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"He Said," "She Said," and Issues of Life and Death: The Right to Confrontation at Capital Sentencing Proceedings

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ERRORS AND ETHICS: DILEMMAS IN DEATH

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"Whatever you think about the death penalty, a system that will take life must first give justice."[1]

I. INTRODUCTION

In the last five years, the death penalty has become a frequent topic of discussion. While discussion of such an emotive topic is not unusual for any period in history, the tenor of the recent dialogue is unusual. For the most part, the discussion centers around the problems with capital punishment, particularly its inaccuracy and unfairness. This Article begins in Part II with a discussion of recent claims about the frequency of errors in capital cases. Part III enumerates and discusses the factors generally thought to be the cause of the errors. Part IV details new rules recently adopted in one jurisdiction in an effort to eliminate the errors. Part IV also suggests that these new rules, though worthwhile, are actually a reiteration of long-standing ethical obligations of judges and lawyers, the breach of which is responsible for many of the errors. Part V recommends additional remedies which the bench and the bar must take if there is a true commitment to providing a fair, just, and reliable system for determining who the government is entitled to kill.

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1. *Habeas Corpus Issues: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong. 447 (1991) (statement of John Curtin, Jr., then President of the American Bar Association).

II. ERRORS IN EXECUTIONS

A. *Attention to Errors*

Public discourse about capital punishment is nothing new. Throughout the history of the death penalty in America, its appropriateness has been debated frequently. The subject of abolition, prevalent in the late 1800s and early 1900s, gave way in the mid-twentieth century to a discussion of execution methods.[2] Citizens, troubled by the prevalence of crime during the Great Depression, expressed support for the ultimate punishment.[3] As a result, the number of executions peaked in the late 1930s.[4] Discussion shifted from the question of the appropriateness of capital punishment to the method of capital punishment.[5]

The number of annual executions declined fairly steadily from the mid-1940s until the 1960s.[6] No executions occurred between the years of 1968 and 1976 while the courts dealt with the constitutionality of capital punishment.[7] Although discussion about capital punishment lessened, it never ended, and a renewed interest in the subject accompanied the Supreme Court's decision in *Furman v. Georgia*,[8] which held that capital

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2. *See* Hugo Adam Bedau, *Background and Developments*, *in* THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES 7-11 (Hugo Adam Bedau ed., 1997) [hereinafter DEATH PENALTY].

3. *See id.* at 9.

4. *See id.* at 10 fig.1-1.

5. The debate concerning which method of execution is more humane continues today. It has simply shifted from concerns about the gas chamber to concerns about the electric chair. *See generally* Deborah W. Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death Over the Century*, 35 WM. & MARY L. REV. 551 (1994). Much of the debate has centered around botched executions in Florida. In March 1997, during the execution by electrocution of Pedro Medina, flames shot from the condemned's headpiece. *See* Doug Martin, *Flames Erupt from Killer's Headpiece*, GAINESVILLE SUN, Mar. 26, 1997, at 1A. Two experts hired by the governor determined that the fire started because of the improper application of a sponge to Medina's head. *See id.* Two years later, the execution of Allen Lee Davis prompted Justice Shaw of the Supreme Court of Florida to write that Davis "was brutally tortured to death by the citizens of Florida" by an "act[] more befitting a violent murderer than a civilized state." Provenzano v. Moore, 744 So. 2d 413, 440 (Fla. 1999) (Shaw, J., dissenting); *see also id.* at 442-44 (providing photographs of Allen Lee Davis' execution). In October 2001, the Georgia Supreme Court held that "future use of electrocution as a means of executing death sentences in Georgia would violate the prohibition against cruel and unusual punishment" in the state constitution. Dawson v. State, No. S01A1041, 2001 Ga. LEXIS 785, at *3 (Ga. Oct. 5, 2001).

6. *See* DEATH PENALTY, *supra* note 2, at 13.

7. *See id.*

8. 408 U.S. 238 (1972) (per curiam). The Court issued a one paragraph per curiam opinion "hold[ing] that the imposition and carrying out of the death penalty in these cases constitute[s] cruel

punishment was not a per se violation of the Eighth Amendment.[9] Four years later when the Court approved new capital punishment systems in four states,[10] the plurality opinions cited increased popular support for capital punishment as one justification for the decision.[11]

What is unique about the death penalty dialogue that has occurred in the last decade is its focus. For the most part, recent discussions have

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and unusual punishment in violation of the Eighth and Fourteenth Amendments." *Id.* at 239-40. Each Justice then wrote separately with Justices Douglas, Brennan, Stewart, White, and Marshall concurring, *see id.* at 240, and Chief Justice Burger dissenting with Justices Blackmun, Powell, and Rehnquist. *See id.*

9. *See, e.g., id.* at 310-11 (White, J., concurring). The 50,000 words of the nine separate opinions in *Furman v. Georgia* emphasized the unconstitutionality of a capital punishment system which operated arbitrarily or discriminatorily. Justice Douglas, for example, concluded that the death penalty would be unusual, and thus in violation of the Eighth Amendment, if it was administered in an arbitrary or discriminatory manner. *See id.* at 249, 255-57 (Douglas, J., concurring). Justice Brennan emphasized the need for proportionality and found no reason to believe that the death penalty served any legitimate penal purpose more effectively than alternative punishment. *See id.* at 279-80 (Brennan, J., concurring). In his concurrence, Justice Stewart focused on arbitrariness and decried a "system[] that permit[s] this unique penalty to be so wantonly and so freakishly imposed." *Id.* at 310 (Stewart, J., concurring). Justice Marshall concluded that the death penalty was per se unconstitutional because it was excessive and "morally unacceptable." *See id.* at 358-60 (Marshall, J., concurring). He suggested that a fully informed citizenry would find the death penalty to be unacceptable in light of its arbitrary and discriminatory use. *See id.* at 361-64 (Marshall, J., concurring). Justice White believed that the state laws before the Court violated the Constitution because they were rarely used and had ceased to accomplish a meaningful sentencing purpose. *See id.* at 311-13 (White, J., concurring).

10. In order to resume executions, the states began revising their death penalty statutes to attempt to address the problems identified in *Furman*. Four years after *Furman*, the Court opened the doors to America's death chambers when it held that three southern states had been successful in their efforts to constitutionalize their administration of capital punishment. *See* Gregg v. Georgia, 428 U.S. 153, 207 (1976) (plurality opinion); Proffitt v. Florida, 428 U.S. 242, 260 (1976) (plurality opinion); Jurek v. Texas, 428 U.S. 262, 277 (1976) (plurality opinion). In Florida, Texas, North Carolina, Louisiana, and Georgia, persons had been sentenced to death under modified state statutes. *See Gregg*, 428 U.S. at 162; *Proffitt*, 428 U.S. at 247; *Jurek*, 428 U.S. at 268; Woodson v. North Carolina, 428 U.S. 280, 286 (1976) (plurality opinion); Roberts v. Louisiana, 428 U.S. 325, 328 (1976) (plurality opinion). The five cases were consolidated for appeal. The statutes of Georgia, Florida, and Texas, passed constitutional muster; the mandatory death statutes of the Louisiana and North Carolina legislatures did not. *See Gregg*, 428 U.S. at 207; *Proffitt*, 428 U.S. at 260; *Jurek*, 428 U.S. at 277; *Woodson*, 428 U.S. at 305; *Roberts*, 428 U.S. at 336. The North Carolina statute, for example, included a mandatory death penalty designed to treat all persons convicted of a designated offense alike. *See Woodson*, 428 U.S. at 286-87. According to the Court, this treatment of all of these individuals as "a faceless, undifferentiated mass" did nothing to eliminate the concerns of arbitrariness in sentencing. *See id.* at 304.

11. *Gregg*, 428 U.S. at 182. Justice Stewart, writing for the plurality, noted that "[a] December 1972 Gallup poll indicated that 57% of the people favored the death penalty, while a June 1973 Harris survey showed support of 59%." *Id.* at 181 n.25. The Justice also referred to state referenda in California and Illinois that had resulted in votes supporting capital punishment and efforts on behalf of thirty-five state legislatures and the United States Congress to codify at least some capital crimes. *See id.* at 179-80, 181 n.25.

focused on the reliability of the capital punishment system, rather than whether the death penalty is right or wrong.[12]

This is not the first time that the subject of the reliability of our capital punishment scheme has been debated. In 1964, an essay was published identifying seventy-four capital cases occurring between the years of 1893 and 1962 that were said to be "errors of justice."[13] A more thorough study describing 350 cases of wrongful convictions between the years of 1900 and 1985 was published in 1987.[14]

During this same time period, critics voiced concerns about disparity in the use of the death penalty. Three professors conducted a study of capital punishment in Georgia during the 1970s and concluded that the death penalty was disparately imposed based on the race of the victim, and to a lesser extent, the race of the accused.[15] When the study was offered as evidence of the unconstitutional application of the death penalty in Georgia, it was rejected because, among other reasons, "[a]pparent disparities in sentencing are an inevitable part of our criminal justice system" and because "'there can be no perfect procedure for deciding in which cases governmental authority should be used to impose death.'"[16]

B. Reactions to Error

Despite the Supreme Court's acceptance of a less than perfect system, death penalty opponents would argue that the imperfection was becoming more demonstrable and more disturbing. In 1992, a book described as "the ordeal of 400 Americans wrongly convicted of crimes

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12. *See, e.g.*, Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 26 (1987).

13. *See* Hugo A. Bedau, *Murder, Errors of Justice, and Capital Punishment*, *in* THE DEATH PENALTY IN AMERICA: AN ANTHOLOGY 434, 436 (Hugo Adam Bedau ed., 1964).

14. *See* Bedau & Radelet, *supra* note 12, at 38 tbl. 4. At the request of Attorney General Edwin Meese, two authors researched the article and responded to it in the subsequent edition of the *Stanford Law Review*. *See* Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121 (1988); *see also* Hugo Adam Bedau & Michael L. Radelet, *The Myth of Infallibility: A Reply to Markman and Cassell*, 41 STAN. L. REV. 161 (1988).

15. *See* McCleskey v. Kemp, 481 U.S. 279, 286-87 (1987); RANDALL COYNE & LYN ENTZEROTH, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS 135 (1994); *see also* David Bruck, *Decisions of Death*, NEW REPUBLIC, Dec. 12, 1983, at 18, 21.

16. *McCleskey*, 481 U.S. at 312-13 (quoting Zant v. Stephens, 462 U.S. 862, 884 (1983)) (internal quotation marks omitted). The author of *McCleskey*, Justice Powell, characterized his decision in that case as one of his greatest regrets. *See* JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 451 (1994).

punishable by death"[17] was published.[18] Its publication, according to its authors, would form "a base line for future research into the general problem of wrongful convictions in capital or potentially capital cases in this century in the United States."[19] Two Supreme Court Justices, who had supported capital punishment during their tenures, expressed dissatisfaction with their earlier positions.[20] The American Bar Association ("ABA"), the nation's largest organization of lawyers, concerned about the effects of recent legal developments on the fairness of the capital punishment system,[21] began a study about the current implementation of the death penalty. In February 1997, characterizing the death penalty as "far from being fair and consistent, [and] instead a haphazard maze of unfair practices with no internal consistency,"[22] the

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17. Regis Ryan, Editorial, *We Should Have the Grace to Rise Above the Death Penalty*, PITT. POST-GAZETTE, Aug. 27, 1994, at B2.

