and collateral review proceedings, prosecutors may gain a deeper understanding of, and appreciation for, the myriad problems that result in harmful legal error and miscarriages of justice in capital cases. I do not believe my proposal risks over-penalizing prosecutors and their jurisdictions for unforeseeable mistakes because of the screening function of the review committee (aided by the participation of defense counsel) that is aimed at minimizing foreseeable arbitrariness, caprice, and bias. It is also worth noting that the substantive and procedural appellate rules require a showing of actual prejudice (i.e., harmful error) for most trial errors occurring in capital cases.²⁴ As Justice Minon famously noted, “A defendant is entitled to a fair trial, but not a perfect one” (*U.S. v. Lutwak*, 344 U.S. 604 (1953)). This principle had been codified, previously, in Federal Rule of Criminal Procedure 52(a): “Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.”

CONCLUSION

The legitimacy of the criminal justice system rests, largely, on the ability of its policies and procedures to reduce systematic criminal justice errors.²⁵ These errors may represent the sum of the costs borne by innocent or disproportionately punished individuals and are typically generated by extreme pressure to solve cases and reduce crime, as well as by the absence of professionalism among criminal justice officials (Forst 2004). The empirical literature on the operation of the death penalty consistently reveals that prosecutors’ charging and plea bargaining decisions are plagued

by inaccuracy, unreliability, and legally unjustified racial, gender, and regional disparities. The reasons for the persistence of these problems are undoubtedly complex, but largely unconstrained and potentially improperly motivated prosecutorial decision-making has both garnered the attention, and provoked the ire, of death penalty reformers since the Court's initial foray into rationalizing and regulating the death penalty in *Furman*. This essay outlined a proposal aimed at bringing greater accountability to prosecutors' exercise of discretion. It is important to underscore that I deem my proposal to be modest for two reasons. First, while it differs in varying degrees from existing proposals in several respects, it does not present a radical departure from the corpus of proposals articulated by other scholars also concerned with reducing/eliminating both arbitrariness, bias, and other legal errors in the capital charging-and-sentencing process.²⁶ This conventionality is understandable, in many respects, given the nature of the doctrinal, political, and structural constraints impacting death penalty reform. Any feasible proposal must be developed with full awareness of the (im)practicalities accompanying the administration of the government's ultimate sanction (Bright 1995; Liebman 2002; Steiker & Steiker 2015).

Second, and perhaps more importantly, I deem my proposal as modest because there are important, yet often underappreciated, limitations to technocratic thought — that is, the widely held view among lawyers and legal scholars that problems of law can be reduced to problems of technique (Black 1972). It remains an open question whether the capital punishment process is amenable to the types of “fixes” that have been successfully implemented by the federal government to substantially reduce (to varying degrees) arbitrariness, caprice, and racial/ethnic bias in previously problematic areas such as voting, housing, employment, and public education

(Howe 2004). Although broad consensus exists among death penalty analysts concerning the sources of these problems — e.g., overly-broad capital statutes, inadequate legal representation, decentralized decision-makers, broad charging and sentencing discretion, and overly restrictive merits review in state and federal habeas proceedings — there is considerable disagreement over whether any set of proposed remedies will produce the desired result.²⁷ Carol Steiker and Jordan Steiker (1995: 359) explained that “the body of doctrine produced by the Court is enormously complex and its applicability to specific cases [is] difficult to discern; yet it remains unresponsive to the central animating concerns that inspired the Court to embark on its regulatory regime in the first place. Indeed, most surprisingly, the overall effect of twenty-odd years of doctrinal head banging has been to substantially reproduce the pre-*Furman* world of capital sentencing.”