18. *See* MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES (1992).

19. *Id.* at x.

20. In his dissent from a denial of certiorari in *McFarland v. Scott*, 512 U.S. 1256 (1994), Justice Blackmun commented:

> When we execute a capital defendant in this country, we rely on the belief that the individual was guilty, and was convicted and sentenced after a fair trial, to justify the imposition of state-sponsored killing .... My 24 years of overseeing the imposition of the death penalty from this Court have left me in grave doubt whether this reliance is justified and whether the constitutional requirement of competent legal counsel for capital defendants is being fulfilled.

Id. at 1264 (Blackmun, J., dissenting from denial of certiorari). Justice Blackmun had concluded that the death penalty could no longer be fairly imposed in *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari), when he stated "[f]rom this day forward, I no longer shall tinker with the machinery of death." Justice Powell also expressed concerns about whether the death penalty could be administered in a fair manner. *See supra* note 16.

21. The American Bar Association ("ABA") expressed three concerns: undermining of important ABA recommended procedural safeguards by the states; passage of the Anti-Terrorism and Effective Death Penalty Act of 1996; and the defunding of postconviction defender organizations. *See* A.B.A., REPORT SUBMITTED WITH RECOMMENDATION NO. 107, at 4 (Feb. 3, 1997) [hereinafter REPORT], *available at* http://www.abanet.org/irr/rec107.html (last visited Mar. 13, 2001). The Anti-Terrorism and Effective Death Penalty Act of 1996, codified at 28 U.S.C. §§ 2261-2266 (Supp. II 1997), among other things, imposes a statute of limitations for the filing of habeas corpus petitions, limits the circumstances under which a federal court can grant an evidentiary hearing in habeas corpus cases, prohibits second or successive petitions for habeas corpus relief except in very rare circumstances, and disallows relief unless the state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law." *Id.* § 2254(b)-(d) (1994 & Supp. IV 1999); REPORT, *supra*, at 4; *see also* Williams v. Taylor, 529 U.S. 362, 379 (2000). The postconviction defender organizations had provided or recruited representation for indigent defendants in most capital postconviction cases. *See* REPORT, *supra*, at 4.

22. REPORT, *supra* note 21, at 3. The full text of the ABA recommendation is as follows:

> RESOLVED, That the American Bar Association calls upon each jurisdiction that imposes capital punishment not to carry out the death penalty until the jurisdiction implements policies and procedures that are consistent with the following longstanding

ABA asked states with capital punishment statutes to cease executions "unless and until greater fairness and due process prevail in death penalty implementation."[23]

While these developments sparked debate in legal circles, it was attention to a more stark development that caught the attention of the public. The imperfections of America's capital punishment system became real when Americans learned that innocent people were being sentenced to death and executed for crimes they did not commit.[24] An investigative report by a respected newspaper detailed the cases of thirteen wrongfully convicted individuals by a capital punishment system where "errors and incompetence" rule and justice is often absent.[25] A book, *Actual Innocence*,[26] detailed the circumstances of numerous exonerations due to DNA testing.[27] Many long-time supporters

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American Bar Association policies intended to (1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed:

(i) Implementing ABA "Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases" (adopted Feb. 1989) and Association policies intended to encourage competency of counsel in capital cases (adopted Feb. 1979, Feb. 1988, Feb. 1990, Aug. 1996);

(ii) Preserving, enhancing, and streamlining state and federal courts' authority and responsibility to exercise independent judgment on the merits of constitutional claims in state postconviction and federal *habeas corpus* proceedings (adopted Aug. 1982, Feb. 1990);

(iii) Striving to eliminate discrimination in capital sentencing on the basis of the race of either the victim or the defendant (adopted Aug. 1988, Aug. 1991); and

(iv) Preventing execution of mentally retarded persons (adopted Feb. 1989) and persons who were under the age of 18 at the time of their offenses (adopted Aug. 1983).

FURTHER RESOLVED, That in adopting this recommendation, apart from existing Association policies relating to offenders who are mentally retarded or under the age of 18 at the time of the commission of the offenses, the Association takes no position on the death penalty.

Id. at 1.

23. *Id.* at 23.

24. *See, e.g.*, Ryan, *supra* note 17.

25. *See* Ken Armstrong & Steve Mills, *The Failure of the Death Penalty in Illinois*, CHI. TRIB., Nov. 14-18, 1999, pts. 1-5, at 1. The five-part series by Ken Armstrong and Steve Mills of the *Chicago Tribune*, published in November 1999, described the capital punishment system in Illinois in this manner and also as "a system so riddled with faulty evidence, unscrupulous trial tactics and legal incompetence that justice has been forsaken." *Id.*, pt. 1, at 1.

26. JIM DWYER, PETER NEUFELD & BARRY SCHECK, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000).

27. For example, Marion Coakley, who had been convicted of rape, was exonerated after more than a dozen randomly gathered semen samples proved that he could not have been the rapist. *See id.* at 30-34. Walter Tyrone Snyder, who was also wrongfully convicted of rape, spent seven years in prison until a newly developed test for analyzing trace amounts of DNA was developed, and proved his innocence. *See id.* at 67-72. Another man, Robert Miller, had been sentenced to two

of capital punishment began to question the ability of the government to choose the right people to execute.[28]

Among those who came to fear the ramifications of government imperfection was Governor George Ryan of Illinois.[29] Governor Ryan, a Republican supporter of the death penalty, became alarmed after an investigation by the *Chicago Tribune* exposed catastrophic problems with the capital punishment system in Illinois.[30] On more than one occasion, individuals had come within days, and sometimes hours, of execution only to be completely exonerated by DNA or other evidence uncovered by students investigating the case.[31] Governor Ryan declared a moratorium on executions in Illinois on February 1, 2000, in light of evidence that appellate courts had found errors in half of the capital cases that had completed at least the first level of appeal[32] and because the number of exonerated individuals who had been previously condemned to die exceeded the number of inmates executed since the state's reinstatement of the death penalty.[33]

Governor Ryan's action was neither the first nor the last indication that the country needed to take a long look at its capital punishment system. The Nebraska legislature authorized, over gubernatorial veto, a study on the fairness of the death penalty in their state.[34] Seven other states commissioned studies and seven undertook measures to impose a moratorium or abolish capital punishment.[35] Senator Leahy, and Representatives Delahunt and LaHood proposed an Innocence Protection Act in Congress.[36] Both print and electronic media began

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life sentences plus 725 years for the rape and murder of two elderly women. *See id.* at 85. More than ten years after his conviction, and more than six years after exculpatory DNA evidence had been discovered, Robert Miller was released from prison. *See id.* at 103-06.

28. *See* George F. Will, *Innocent on Death Row*, WASH. POST, Apr. 6, 2000, at A23 ("Capital punishment, like the rest of the criminal justice system, is a government program, so skepticism is in order."). Reverend Pat Robertson also expressed concern about capital punishment. *See* Brooke A. Masters, *Pat Robertson Urges Moratorium on U.S. Executions*, WASH. POST, Apr. 8, 2000, at A1 (quoting Robertson as saying "'a moratorium would indeed be very appropriate'").

29. *See* Ken Armstrong & Steve Mills, *Ryan: 'Until I Can Be Sure': Illinois Is First State to Suspend Death Penalty*, CHI. TRIB., Feb. 1, 2000, at 1.

30. *See id.*

31. *See, e.g.*, Armstrong & Mills, *supra* note 25, pt. 1, at 1.

32. *See* Ken Armstrong & Christi Parsons, *Half of State's Death-Penalty Cases Reversed: A Variety of Errors Found in 130 Trials*, CHI. TRIB., Jan. 22, 2000, at 1.

33. At the time of Governor Ryan's announcement, thirteen Illinois death-row inmates had been exonerated since 1977; twelve had been executed. *See* Armstrong & Mills, *supra* note 29, at 1.

34. Neb. L.B. 76A, 96th Leg., 1st Sess. (1999).

35. *See* Brooke A. Masters, *A Rush on Va.'s Death Row: Pace of Executions–Second to Texas's–Raises Warnings Flags*, WASH. POST, Apr. 28, 2000, at A1.

36. *See* Innocence Protection Act of 2000, S. 2690, 106th Cong. (2000); Innocence Protection Act of 2000, H.R. 4167, 106th Cong. (2000); *see also* Innocence Protection Act of 2001, S.486,

devoting resources to the issues surrounding the fallibility of the capital punishment system.[37]

Despite the prominence of state court issues in the present capital punishment inquiry, the concerns were not limited to state cases. In September 2000, the United States Department of Justice ("Department") released a statistical survey regarding the federal death penalty system.[38] The survey showed that seventy-three percent of the cases approved[39] for federal death penalty prosecution between 1995 and 2000 involved minority defendants.[40] The intent to seek the death penalty was withdrawn almost twice as often in cases involving white defendants than in those involving minority defendants.[41] Minorities constituted seventy-nine percent of federal death row inmates.[42] These and other study results prompted the Department to announce its intention to retain outside experts to explore the situation further. Shortly after this announcement, Senator Feingold proposed a federal moratorium on the death penalty.[43]

107th Cong. (2001), *reprinted in* 29 HOFSTRA L. REV. 1113 (2001). A non-binding resolution proposed by Senator Leahy was passed by the Senate in October 2000. *See* Paul Coverdell National Forensic Sciences Improvement Act of 2000, S. 3045, 106th Cong. (2000). The resolution calls for states to improve the quality of indigent representation in capital cases and to provide greater access to DNA testing after conviction. *See id.* § 4.

37. *See, e.g.*, Masters, *supra* note 35, at A1; Editorial, *No System, No Justice: Prosecutors' Zeal, Misconduct Mar Death Penalty*, CHARLOTTE OBSERVER, Sept. 12, 2000, pts. 1-5, at 10A; Scott Wilson, *Curry, Duncan Want Md. Executions Halted*, WASH. POST, June 23, 2000, at B1; *CNN TalkBack Live: Should Gary Graham Be Executed?* (CNN television broadcast, June 22, 2000), *available at* http://www.cnn.com/TRANSCRIPTS/0006/22/tl.00.html (last visited Mar. 13, 2001) (providing a transcript of the broadcast); *Nightline: Crime and Punishment: A Matter of Life and Death*, pts. 1-4 (ABC News television broadcast, Sept. 12-15, 2000), *available at* http://abcnews.go.com/onair/nightline/transcripts/n1000912_trans.html (last visited Mar. 13, 2001) (providing a transcript of the broadcast); *The Oprah Show: Death Penalty Controversy* (ABC television broadcast, Sept. 28, 2000), *available at* http://oprah.oxygen.com/tows/pastshows/tows_2000/tows_past_20000928.html (last visited Mar. 13, 2001).

38. *See* U.S. DEP'T OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: A STATISTICAL SURVEY (1988-2000) (Sept. 12, 2000).

39. The Department of Justice adopted a protocol in 1995 which required authorization from the Attorney General to seek the death penalty. *See id.* at 2. All eligible capital cases were required to be submitted for review. *See id.* Forty-two percent of the cases submitted for review came from five of the ninety-four federal districts. *See id.* at T-14 tbl.5A (Maryland; New York, Eastern; New York, Southern; Puerto Rico; Virginia, Eastern). Of the 682 cases submitted for review, the death penalty was authorized in 159 cases. *See id.* at 2.

40. *See id.* at 11-12.

41. *See id.* at T-4, tbl.2A.

42. *See id.* at 24.

43. In September 2000, Senator Feingold introduced legislation to impose a moratorium pending the outcome of a study commissioned on the death penalty. *See* Federal Death Penalty Moratorium Act of 2000, S. 3048, 106th Cong. (2000). The legislation recommends similar action

In the midst of this activity, the Liebman study, a twenty-three year study on error rates in capital cases was released.[44] Described as "the first statistical [death penalty] study,"[45] the findings of the study were staggering. Of the twenty-eight states whose death penalty cases were included in the study,[46] only two states did not err at least fifty percent of the time during the three stages of judicial review in a capital case.[47] Nationally, "courts found serious, reversible error in nearly 7 of every 10" capital cases that were fully reviewed during the twenty-three year study period.[48] Put in context, then, for the twenty-three year period studied, serious error undermining the reliability of a finding of guilt, or sentence of death, occurred in more than two out of every three death penalty cases.[49] While that significant of an error rate is indeed disturbing, even more troubling is the study's finding that eighty-two percent of the capital cases that were retried resulted in either a sentence of less than death or no sentence at all.[50]

Yet, the public seems to remain supportive of capital punishment.[51] If the United States is to continue its state and federal capital punishment systems, it must devise a more reliable and accurate means of

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on the part of the states and gives Congress the ultimate authority to lift the moratorium. *See id.* §§ 102, 202. Similar legislation was introduced prior to September 2000, but was not acted upon. *See* National Death Penalty Moratorium Act of 2000, S. 2463, 106th Cong. (2000) (also proposed by Senator Feingold); Federal Death Penalty Abolition Act of 1999, S. 1917, 106th Cong. (1999) (also proposed by Senator Feingold); *see also* Jill Zuckman, *Feingold Launches Bill to Halt Federal Death Penalty*, CHI. TRIB., Feb. 1, 2001, at 3.

44. *See* JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995 (2000). The authors studied cases in which death sentences were imposed during the study period, some 5760 cases. *See id.* at 1.

45. *Id.* at i.

46. *See id.* at 28, 68 tbl.10. Although thirty-four states have capital punishment statutes, the study excluded those states in which capital cases had not yet been through federal habeas review. *See id.* at 28.

47. *See id.* at 68 tbl.10. The study refers to this factor as the overall success rate, meaning the proportion of capital cases that underwent successfully the three-stage judicial review involved in capital cases. *See id.* at 4.

48. *Id.* at i. This factor, the overall error rate, defined as the proportion of fully reviewed capital cases that were overturned at one of the three stages of judicial review, was sixty-eight percent nationally for the 1973-1995 period. *See id.* at 6. "Serious [reversible] error" was defined by the reporters as "error that substantially undermines the reliability of the guilt finding or death sentence imposed at trial." *Id.* at 5.

49. *See id.* at 30.

50. *See id.* at ii. Seven percent of those retried were found innocent of the offense. *See id.*

51. Polls vary, but many indicate a consistent support for capital punishment, although at a reduced rate than other times in this century. *See* Death Penalty Information Center, *Summaries of Recent Poll Findings*, *at* http://www.deathpenaltyinfo.org/Polls.html (last visited Mar. 13, 2001); *see also* LIEBMAN ET AL., *supra* note 44, at 1 (explaining how the two-thirds of public support for the death penalty is a decline from the four-fifths of public support it had in 1994).

administration. To devise a reliable system, the government should explore what causes the multitude of errors that occur in capital cases. Why are innocent people sent to death row? Why do mistakes that undermine the reliability of the findings occur in more than two-thirds of capital cases? Why is the penalty disproportionately applied to non-white defendants?

III. CAUSE OF ERRORS

The Liebman study made an early diagnosis of the error-ridden capital punishment system.[52] Its conclusions mirror those revealed by journalists and academics who have searched for explanations. The Liebman study found that serious error, defined as error that "substantially undermin[es] the reliability of" the guilt finding or death sentence imposed at trial,[53] was largely attributable to four factors, two of which account for the majority of errors.[54] Incompetent defense lawyering and prosecutorial misconduct account for more than half of the errors in capital cases.[55] The remaining errors are the result of judicial bias, legal error, or bias among jurors.[56]

These indictments of the nation's capital punishment system are neither surprising nor new. Volumes have been written about the conduct of counsel in capital cases[57] and the results of biased judges and misinformed juries.[58]

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52. These findings were based upon the errors that led to reversal of capital judgments at the state postconviction level. *See* LIEBMAN ET AL., *supra* note 44, at 3.

53. *Id.* at 5.

54. *See id.* at ii.

55. *See id.* The Liebman study attributes thirty-seven percent of the error to ineffective assistance of counsel and sixteen to nineteen percent to prosecutorial suppression of *Brady* evidence. *See id.* app. at C-2 to C-4.

56. *See id.*

57. *See, e.g.*, Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741, 1811 (1987); Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 347-50 (1983); Retta A. Miller & Kimberly O'D. Thompson, *"Death Penalty" Sanctions: When to Get Them and How to Keep Them*, 46 BAYLOR L. REV. 737, 746-47 (1994); Stephen Reinhardt, *The Anatomy of an Execution: Fairness vs. "Process,"* 74 N.Y.U. L. REV. 313, 327-28 (1999); David L. Szlanfucht, *Are Capital Defense Lawyers Educable? A Moderately Hopeful Report from the Trenches*, 19 MISS. C. L. REV. 305, 305 (1999); Ivan K. Fong, Note, *Ineffective Assistance of Counsel at Capital Sentencing*, 39 STAN. L. REV. 461, 468 (1987); Note, *The Eighth Amendment and Ineffective Assistance of Counsel in Capital Trials*, 107 HARV. L. REV. 1923, 1923 (1994).

58. *See, e.g.*, Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 760 (1995); Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95, 98 (1997); Amy D. Ronner, *When Judges Impose the Death Penalty After the Jury Recommends Life:* Harris v. Alabama *as the Excision of the*

A. *Ineffective Assistance of Counsel*

> It is imperative that the courts have before them counsel who are competent in capital cases ... and it is very difficult to obtain them.... [T]he records are huge. The expenditure of time is great. The lawyers who take these cases are burnt out after taking just one, whether they win it or lose it. And this is a very, very difficult ... area.[59]

> That a person who happens to be a lawyer is present at trial alongside the accused ... is not enough to satisfy the constitutional command [of the right to counsel].... An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.[60]

Despite the above language, the standard for evaluating the effectiveness of counsel in criminal cases, even capital ones, is extremely low. The standard articulated in *Strickland v. Washington*[61] requires an evaluation, first, of counsel performance, and second, of the effect of that performance on the outcome of the case.[62] Counsel's performance must be "deficient."[63] But even if counsel performs deficiently, the errors do not warrant the reversal of a conviction unless the error resulted in prejudice to the accused.[64] As a result, even when counsel's conduct is deplorable, the judge may deny relief based on the finding that the jury would have sentenced the defendant to death anyway. Very often, defendants who had wholly ineffective trial lawyers

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Tympanic Membrane in an Augmentedly Death-Biased Procedure, 23 HASTINGS CONST. L.Q. 217, 221 (1995).

59. *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1996: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 104th Cong. 15 (1995) (statement of Justice Anthony Kennedy, U.S. Supreme Court).

60. Strickland v. Washington, 466 U.S. 668, 685 (1984).

61. 466 U.S. 668 (1984). On October 9, 2001, the Supreme Court denied certiorari in a case that raised as one issue standards for capital case counsel. *See* Abdur'Rahman v. Bell, No. 00-1742, 2001 U.S. LEXIS 9754, at *1 (U.S. Oct. 9, 2001).

62. *See id.* at 687.

63. A "deficient" counsel is one whose errors undermine the accused's right to a fair trial. *See id.* at 685, 687. A fair trial, however, is viewed by the Supreme Court as one that produces a "reliable" result. *See id.* at 687. In reviewing counsel's performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689.

64. The test for prejudice is whether the defendant can "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

receive no relief on appeal or postconviction because of the restrictive *Strickland* standard.[65]

Because of the high standard that must be met before a capital case is reversed for ineffective assistance of counsel, only the most egregious errors are corrected.[66] Counsel is presumed to have performed within the range of acceptable professional conduct.[67] Given that presumption, and the difficulty of proving prejudice after the fact, death-sentenced individuals who have received atrocious representation are rarely entitled to relief. The narrow opening for a finding of ineffective assistance under *Strickland* makes the number of cases in which ineffective assistance is found very small indeed.

Most of those who have attempted to dissect the cases involving ineffective assistance of counsel attribute the problem to insufficient training and experience, as well as insufficient resources.[68] Lawyers, less than a year out of law school, who have never tried a criminal case have been appointed to represent individuals charged with capital offenses.[69] Others have been appointed, not based on their qualifications, but on their quickness.[70] For a multitude of reasons, none of which are valid, people facing the death penalty are appointed lawyers who sleep[71] and drink during trial, or who practically stipulate the client's guilt or the appropriateness of a death sentence.[72] Counsel in one capital case in Alabama was so drunk during the trial that he was held in contempt, sent

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65. *See* William S. Geimer, *A Decade of* Strickland's *Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS J. 91, 134, 147 & n.315 (1995).

66. *See id.* at 160.

67. *See id.* at 120.

68. *See* Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 337-38 (1995).

69. *See* Paradis v. Arave, 954 F.2d 1483, 1490 (9th Cir. 1992), *vacated by* 507 U.S. 1026 (1993).

70. Judges in Texas and California have appointed counsel in capital cases who are known for their speed in concluding the cases. *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; Ted Rohrlich, *The Case of the Speedy Attorney*, L.A. TIMES, Sept. 26, 1991, at A1.

71. Joe Frank Cannon, the sleeping, "'greased-lightning'" lawyer in Texas, represented Calvin Burdine, but slept through much of the trial. *See* Paul M. Barrett, *On the Defense: Lawyer's Fast Work on Death Cases Raises Doubts About System*, WALL ST. J., Sept. 7, 1994, at A1. He also used the words "'queer'" and "'fairy'" in court documents in his representation of Burdine, who was openly gay. *See* Mark Ballard, *Judge Won't Stay Execution Despite Sleeping Defense*, RECORDER, Apr. 10, 1995, at 1.