All proposals aimed at repairing the “broken system” of capital punishment must fully acknowledge that inherent limitations may exist with respect to altering doctrines, policies, and practices in order to achieve even-handed administration of the death penalty. While establishing “super due process” for criminal defendants on the one hand, and encouraging “tighter” self-monitoring and self-regulation of charging and plea-bargaining practices on the other hand, may provide minor fixes to longstanding problems, it is highly unlikely that more “tinkering” is all that is needed to satisfy the still unfulfilled promise of *Furman* (*Callins v. Collins*, 510 U.S. 1141 (1994)).

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Endnotes

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¹ Prosecutors recognize that elected judges are less likely to require capital trials to strictly follow reliable procedures out of fear that prosecutors will publicly blame judges for losses based on “legal technicalities” (Bright & Keenan 1995). The independence of the judiciary is further diminished by political attacks from both political parties and from candidates for judicial office (Bright 1997).

² See Misner (1996: 719) (arguing the current flaw in the evolving power of the prosecutor is the failure to force her to face the full costs of prosecutorial decisions).

³ Cost-shifting from federal post-conviction proceedings would come in the form of reductions in federal assistance to states, perhaps with restrictions on sub-recipients to specifically target offending jurisdictions. See Part C.

⁴ See Part C.

⁵ In a dissenting opinion in *Walton v. Arizona*, 497 U.S. 639 (1990), Justice Scalia highlighted the tension in the Court’s capital punishment jurisprudence ruling following *Furman* and opined that the conflict was irreconcilable.

⁶ The risk of the discriminatory imposition of the death penalty was also emphasized by multiple Justices (Baldus et al. 1990).

⁷ Scheck et al. (2000) reported that not a single prosecutor had been disbarred in the 381 murder convictions that were reversed because of prosecutorial misconduct.

⁸ Liebman et al. (2000) discovered that state courts overturned 47 percent of death sentences

(mostly on direct appeal), while 40 percent of convictions upheld by state courts were subsequently overturned by federal courts.

⁹ Gelman et al. (2004) report that legal innocence of the death penalty (i.e., ineligibility for the death penalty), as opposed to factual innocence, accounted for 20% of reversals on direct appeal.

¹⁰ The Court's ruling is somewhat perplexing because the rationale for requiring automatic reversal for structural errors is that the impact of structural errors are unamenable to harmless error analysis. The Court explained that errors are deemed "structural" for different reasons. Some structural errors will always result in fundamental unfairness, whereas others are simply too hard to measure, or they are designed to protect an interest other than preventing erroneous convictions.

¹¹ Dissenting in *McCleskey v. Kemp*, 481 U.S. 279 (1987), Justices Stevens and Blackmun proposed that Georgia's capital statute be limited to only the most heinous murders to reduce the arbitrary and discriminatory application of the death penalty.

¹² "Whether legal rules predict [legal] behavior is an empirical rather than a conceptual question" and rules are to be taken as an object to be explained and not, themselves, what explains law" (Horwitz 1983: 372).

¹³ Due to the fact that the pool of capital charged cases is so large, the capital defense bar tends to neglect capital pre-trial, trial, and direct appellate proceedings, and focuses on procedural issues that are winnable in habeas proceedings rather than the substantive issues that are in play at the earlier stages. This is particularly true because condemned inmates' access to state-compensated attorneys shrinks, so it becomes easier for outside attorneys to intervene at the post-conviction stages (Liebman 2000: 2076).

¹⁴ Prosecutors' suppression of possibly exculpatory evidence accounted for 20 percent of reversals in capital cases from 1973-1995 (Liebman et al. 2002; Gelman et al. 2004).

¹⁵ The eventual authorization rate for these cases was 87 percent. This protocol was subsequently expanded to require the regular submission of information on all cases in which an indictment was obtained for conduct that *could* have been charged as a capital offense, irrespective of whether the prosecutor sought such an indictment (U.S. DOJ 2001).

¹⁶ Compare Baldus (2001) (unwarranted regional and race-of-victim disparities persist in the administration of the federal death penalty) with Klein et al. (2006) (failing to find race-of-defendant or race-of-victim disparities in the administration of the federal death penalty).