72. An Alabama lawyer failed to appear for oral argument before the Alabama Supreme Court after filing his one-page brief citing one case. *See* Heath v. Jones, 941 F.2d 1126, 1131 (11th Cir. 1991); *see also* Panel Discussion: *The Death of Fairness? Counsel Competency and Due Process in Death Penalty Cases*, 31 HOUS. L. REV. 1105, 1127 (1994).

to jail, and entered the courtroom from lockup with his client the next morning for trial.[73] Attorneys who are awake and sober may have not read a single case on capital punishment and may have never tried a murder case.[74] Still others have spent less than a week preparing for a case which should require 400 to 1000 hours of preparation.[75]

In striking examples of counsel incompetence, a defendant sentenced to death saw his lawyer only two times before his trial for a total of seventy-five minutes.[76] The lawyer did not interview any of the twenty witnesses who claimed to have witnessed the killing.[77] Counsel in Louisiana completed the penalty phase of a capital case in twenty minutes by stipulating to the client's age.[78]

One lawyer, who failed to retrieve his client's medical or military records and asked no questions about the client's mental background during the seven hours he spent investigating the case, did not learn that his client had been on psychotropic medication, had been diagnosed as psychotic by three psychiatrists, and had undergone eighty-one shock therapy treatments.[79] In another case, court-appointed counsel was unaware that the sentencing phase would immediately follow the determination of guilt on a capital offense.[80] As a result he was completely unprepared for the sentencing.[81] The lawyer waived the opening statement, presented no character witnesses, and failed to introduce any evidence of his client's mental condition, which included "fixated" infantile functioning at an infantile level with an IQ between fifty-eight and sixty-seven, brain damage due to blows to the head, and shock therapy treatment.[82]

It is not only the lack of skill that contributes to poor performance in capital cases, it is also the lack of compensation. In one case, the Court of Appeals for the Fifth Circuit unanimously reversed a death sentence based on the incompetence of counsel who was paid $11.84 per

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73. *See* Haney v. State, 603 So. 2d 368, 377 (Ala. Crim. App. 1991).

74. *See* Commonwealth v. Stoyko, 475 A.2d 714, 721-24 (Pa. 1984) (noting that neither of the appointed counsel raised any issues during the penalty phase).

75. *See* Stephanie Saul, *When Death Is the Penalty: Attorneys for Poor Defendants Often Lack Experience and Skill*, NEWSDAY (New York City), Nov. 25, 1991, at 8.

76. *See* Stephen N. Maskaleris, *Two Views of America's Obsession with Death: Cavalier Defense Leads to the Death Penalty for Many*, NAT'L L.J., Feb. 12, 1996, at A21.

77. *See* State v. Messiah, 538 So. 2d 175, 186 (La. 1988); Stuart Taylor, Jr., *He Didn't Do It*, AM. LAW., Dec. 1994, at 70, 70.

78. *See Messiah*, 538 So. 2d at 187.

79. *See* Agan v. Singletary, 12 F.3d 1012, 1015 (11th Cir. 1994).

80. *See* Brewer v. Aiken, 935 F.2d 850, 852 n.1 (7th Cir. 1991).

81. *See id.* at 852 n.1, 853.

82. *See id.* at 852, 857-58.

hour.[83] "Unfortunately," the court commented, "the justice system got [just] what it paid for."[84] In another example of cheap justice, a California lawyer told the jury in his ten minute closing argument that his client could not "'live with that beast from within any longer' and that a death sentence might be 'the gift of life.'"[85]

Courts that barely pay lawyers do no better at funding essential defense services. Despite the constitutional right of an indigent capital defendant to expert services necessary for an effective defense,[86] the right is often a hollow one. Many jurisdictions experience funding crises.[87] Counsel attempting to receive funds to hire experts may find available funds to be extremely limited or nonexistent. As a result, counsel may be unable to investigate defenses and to collect evidence on the client's behalf.[88] For example, counsel, in Texas, was warned not to request expert or investigative funds since the court-appointed fees for co-counsel had already depleted the county's budget.[89]

Just before he retired from the Supreme Court, Justice Blackmun spoke of the dilemma of underpaid appointed counsel who finds his client's *Ake v. Oklahoma*[90] rights to exist in name only:

> Court-awarded funds for the appointment of investigators and experts often are either unavailable, severely limited, or not provided by state courts. As a result, attorneys appointed to represent capital defendants at the trial level frequently are unable to recoup even their overhead costs and out-of-pocket expenses, and effectively may be required to work at minimum wage or below while funding from their own pockets their client's defense.[91]

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83. *See* Martinez-Macias v. Collins, 979 F.2d 1067, 1067 (5th Cir. 1992).

84. *Id.* Martinez-Macias' counsel did not call available witnesses or investigate mitigating evidence and prepared for the sentencing phase only by speaking with Martinez-Macias and his wife at a luncheon break during the sentencing proceedings. *See* Adam Cohen, *The Difference a Million Makes*, TIME, June 19, 1995, at 43.

85. Bob Egelko, *9th Circuit Overturns Death Sentence*, L.A. DAILY J., May 17, 1994, at 2 (quoting the California lawyer).

86. *See* Ake v. Oklahoma, 470 U.S. 68, 83 (1985).

87. *See* Arbelaez v. Butterworth, 738 So. 2d 326, 327-28 (Fla. 1999).

88. In seventeen capital cases in Tennessee prior to May 15, 1989, no mitigation proof was offered during the sentencing phase. *See* State v. Melson, 772 S.W.2d 417, 421 (Tenn. 1989).

89. *See* Roscoe C. Howard, Jr., *Federalism and the Criminal Justice System: The Defunding of the Post Conviction Defense Organizations as a Denial of the Right to Counsel*, 98 W. VA. L. REV. 863, 893 (1996).

90. 470 U.S. 68 (1985).

91. McFarland v. Scott, 512 U.S. 1256, 1258 (1993) (Blackmun, J., dissenting from denial of certiorari) (citations omitted).

Realizing that they may not be paid,[92] experts decline to work in certain jurisdictions.[93]

If inadequate funding of the capital defense system contributes to errors in the results, then the behavior of some court-appointed counsel only exacerbates the problem. Co-counsel has at times presented conflicting defenses during the same trial.[94] Other counsel have berated their clients or referred to them by using ethnic or racial slurs.[95] Far too many more have provided outrageously insufficient representation.[96]

Despite the deplorable state of indigent capital representation, and the delays, costs, and hardships that it causes, prosecutors have almost routinely objected to efforts to improve the quality of indigent representation. In 1990, the National Association of District Attorneys adopted a resolution opposing legislation in Congress which would have established standards of competency for capital defenders.[97] Similarly, in 1993, several prosecutors opposed a more modest effort to set minimum standards for capital defenders.[98] This resistance to efforts to improve the fairness of the capital punishment system suggests that "[t]he enthusiasm of prosecutors to continue to take every advantage [in capital litigation] has not been tempered by the poverty and powerlessness of those accused of capital crimes."[99]

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92. *See* Fredric N. Tulsky, *What Price Justice? Poor Defendants Pay the Cost as Courts Save on Murder Trials*, PHILA. INQUIRER, Sept. 13, 1992, at A1 (quoting a University of Pennsylvania professor who declines work in Philadelphia saying, "'I like to choose my charities'").

93. In a capital case in Philadelphia, a city saddled with financial constraints, a judge denied counsel's request for funds for expert services as unwarranted until the issue of capital sentencing arose. *See* MICHAEL KROLL, DEATH PENALTY INFO. CTR., JUSTICE ON THE CHEAP: THE PHILADELPHIA STORY 6 (May 1992), *available at* http://www.deathpenaltyinfo.org/dpic.r09.html (last visited Mar. 13, 2001). When the client was convicted of a capital offense and the motion was renewed, the judge denied the motion relying on the client's statement that he had "'no problems.'" *See id.* When defense counsel announced that he had retained a psychologist, the judge instructed the lawyer that he would have to pay the expert out of his court-appointed attorney fee. *See id.*

94. *See* Ross v. Kemp, 393 S.E.2d 244, 245 (Ga. 1990).

95. *See, e.g.*, Goodwin v. Balkcom, 684 F.2d 794, 805 n.13 (11th Cir. 1982); *Ex parte* Guzmon, 730 S.W.2d 724, 736 (Tex. Crim. App. 1987).

96. *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, 1845 n.56 (1994) (collecting cases).

97. *See id.* at 1875.

98. *See id.* at 1875-76.

99. *Id.* at 1877.

B. *Prosecutorial Misconduct*

> The [prosecutor] is the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.[100]

The second most frequent explanation for errors in capital cases is the misconduct of prosecutors. Despite the prosecutor's obligation to "do justice," charges of misconduct against prosecutors in capital cases include allegations that prosecutors suppressed exculpatory evidence, knowingly used false evidence, exercised their discretion disparately, and made inappropriate arguments.[101]

Appellate judges have used varying terms to describe the antics of prosecutors in capital cases. A Pennsylvania prosecutor whose tactics were described as "outlandish" and "out of control" was deemed unworthy of belief by a federal district magistrate.[102] Illinois appellate courts have frequently admonished prosecutors for their overzealous and inappropriate conduct.[103] The conduct of some Cook County prosecutors, for example, has been described by an Illinois Appellate Court as "'[i]nexcusable,'" and "'[a]n insult to the court and to the dignity of the trial bar.'"[104]

In other states, prosecutors who have withheld evidence in capital cases have advanced to positions of greater prominence in the legal profession. For example, a Georgia prosecutor became a Congressman after he successfully prosecuted seven men who were later exonerated for murder, one of whom was sentenced to death.[105] In New Mexico, a former prosecutor cited for failure to disclose evidence in a capital case had been named chief counsel for the state's lawyer disciplinary board by the time the illegal conviction was overturned.[106]

Some former prosecutors attribute the overzealousness of the prosecution's death squads to an "'adrenalin rush'" that pushes

100. Berger v. United States, 295 U.S. 78, 88 (1935).

101. *See* James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2084-87, 2110-11, 2094 n.160 (2000).

102. *See* Report and Recommendation of U.S. Magistrate Richard A. Powers III, Diggs v. Vaughn, No. 90-2083 (E.D. Pa. Mar. 8, 1991).

103. *See, e.g.*, People v. Weathers, 338 N.E.2d 880, 881, 883-84 (Ill. 1975).

104. Ken Armstrong & Maurice Possley, *Trial & Error: How Prosecutors Sacrifice Justice to Win: Break Rules, Be Promoted*, CHI. TRIB., Jan. 14, 1999, pt. 5, at 1 (quoting an Illinois Appellate Court). The prosecuting attorneys described in these ways by the appellate court in Illinois all received promotions within their offices and now serve as judges. *See id.*

105. *See* Ken Armstrong & Maurice Possley, *Trial & Error: How Prosecutors Sacrifice Justice to Win: The Verdict: Dishonor*, CHI. TRIB., Jan. 10, 1999, pt. 1, at 1.

106. *See id.*

prosecuting attorneys over the line.[107] Other individuals attribute the barrage of misconduct to society's willingness to ignore rule breaking when "'it serves the ultimate end[] of justice.'"[108] Whatever the reason, prosecutorial misconduct, according to one expert, has grown to epidemic proportions and is largely controlled only by the individual prosecutor's "'inner morality.'"[109]

The frequency of prosecutorial misconduct is difficult to ascertain. Often, the misconduct goes undiscovered. In one case in Florida, evidence which freed a man who had served twenty-one years in prison was only discovered when it was stolen from the prosecutor's office.[110] In other cases, prosecutorial misconduct has been uncovered only after journalists or citizens have filed Freedom of Information Act requests or after the true perpetrator of the crime has confessed.[111]

One aspect of prosecutorial misconduct is more visible, but is no less tolerated. Often, in capital cases, prosecutors pepper their closing arguments with comments intended to induce fear, hate, or intimidation.[112] A favorite tactic seems to be to equate the defendant with some notoriously feared individual such as Charles Manson.[113] Whether untempered prosecutor's arguments in capital murder cases are caused by an adrenalin rush or fear of losing the case, the boldness of some of the arguments is shocking.

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107. Maurice Possley & Ken Armstrong, *Trial & Error: How Prosecutors Sacrifice Justice to Win: The Flip Side of a Fair Trial*, CHI. TRIB., Jan. 11, 1999, pt. 2, at 1 (quoting Michael Ficaro, former supervisor in the Illinois State Attorney's Office).

108. Maurice Possley & Ken Armstrong, *Trial & Error: How Prosecutors Sacrifice Justice to Win: Prosecution on Trial in DuPage*, CHI. TRIB., Jan. 12, 1999, pt. 3, at 1. Possley and Armstrong also quote Professor Lawrence Marshall as saying: "Many players in the system—judges, defense lawyers, prosecutors—know some of the stuff that happens, but nonetheless tend to turn a blind eye. There's a feeling that that is how it works, that it's legitimate to bend the truth sometimes when you are doing it with—quote, the greater good, end quote—in mind." *Id.*

109. *See* Armstrong & Possley, *supra* note 105, pt. 1, at 1 (quoting Professor Bennett Gershman). Bennett Gershman, a law professor at Pace University who has written extensively on the subject of prosecutorial misconduct, refers to the phenomenon as a "'serious cancer in our system of justice.' 'There is no check on prosecutorial misconduct except for the prosecutor's own attitudes and beliefs and inner morality.'" *Id.* (quoting Professor Bennett Gershman). A frequent nemesis of prosecutors, Professor Alan Dershowitz has commented that "'[w]inning has become more important than doing justice.'" *Id.* (quoting Professor Alan Dershowitz).

110. *See* Andrew H. Malcolm, *Tainted Verdicts Resurrect Specter of Executing the Innocent*, N.Y. TIMES, May 3, 1989, at A18.

111. *See* Liebman, *supra* note 101, at 2048 n.84, 2089 n.151.

112. For a collection of all cases in Nevada, for example, where prosecutors closing arguments have been cited by the court as in error, but nonetheless harmless, see The National Judicial College, Nevada Capital Cases Resource Center, *at* http://www.judges.org/nv_case/images/cases/index2.html (last visited Mar. 13, 2001).

113. *See* Howard v. State, 800 P.2d 175, 177 (Nev. 1990).

For example, prosecutors sometimes place inordinate and unfair responsibilities on the capital jury. Prosecutors offered one such argument in a capital case in Illinois when they told the jurors that "'you will live with your decision today and so will the rest of us in our society. And so will the rest of the people from that neighborhood—if you let him escape responsibility for his crime.'"[114] A Nevada prosecutor similarly told the jury that no matter what they did, their verdict would sentence someone to death.[115] The only question was whether the death sentence would be for the defendant or for another innocent victim.[116] Prosecutors have rabidly characterized the accused as "'mad dog[s],'" "disease," "plague," and "pestilence."[117]

Prosecutors have also been faulted for allowing racial bias to enter into their arguments,[118] their decision making in capital cases[119] and their selection of petit juries. One prosecutor was found to have used over ninety percent of his peremptory challenges in capital cases to excuse black jurors.[120] To assist in his efforts of eliminating certain individuals from the jury pool, the prosecutor had taught the court clerk how to secretly underrepresent blacks and women in the jury pools.[121] Another prosecutor who tried a capital defendant three times, each time used every peremptory challenge to exclude blacks from the jury, seating all white juries twice in a city in which blacks constituted one-third of the total population.[122] More subtle prosecutors may ask questions of white jurors in a different manner than they do of black jurors.[123] They may challenge black jurors who have certain characteristics or give certain

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114. Possley & Armstrong, *supra* note 107, pt. 2, at 1 (quoting the prosecutor) (discussing People v. Stack, 470 N.E.2d 1252 (Ill. App. Ct. 1984)).

115. *See* McKenna v. State, 968 P.2d 739, 747 (Nev. 1998).

116. *See id.* at 748; Sherman v. State, 965 P.2d 903, 915 (Nev. 1998); Castillo v. State, 956 P.2d 103, 109 (Nev. 1998).

117. *See* Jones v. State, 937 P.2d 55, 65 (Nev. 1997); Collier v. State, 747 P.2d 225, 227 (Nev. 1987).

118. *See, e.g.*, Dawson v. State, 734 P.2d 221, 223 (Nev. 1987) (detailing arguments from the prosecution that black defendant had a preference for white women).

119. *See* John H. Blume et al., *Post-*McCleskey *Racial Discrimination Claims in Capital Cases*, 83 CORNELL L. REV. 1771, 1781-82 (1998) (reviewing racial disparities in prosecutors' decisions to seek the death penalty in South Carolina).

120. *See* Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433, 457 (1995).

121. In capital cases involving white victims and black defendants, prosecutor Joseph Briley's challenges to black jurors exceeded ninety-four percent. *See* STEPHEN B. BRIGHT, S. CTR. FOR HUM. RTS., CAPITAL PUNISHMENT ON THE 25TH ANNIVERSARY OF *FURMAN V. GEORGIA* 8 (June 26, 1997), *available at* http://www.schr.org/reports/furman3.pdf (last visited Oct. 11, 2001).

122. *See* Bright, *supra* note 120, at 455-56.

123. *See* Splunge v. Clark, 960 F.2d 705, 708 (7th Cir. 1992); Wiese v. State, 811 S.W.2d 958, 960 (Tex. App. 1991).

answers to questions, but allow white jurors with the same characteristics or answers to remain on the panel.[124] Sometimes prosecutors may make public comments, out of the courtroom, that indicate their attitudes toward certain jurors.[125]

In one of the more disturbing recent cases involving racial discrimination, the Pennsylvania Supreme Court reversed a death penalty conviction in part because of the discovery of a training videotape used by the Philadelphia district attorney's office detailing methods to keep blacks off of juries.[126] Among other tips, the prosecutor on the tape suggested that prosecutors lie when asked by judges to explain their reason for exercising peremptory challenges against black jurors.[127] In the case that the court reversed, the prosecutor had used nineteen of his twenty peremptory challenges to strike black jurors.[128] A study showed that in fourteen cases he had struck black jurors seventy-one percent of the time.[129]

Biased prosecutors exhibit their racism both in and out of the courtroom. In one case in Texas, involving a black defendant and a white victim, the prosecutor and trial judge conducted ex parte pretrial

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124. *See* Devose v. Norris, 53 F.3d 201, 204 (8th Cir. 1995); Jones v. Ryan, 987 F.2d 960, 973 (3d Cir. 1993); State v. Grate, 423 S.E.2d 119, 120 (S.C. 1992). *See generally* Bright, *supra* note 120, at 454-55 (discussing how prosecutors often limit the number of blacks on juries during a death penalty case by excluding them based on their views of the death penalty, which blacks are more likely than whites to oppose because of the discriminatory way in which it is applied).

125. *See* Edwards v. Scroggy, 849 F.2d 204, 207 (5th Cir. 1988); *see also* Hoke v. Netherland, 92 F.3d 1350, 1366 (4th Cir. 1996) (Hall, J., dissenting) (noting the remark of an African-American prosecutor that he "'wanted to be the first black man to put a white man in the electric chair'") (emphasis omitted). Unfortunately, defense counsel may likewise be biased against the accused. *See* Dobbs v. Zant, 720 F. Supp. 1566, 1577 (N.D. Ga. 1989) (noting that the trial court appointed counsel who referred to client and the black community in derogatory, prejudicial ways), *aff'd*, 946 F.2d 1519 (11th Cir. 1991), *rev'd*, 506 U.S. 357 (1993). *See generally* Blume et al., *supra* note 119, at 1786-87 (quoting a South Carolina prosecutor's public statements attributing the growing crime rate to the breakdown of family in the black community and his support of the continued display of the confederate battle flag at the State capitol).

126. *See* Commonwealth v. Basemore, 744 A.2d 717, 727, 734 (Pa. 2000).

127. *See* Pete Shellem, *Murder Case Sent Back to Philly: Prosecutor's Training Videotape Casts Doubt on Fairness, According to Jurists*, PATRIOT-NEWS (Harrisburg, Pa.), Jan. 25, 2000, at B06. Following the discovery of the tape, the state Center for Legal Education, Advocacy, and Defense Assistance requested that the supreme court investigate allegations of disparate justice in Philadelphia's court system and particularly in death penalty cases. *See* B. Bergstrom, *Group Seeks Death Penalty Inquiry-Supreme Court Asked to Examine Racism in Executions*, SUNDAY PATRIOT-NEWS (Harrisburg, Pa.), Jan 17, 1999, at B10.

128. *See Basemore*, 744 A.2d at 727.

129. *See* Bergstrom, *supra* note 127. The Philadelphia district attorney's office also prompted an article in a 1995 edition of the *New York Times Magazine* called *The Deadliest D.A. See* Tina Rosenberg, *The Deadliest D.A.*, N.Y. TIMES MAG., July 16, 1995, at 20ff, *reprinted in* DEATH PENALTY, *supra* note 2, at 319.

sessions in order to practice objections and rulings.[130] In granting state habeas corpus relief, Judge Perry Pickett commented that "'[t]he court unequivocally concludes that the color of Clarence Brandley's skin was a substantial factor which pervaded all aspects of the state's capital prosecution.'"[131] Judge Pickett continued:

> "In the 30 years this court has presided over matters in the judicial system, ... no case has presented a more shocking scenario of the effects of racial prejudice, perjured testimony, witness intimidation, an investigation the outcome of which was predetermined, and public officials who, for whatever motives, lost sight of what is right and just."[132]

C. *Judicial Bias*[133]

> "'A campaign promise to be tough on crime or to enforce the death penalty, is evidence of bias that should disqualify a candidate from sitting in criminal cases.'"[134]

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130. *See* Robert Batey, Naked Lunch *For Lawyers: William S. Burroughs on Capital Punishment, Pornography, the Drug Trade, and the Predatory Nature of Human Interaction*, 27 CAL. W. INT'L L.J. 101, 194 n.497 (1996) (discussing *Ex parte* Brandley, 781 S.W.2d 886 (Tex. Crim. App. 1989)).