¹⁷ Misner (1996), e.g., suggests that states designate an existing agency or create a separate agency for the purposes of inventorying prosecutorial resources on a county-by-county and statewide basis. Several attempts were made by members of the U.S. Congress to pass a "Racial Justice Act" that would require states to maintain sufficient data on all potential cases in order to allow capital defendants and prosecutors to allege racial bias in capital charging (or the absence thereof) (Baldus 1994b).

¹⁸ Gazal-Ayal (2005) posits that prosecutors may overcharge in order to coerce a defendant into accepting a plea to prevent the defendant from arguing legitimate defenses in court.

¹⁹ Compare *Britt v. North Carolina*, 404 U.S. 226, 227 (1971) (explaining that indigent prisoners are constitutionally entitled to "the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners.") with *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) (there is no absolute right to state-funded expert services, but many jurisdictions recognize

a limited or conditional right to such experts).

²⁰ Scholars disagree as to whether the presentation of robust mitigation during the penalty phase has a demonstrable impact on death sentences. Whereas Stetler (2018) has argued that the emphasis on mitigation litigation in the penalty phase of capital cases has led to a sharp reduction in death sentences), Smith (2014) identifies recent research discovering that powerful mitigation evidence is ubiquitous among capital defendants who were ultimately executed.

²¹ From 1995-2000, the Attorney General authorized 87 percent of capital case submissions from U.S. Attorneys (U.S. DOJ 2000). The federal protocol requires approval from the Attorney General for a U.S. Attorney to withdraw the death penalty by ultimately reaching a plea agreement. Given the non-binding nature of the committee's recommendation under my proposal, no such authorization is needed from the reviewing committee; however, my proposal incorporates cost-shifting when a prosecutor rejects the committee's negative recommendation, seeks the death penalty, and ultimately reaches a plea agreement.

²² Carlson et al. (2008) provide descriptions and assessments of states' mixes of state and local funding for trial courts. California provides reimbursements to counties, minus normal salaries and expenses, when criminal trial costs seriously impair the finances of the county. One study discovered that, during a ten year period, 1996-2005, the state reimbursed counties \$45.8 million for 21 identifiable homicide trials—eight of which were capital trials. The three most expensive trials ranged from \$3.2 million to \$10.9 million (California Commission on the Fair Administration of Justice 2008: 129).

²³ “Under vertical representation, one attorney represents a single defendant at every stage of

the proceedings, rather than assigning specialized procedural stages to different attorneys in the office” (Wright 2011: 1527). Different versions of the vertical representation are operative throughout the country—some models terminate vertical representation after the sentencing phase, while others require the attorney to represent the client through the direct appeal. According to Wright (2011: 1527), “The continued dominance of vertical representation is an indicator that the individualistic ethic is still vibrant in public defense management. It is telling, then, that the use of vertical organizational schemes remains stronger on the public defense side than on the prosecution side.”

²⁴ See Part II.

²⁵ In contrast, a *random error* results from the individual action of criminal justice practitioners or from circumstances beyond the control of the offender. An example of a random error would be the unintentional destruction of inculpatory evidence that permits a clearly guilty offender to evade conviction (Forst 2004).

²⁶ While I have not reviewed, at length, any single proposal articulated by other scholars, Parts III.A. and III.B summarize the various components of those proposals and reveal overlap with my proposal.

²⁷ For example, Baldus et al. (1994a) refute the claim that discrimination in the imposition of the death penalty is inevitable and impossible to prevent, while Howe (2004) suggests that even an increase in the due process protections – “super due process” – for capital defendants is unlikely to significantly reduce or eliminate racial bias in the capital punishment process. Similarly, Ogletree (2002: 34) cautions that the incremental procedural fixes to the capital

punishment system have done little to correct or change the legacy of racial bias in criminal justice administration in America while simultaneously further entrenching the practice of capital punishment by providing the appearance of legality and impartiality.