131. Stephanie Saul, *Support for Death Penalty Growing Across U.S.: Racism, Incompetence Mar Trials*, NEW ORLEANS TIMES-PICAYUNE, Nov. 13, 1994, at A22 (quoting Judge Perry Pickett).

132. Ted Rohrlich, *Minister of Justice for the Wrongly Convicted, Jim McCloskey is a Clergyman and Gumshoe Who Opens the Prison Door*, L.A. TIMES, Dec. 23, 1990 (Magazine), at 10 (quoting Judge Perry Pickett).

133. A less frequent, but nonetheless significant reason for error in capital cases is juror bias. Biased jurors cannot be objective in their evaluation of the case. Their prejudices may lead them to convict an innocent person. Courts have reversed cases based on inappropriate comments or attention to ethnicity or race. *See, e.g.*, United States v. Scott, 854 F.2d 697, 698, 700 (5th Cir. 1988) (discussing the failure of a juror to disclose a relative in law enforcement); United States v. Perkins, 748 F.2d 1519, 1529-34 (11th Cir. 1984) (noting the failure of a juror to disclose prior knowledge of defendant); *Ex parte* Pool, 497 So. 2d 537, 538 (Ala. 1986) (noting the failure of a juror to disclose previous problems with law enforcement); State v. Freeman, 605 So. 2d 1258, 1259 (Ala. Crim. App. 1992) (discussing the failure of a juror to disclose that he was a police officer); Abercrombie v. State, 574 So. 2d 879, 881-82 (Ala. Crim. App. 1990) (providing the failure of a juror to disclose that she was the mother of rape victim); *In re* Hitchings, 860 P.2d 466, 476 (Cal. 1993) (providing the failure of a juror to disclose prior knowledge of the case). Unless counsel has been totally ineffective in voir dire, many jurors who demonstrate bias against the accused or favor towards the prosecution have also engaged in lying or deceitful conduct during the jury selection process. *See, e.g., id.* This, too, can result in reversal of a conviction.

134. Stephen B. Bright, *Political Attacks on the Judiciary*, JUDICATURE, Jan.-Feb. 1997, at 165, 173 (quoting Justice John Paul Stevens speaking at the 1996 ABA Annual Meeting) (internal quotation marks omitted).

> The "higher authority" to whom present-day capital judges may be "too responsive" is a political climate in which judges who covet higher office—or who merely wish to remain judges—must constantly profess their fealty to the death penalty.[135]

The third most frequent reason that errors occur in capital cases is judicial bias. While less pervasive than the incidence of ineffective assistance of counsel and prosecutorial misconduct, error prompted by judicial bias, because it is so reprehensible, may be the most horrific of the causes of capital punishment injustice.[136]

Judges on high and low courts have found it advantageous to voice publicly their support for capital punishment. In a supreme court race in Nevada, for example, an incumbent justice, supported by the State's Attorney General, announced that he had a record of fighting crime, supported the death penalty, and "had voted to uphold the death penalty seventy-six times."[137] In Alabama, an appellate judge campaigning for the state supreme court called upon the court to set execution dates in cases in which habeas claims were pending in federal courts.[138] A lawyer in Texas challenged an incumbent appellate judge who had authored an unpopular opinion promising that if elected he would use the death penalty, harmless error, and frivolous appeal rules more frequently.[139] Another attorney, campaigning for a judgeship in California, produced

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135. Harris v. Alabama, 513 U.S. 504, 519 (1995) (Stevens, J., dissenting).

136. *See, e.g.*, Bright & Keenan, *supra* note 58, at 792-93; Gerald F. Uelmen, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133, 1135, 1142 (1997).

137. Nevius v. Warden, 944 P.2d 858, 859 (Nev. 1997), *aff'd*, 960 P.2d 805 (Nev. 1998). In a per curiam opinion denying relief to a death-sentenced inmate who moved that the justice be disqualified, the Nevada Supreme Court expressed their viewpoint as follows:

> Justice Young was simply responding to an assertion, based on one case, that he was soft on the death penalty and demonstrating to the electorate that the allegation against him was distorted.... Citing [his] record in upholding the death penalty was nothing more than showing that he will enforce Nevada law in an area very important to Nevada voters.

Id. The dissenting judge noted that "[i]f the public praise and endorsement ... by the attorney general were not enough in itself, Justice Young's putting forth his 'record' of fighting crime *rather than judging crime* adds up ... to an unacceptable appearance of bias in this case." *Id.* at 860-61 (Springer, J., dissenting) (emphasis added).

138. *See* T. Hughes, *Montiel Challenges Court to Schedule Executions*, MONTGOMERY, ALA. ADVERTISER, May 19, 1994, at 3B.

139. *See* Janet Elliott & Richard Connelly, *Mansfield: The Stealth Candidate: His Past Isn't What It Seems*, TEX. LAW., Oct. 3, 1994, at 1. Stephen Mansfield defeated Judge Charles F. Campbell, a twelve year veteran of the court, who had authored the court's opinion "overturning the capital murder conviction of [a] notorious Houston killer ... in *Rodriguez v. State*" the year before. *Id.* For a more detailed discussion of Judge Mansfield and his campaign, see Stephen B. Bright, *Death in Texas*, CHAMPION, July 1999, at 16, 24-26.

and distributed a flyer which noted his qualification for the job to be "the number of 'killers' he had sent to death row [while working] as a prosecutor."[140]

Even those judges who do not face a vote by the citizens of their states sense reason to appear to favor capital punishment. In California, for example, individuals who seek judicial appointments are reportedly asked whether they personally favor the death penalty.[141] Governors in other states have campaigned against justices, even some of their own appointees, because of their decisions in capital cases.[142]

Judges who favor the death penalty and who decide cases in accordance with their biases will often influence the outcome in individual capital cases by their rulings. But a judge who favors the death penalty can have a much more devastating effect on the overall reliability and fairness of the capital justice system.

If pro-death judges desire appointments to higher courts during their careers, they may shy away from making the difficult, politically sensitive decisions that seem to pit them against capital punishment. The judge who wants to make his or her position on capital punishment known, for political reasons, may invite cases that demonstrate his or her fervor. They may assign inexperienced lawyers to defend those accused of capital crimes[143] or show inappropriate deference to the prosecutor.[144] Some judges may even be incapable of shedding their own prejudices and unable to rule in a fair and objective manner.[145]

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140. RICHARD C. DIETER, DEATH PENALTY INFO. CTR., KILLING FOR VOTES: THE DANGERS OF POLITICIZING THE DEATH PENALTY PROCESS 7 (Oct. 1996), *available at* http://www.deathpenaltyinfo.org/dpicrkfv.html (last visited Mar. 19, 2001).

141. *See* Greg Mitchell, *Litmus Test?*, RECORDER, July 22, 1999, at 1.

142. *See* Burt Hubbard & Ann Carnahan, *Angered Over Death Penalty, Lamm Assails Two Judges*, ROCKY MTN. NEWS (Denver), Mar. 12, 1994, at 5A. The Author of this Article was challenged and defeated in a retention election largely orchestrated by the governor and the governor's party. *See* Bright, *supra* note 134, at 166, 168-69. The governor promised to appoint only death penalty supporters to judgeships. *See id.* at 166, 171.

143. *See supra* text accompanying notes 68-69.

144. *See* Bright & Keenan, *supra* note 58, at 803-11. Bright and Keenan describe judges who criticize higher courts and identify themselves as former prosecutors. *See id.* at 811-13.

145. *See id.* Bright and Keenan discuss an unseemly story in which a judge stated "that he was doing 'God's work'" in seeing to it that a capital defendant was executed. *See id.* at 812-13. The same judge, William Harmon, from Houston, Texas, reportedly asked rhetorically whether arrangements could be made for a van transporting death row inmates to be blown up on its way to the courthouse. *See id.* at 813; Brent E. Newton, *A Case Study in Systemic Unfairness: The Texas Death Penalty, 1973-1994*, 1 TEX. F. ON C.L. & C.R. 1, 26 (1994). Other examples of judicial bias can be found. *See* United States v. Van Chase, 137 F.3d 579, 582 (8th Cir. 1998) (discussing a trial judge who commented during voir dire on the defendant's ethnicity, Native American, and the location of the crime, a reservation); State v. Smulls, 935 S.W.2d 9, 25 (Mo. 1996) (quoting a trial judge referring to a juror's race and saying "'I don't know what constitutes black.... Years ago

IV. RECENT PROPOSALS TO REMEDY ERRORS—ILLINOIS SUPREME COURT RULES

When a committee appointed by the Illinois Supreme Court proposed new rules pertaining to capital cases earlier this year, it was lauded as "'a step in the right direction.'"[145] Since Illinois was the focus of most of the recently publicized cases of wrongful conviction, and the state in which a pro-death penalty governor had temporarily halted executions, much attention was focused on the state's attempt to cure the problems.[147]

The cures suggested by the *Illinois Supreme Court Rules* and the *Illinois Rules of Professional Conduct* fall into three categories.[148] First, the rules address the obligations of the prosecutor.[149] Second, the rules create and define a Capital Litigation Trial Bar.[150] Lastly, the rules require mandatory training for trial judges hearing capital cases.[151]

Are these rules[152] the answer to the flawed capital punishment scheme in Illinois, and perhaps, the country?[153] Will they improve the

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they used to say one drop of blood constitutes black.'" (quoting the court)); State v. Smulls, No. 75511, 1996 WL 344673, at *15 (Mo. June 25, 1996), *modified by* 935 S.W.2d 9 (Mo. 1996) (quoting the trial judge as saying "'[w]e can't hold a barbeque because we don't have a black judge to do the cooking.'"). *But see* State v. Kinder, 942 S.W.2d 313, 340 (Mo. 1996) (White, J., dissenting) (describing a judge's press release issued six days before trial as a "pernicious, racial stereotype . . . not ambiguous or complex [because it said] . . . 'minorities' . . . are not hard-working taxpayers").

146. Steve Mills, *Bar Raised for Capital Case Trials: State High Court Sets Standards*, CHI. TRIB., Jan. 23, 2001, at 1 (quoting Illinois Chief Justice Moses Harrison II).

147. The Illinois Supreme Court's committee is only one of a host of groups in Illinois working to suggest remedies for the problem of wrongful convictions. Other committees throughout the state, including the panel appointed by Governor Ryan, continue to work on their reports. *See Ill. Governor Orders a Halt to Executions: Mistaken Convictions Spur Move*, CHARLESTON GAZETTE, May 21, 2000, at 5A.

148. The amendments to the Illinois Supreme Court Rules and the *Illinois Rules of Professional Conduct* include some provisions that are beyond the scope and focus of this Article. They allow, for example, depositions to be taken in capital cases. *See* ILL. SUP. CT. R. 416(e). They provide for conferences for the purposes of case management in capital cases. *See id.* R. 416(f). The new rules also include provisions which apply to DNA evidence and its admission in capital cases. *See id.* R. 417 (2001).

149. *See* ILL. RULES OF PROF'L CONDUCT R. 3.8 (2001).

150. *See* ILL. SUP. CT. R. 714.

151. *See id.* R. 43 (2001).

152. The Institute for Law and Justice has published a compendium of all standards presently in use in capital cases. *See generally* INST. FOR LAW AND JUSTICE, COMPENDIUM OF STANDARDS FOR INDIGENT DEFENSE SYSTEMS (2000), *available at* http://www.ojp.usdoj.gov/indigentdefense/compendium (last visited Oct. 11, 2001).

153. This Article has assumed the correctness of the studies conducted by the U.S. Department of Justice and by James Liebman, as well as the findings of the Northwestern Innocence Project. That is, this Article presumes that the capital punishment system in America is not working

two-thirds serious error rate in capital cases? Are other bandages necessary[154] to mend a terribly broken system?[155]

A. *The Rules*

1. Rules and Defense Counsel

In an effort to "assure that capital defendants receive fair and impartial trials,"[156] and that errors in capital trial are minimized, the Special Committee on Capital Cases ("Special Committee") has created a Capital Litigation Trial Bar ("Trial Bar").[157] With the exception of the elected or appointed Attorney General or State's Attorney, no licensed attorney who is not a member of the Trial Bar is allowed to appear as lead or co-counsel for the either the state or the defense in a capital case.[158]

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properly. While the empirical basis for that position is the studies and findings set forth above, the Author's personal observations as appointed counsel for capital defendants at trial and at postconviction, as a trial judge, as an appellate and supreme court justice in a death penalty case, as a consultant to the ABA Pro Bono Death Penalty Project and the Nevada Capital Cases Resource Center, and as a frequent lecturer at judicial education programs on capital punishment corroborate that conclusion.

154. The Liebman study addressed whether Illinois' errors were actually aberrational and not indicative of the entire country's capital punishment system and found the rate of serious error to be *slightly less* than the national average (sixty-six as compared with sixty-eight percent). *See* LIEBMAN ET AL., *supra* note 44, at 8.

155. Those who disagree vehemently with the correctness of the Liebman study argue that the anti-death penalty movement specializes in the abolition of the truth. One of the most vocal proponents of capital punishment, Professor Paul Cassell, testified before Congress on July 23, 1993, "that the risk to innocent life from failing to carry out capital sentences imposed under contemporary safeguards far outweighs the speculative and remote risk that an execution might be in error." *Comm. on the Judiciary U.S. House Subcomm. on Civil and Constitutional Rights: Claims of Innocence in Capital Cases* (statement of Paul G. Cassell, Associate Professor of Law, University of Utah College of Law), *at* http://www.law.utah.edu/cassell/testthousehearing.htm (last visited Mar. 13, 2001). His reaction to the most recent findings have not yet been published, but will likely mirror criticisms published by other death penalty activists. The Criminal Justice Legal Foundation, for example, issued a press release on June 19, 2000, criticizing the Liebman study as "riddled with unjustified assumptions and false statements." Press Release, Michael Rushford, President, CJLF, Death Penalty "Error" Study Has Errors of Its Own (June 19, 2000), *at* http://www.cjlf.org/releases/00-11.htm (last visited Mar. 13, 2001). As proof of that attack, the press release discusses nineteen California cases out of the more than 5000 cases reviewed. *See id.* The Foundation also faults the study's inclusion of cases with constitutional errors such as Fourth and Fifth Amendment violations in the category of cases with serious errors. *See id.*

156. ILL. SUP. CT. R. 416(b)(i).

157. *See id.* R. 701, 714.

158. *See id.* R. 701(b), 714(c).

Membership in the Trial Bar is limited to attorneys who are certified by the supreme court to have met the qualifications. To be qualified counsel, must be admitted to practice in Illinois and

> (2) [b]e an experienced and active trial practitioner with at least five years of criminal litigation experience[;] (3) [h]ave substantial familiarity with the ethics, practice, procedure and rules [of the Illinois courts;] (4) [h]ave prior experience as lead or co-counsel in no fewer than eight felony jury trials which were tried to completion, at least two of which were murder prosecutions; and either (i) have completed at least 12 hours of training in the preparation and trial of capital cases . . . within two years prior to making application for admission; or (ii) have substantial familiarity with and extensive experience in the use of expert witnesses, and forensic and medical evidence . . . .[159]

Requirements for co-counsel fall into the same categories with fewer years' experience required.[160] The rules allow the supreme court to waive any of the requirements if counsel can demonstrate the ability to provide effective capital representation based on other trial or appellate experience.[161]

In recommending the creation of a specialized bar to try capital cases, the Special Committee opines that "[t]he most important safeguard of the fairness and accuracy of capital trials is the competence, professionalism, and integrity of the attorneys who try [the] cases," both prosecutors and defense attorneys.[162] The new adoption is based on the Special Committee's finding that minimum standards consistently applied "are the only way to ensure significant, systemwide improvement in the quality of advocacy in capital trials."[163] The observation, as far as it goes, is undoubtedly correct, but the real question that remains is whether quality advocacy will improve the error rate in capital cases. Will better-trained lawyers be able to prevent the innocent from being sentenced to death?

The rules include new obligations for defense counsel as well. For example, under Rule 416, defense counsel is required to file a certificate of readiness with the court not less than fourteen days before the trial.[164] The certificate must verify that counsel has met with the client and

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159. *Id.* R. 714(b).

160. Co-counsel must have practiced for three years and have had prior experience in no less than five felony jury trials which were tried to completion. *See id.*

161. *See id.* R. 714(d).

162. *Id.* R. 714 committee comments: Special Supreme Court Committee on Capital Cases.

163. *Id.*

164. *See id.* R. 416(h).

discussed discovery, the state's case, and defenses relevant to trial and sentencing.[165] The comments do not attempt to explain the reasons for the new certificate of readiness, but it is likely a way to forestall claims of ineffective assistance of counsel.

Regardless of the specificity of the Trial Bar qualifications or the newness of the written certification, defense counsel has always been ethically obliged to undertake only legal matters in which counsel can be competent and thoroughly prepared for trial. Both the *Model Rules of Professional Conduct* and its predecessor, the *Model Code of Professional Responsibility* already require "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation," "reasonable diligence and promptness," and "preparation adequate in the circumstances."[166]

The comments to the ethical rules requiring that lawyers be competent and diligent emphasize that lawyers be sufficiently skilled in a particular matter, or capable of achieving the requisite skill with "reasonable preparation."[167] This, too, has been an undeniable ethical requirement since lawyers became subject to licensing and therefore, except for the appointed or elected state's attorney, applicable members of the legal profession must belong to the Trial Bar.[168]

While competence and preparation are certainly essential to the fair representation of those charged with capital offenses, Part III of this Article has suggested that much more is needed to meet that goal. The "greased lightning" lawyers described would have easily met the requirements to be members of the Trial Bar. In Illinois, for example, it is suggested that eleven of the thirteen exonerated defendants were represented by counsel who would have met the qualifications.[169] More pointedly, even the best prepared and most qualified criminal defense

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165. *See id.*

166. MODEL RULES OF PROF'L CONDUCT R. 1.1, 1.3 (2000); MODEL CODE OF PROF'L RESPONSIBILITY DR 6-101(A)(2) (1983). The "[n]eglect [of] a legal matter entrusted to [a lawyer]" is also forbidden. *Id.* DR 6-101(A)(3).

167. MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. ¶ 4.

> In determining whether a lawyer employs the requisite knowledge and skill . . . relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer[,] . . . associate or consult with, a lawyer of established competence in the field.

Id. ¶ 1. "The required attention and preparation are determined in part by what is at stake." *Id.* ¶ 5.

168. *See* ILL. SUP. CT. R. 701(b).

169. This information was compiled by Rob Warden, Executive Director of the Center on Wrongful Conviction at Northwestern University School of Law. It is on file in their offices and is being submitted to the Governor's panel studying capital cases in Illinois.

lawyer cannot surmount perjured testimony, secreted evidence, or biased judges.

2. Rules and Prosecutors

A single addition is made to Rule 3.8, the existing Illinois ethical rule that sets out the special duties of prosecutors.[170] Whether issued as a reminder or a warning, the new subsection (a) is actually a paraphrase from an almost century-old United States Supreme Court decision.[171] Subsection (a) of Rule 3.8 provides: "The duty of a public prosecutor or other government lawyer is to seek justice, not merely to convict."[172]

The Special Committee added, along with the new provision, commentary supporting the new provision.[173] The Special Committee noted that the provision was in accord with the ABA *Standards for Criminal Justice* and was based upon principles that greatly predated these standards.[174] It quoted from a 1924 decision of the Illinois Supreme Court[175] and from the often-quoted case of *Berger v. United States*,[176] which eloquently described the "peculiar" public servant role of the prosecuting attorney:

> [The prosecuting attorney's] twofold aim . . . is that guilt shall not escape or innocence suffer. [The prosecutor] may prosecute with earnestness and vigor—indeed, he [or she] should do so. But, while [the prosecutor] may strike hard blows, [he or she] is not at liberty to strike foul ones. It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[177]

The new commentary, while more detailed, actually outlined the same principles of prosecutorial responsibility that have long been the norm.[178] The remainder of Rule 3.8 likewise enumerates long-standing

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170. *See* ILL. RULES OF PROF'L CONDUCT R. 3.8 (2001). This Rule was taken from the ABA *Standards for Criminal Justice*. *See id.* R. 3.8 committee comments.

171. *See id.* (citing Berger v. United States, 295 U.S. 78, 88 (1935)).

172. *Id.* R. 3.8(a).

173. *See id.* R. 3.8 committee comments.

174. *See id.*

175. *See* People v. Cochran, 145 N.E. 207, 214 (Ill. 1924).

176. 295 U.S. 78, 88 (1935).

177. ILL. RULES OF PROF'L CONDUCT R. 3.8 committee comments (2001) (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).

178. *See* MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. ¶ 1 (2000) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

prosecutorial responsibilities, many of which are constitutionally based.[179]

In addition to reiterating the obligations of prosecutors, the newly adopted rules include four substantive additions to Illinois death penalty procedure. Rule 411 makes discovery rules which are applicable in criminal cases applicable to the sentencing phase in capital cases.[180] Rule 412 requires the state to "make a good-faith effort to specifically identify by description or otherwise any material disclosed pursuant to [the discovery rule] based upon the information available to the State at the time the material is disclosed to the defense."[181]

In addition, Rule 416 requires the prosecution to certify compliance with the discovery requirements of Rule 412 at least fourteen days before trial.[182] The certification must include a representation that the prosecution has contacted others involved in the investigation and preparation of the case to secure material which is required to be disclosed to the defense.[183]

Rule 416 requires prosecutors to give early notice of the intent "to seek or reject imposition of the death penalty by filing a Notice of Intent to Seek or Decline Death Penalty."[184] The Notice is required to list all of the statutory aggravating factors which the state intends to rely upon for the imposition of the death penalty.[185] However, one aspect of Rule 416 is particularly troublesome. The rules provide that in cases in which the prosecutor has failed to provide any notice, counsel (and the court) must presume an intent to seek the death penalty.[186] Perhaps this is intended only as an assurance that sufficiently trained counsel are appointed in all serious cases, but it seems directly contradictory to the long-standing principle that the death penalty is to be sought sparingly and selectively based upon sufficient aggravating circumstances to set the case apart

179. *See* ILL. RULES OF PROF'L CONDUCT R. 3.8(b)-(e) (2001).

180. *See* ILL. SUP. CT. R. 411 (2001).

181. *Id.* R. 412(c). The proposal refers to this requirement as "the specific-identification proposal." *Id.* R. 412 committee comments. The committee comments that "the duty to specifically identify is not as broad as the duty to disclose under Rule 412(c)." *Id.* The good faith effort required "is intended to avoid creating an impossible burden for the prosecution." *Id.* Further, the requirement is to "be viewed in light of the information available to the State when the material is disclosed to the defense," thus disallowing an evaluation based on hindsight information. *Id.*

182. *See id.* R. 416(g).

183. *See id.*

184. *Id.* R. 416(c). The deadline is "as soon as practicable" but no "later than 120 days after arraignment, unless for good cause shown, the court directs otherwise." *Id.*

185. *See id.*

186. *See id.* R. 416(d).

from other murder cases.[187] This provision seems to imply just the opposite and may result in further abuse by prosecutors in the frequency and disparity in seeking capital punishment. It also creates an inappropriate assumption that may indirectly affect the acceptance of and attitude toward capital punishment.

Just as the added provision to Rule 3.8 is not novel, neither are the procedural additions. While the elaboration of the discovery obligations and the inclusion of the notice and certification requirements may be new to Illinois prosecutors, the constitutional and ethical bases for the requirement are not. In 1963, the U.S. Supreme Court held, in *Brady v. Maryland*,[188] that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[189] Although subsequent decisions tinkered with the application of the rule when postconviction evidence turned up the failure to disclose,[190] the *Brady* rule has remained vital since its inception. The *Brady* constitutional rule, like the Rule 416 procedural ones, applies to all members of the prosecution team, not just the individual prosecutor in the case.[191]

Moreover, Illinois, and the other states that have adopted professional conduct rules based upon the *Model Rules of Professional Conduct*, have always required prosecutors to

> make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to

187. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 305-06 (1987) (noting that in their decisions since *Furman v. Georgia*, 408 U.S. 238 (1972), the Court had "identified a constitutionally permissible range of discretion in imposing the death penalty," including "a required threshold below which the death penalty cannot be imposed" and the inclusion of "any relevant circumstance" that would cause a sentencer to reject the death penalty); Gregg v. Georgia, 428 U.S. 153, 196-97 (1976) (plurality opinion) (citing Georgia's amended murder provisions that require at least one of ten "statutory aggravating circumstances" to exist before the death penalty can be imposed).

188. 373 U.S. 83 (1963).

189. *Id.* at 87.

190. *See* United States v. Bagley, 473 U.S. 667, 669 (1985).

191. *See* Kyles v. Whitley, 514 U.S. 419, 436-37 (1995). A duty to disclose exists even when the prosecution is unaware of the evidence and offers an "'open file.'" *See* Smith v. Sec'y Dep't of Corr., 50 F.3d 801, 828 (10th Cir. 1995). All law enforcement agencies, even if different agencies under different governments (federal and state), are considered part of the prosecution team. *See* United States v. Antone, 603 F.2d 566, 569-70 (5th Cir. 1979).

> the defense and to the tribunal all unprivileged mitigating information known to the prosecutor . . . .[192]

In its elaborate discussion of a prosecutor's duties in the commentary to the new Rule 416, the Special Committee referenced "cases condemning the knowing use of perjured testimony."[193] Again, restrictions on the knowing use of perjured testimony by prosecuting attorneys are anything but new. In 1935, 1942, 1957, and 1959, the U.S. Supreme Court warned prosecutors that the use of perjured testimony or false evidence violated due process.[194] And while not subject to constitutional enforcement, dishonesty, fraud, or deceit on the part of a lawyer has been recognized as unethical since the first codification of ethical standards.[195]

These observations, then, lead to the same questions posed about the new requirements for capital defense counsel. Will reiterating constitutional and ethical obligations diminish the number of cases in which compliance does not occur? Will adding a written reminder that their goal is to "seek justice" cause prosecutors to exercise their discretion and power more fairly in capital cases? Just as many defense lawyers who represented innocent individuals sentenced to death were "qualified," so too were prosecuting attorneys required at the time of their violations to provide discovery and to do justice. The real question remains whether restating and reminding will result in reform.

3. Rules for Judges

The final category of newly adopted rules relates to the competency of judges.[196] A new rule, Illinois Supreme Court Rule 43, requires a "judge who in his [or her] current assignment may be called upon to

192. MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2000). The predecessor to Rule 3.8, DR 7-103(B), likewise required disclosure of exculpatory and mitigating evidence. *See* MODEL CODE OF PROF'L RESPONSIBILITY DR 7-103(B) (1983).

193. ILL. SUP. CT. R. 416 committee comments.

194. *See* Napue v. Illinois, 360 U.S. 264, 269 (1959); Alcorta v. Texas, 355 U.S. 28, 31 (1957) (per curiam); Pyle v. Kansas, 317 U.S. 213, 216 (1942); Mooney v. Holohan, 294 U.S. 103, 112 (1935) (per curiam).

195. DR 1-102(A)(4) provided that "lawyer[s] shall not ... [e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation." MODEL CODE OF PROF'L RESPONSIBILITY DR 1-102(A)(4) (1983). Conduct "prejudicial to the administration of justice" was also prohibited. *Id.* DR 1-102(A)(5).

196. The rules also provide for a case management conference at which the court will assure compliance with the discovery, certification, and qualification rules. *See* ILL. SUP. CT. R. 416(f).

preside over a capital case [to] attend a Capital Litigation Seminar at least once every two years."[197]

Continuing instruction about the ever-changing capital punishment law is certainly essential to the fair resolution of capital cases. Like lawyers, however, judges have always been required under the *Model Code of Judicial Conduct* to "maintain professional competence in" the law.[198] Will specific educational opportunities make a meaningful difference in the fairness and accuracy of capital cases?

Just as judges have been required to maintain competence in the law, so too have judges always been prohibited from making promises or pledges of conduct in office.[199] The Commentary to the *Model Code of Judicial Conduct* notes that judges should emphasize their obligation to uphold the law, regardless of their personal opinion.[200] Nevertheless, as the examples cited in Part III of this Article have shown, occasions are far too frequent when judges place their political ambition over their ethical obligations.

The vast majority of judges will benefit from regular training on the substantive and procedural aspects of capital law. But for others, as evidenced by some of the examples in Part III of this Article, training is not the answer. Those judges who are willing to flaunt the ethical prescripts of the profession are just as willing to ignore the training they receive. The answer for those judges is not a capital litigation seminar. It is likewise not even an ethics seminar. The answer for those judges is disqualification from all capital proceedings.[201]

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197. *Id.* R. 43(b) (2001). The seminar should include, according to the Rule, "the judge's role in capital cases, motion practice, current procedures in jury selection, substantive and procedural death penalty case law, confessions, and the admissibility of evidence in the areas of scientific trace materials, genetics, and DNA analysis." *Id.* R. 43(a). The original proposal required attendance every six years. *See* Laura Sivitz, *Judge Unveils Plan to Help Avert Errors in Capital Cases*, CHI. DAILY HERALD, Jan. 20, 2000, at 13.

198. MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(2) (1999).

199. *See id.* Canon 5(A)(3)(d)(i).

200. *See id.* Canon 5(A)(3)(d) cmt.

201. The *Model Code of Judicial Conduct* provides that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." *See id.* Canon 3(E)(1). It is beyond the scope of this Article as to whether those judges should in fact be removed from the bench for their failure to comply with Canon 1 of the *Model Code of Judicial Conduct*, which requires that judges act independently and "without fear or favor." *Id.* Canon 1 cmt.

V. REAL REFORM

Even the staunchest supporters of capital punishment must support a system in which

> the defendant whose life is at risk will be represented by competent counsel . . . [an] attorney [who] will investigate all aspects of the case, follow all evidentiary and procedural rules, and appear before a judge who is still committed to the protection of defendants' rights—even now, as the prospect of meaningful judicial oversight has diminished [under circumstances in which] . . . the prosecution, in urging the penalty of death, will have exercised its discretion wisely, free from bias, prejudice, or political motive, and will be humbled, rather than emboldened, by the awesome authority conferred by the State.[202]

Is such a system realistic? Can a government find a way to fairly and accurately determine who should die for the violation of its laws?

Some would suggest that the obvious answer is "no." Justice Thurgood Marshall, a death penalty opponent, suggested:

> [n]o matter how careful courts are, the possibility of perjured testimony, mistaken honest testimony, and human error remain all too real. We have no way of judging how many innocent persons have been executed but . . . [s]urely there will be more as long as capital punishment remains part of our penal law.[203]

Are we saddled with accepting that the "imperfect" capital punishment system will always make some mistakes? Must we accept that some innocent people will be executed simply because a perfect system is impossible? Or are we unwilling to undergo the reform necessary to create a system that is not broken?

The reforms to date have focused on what might be tagged the mechanics of the system. Defense lawyers should be better trained and higher paid. Prosecutors should decide early when to seek the penalty and should openly disclose information. Judges should be learned in the law and efficient in the administration of a capital punishment case. But repairing the mechanical aspects of the system will not necessarily repair the system. Clients whose lawyers are trained and paid well will still go to death row if judges and prosecutors use death penalty cases as

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202. Callins v. Collins, 510 U.S. 1141, 1143 (1994) (Blackmun, J., dissenting from denial of certiorari).

203. Furman v. Georgia, 408 U.S. 238, 367-68 (1972) (Marshall, J., concurring).

political stepping stones and if prosecutors continue to view the cases as a battle to be won rather than a problem to be solved.

While real reform will require real study, commitment, and resources, some reform measures that should attribute more to correcting error, than the mechanical ones, are obvious. All actors in the capital punishment system—police, prosecutors, defense lawyers, and judges—should be subject to severe discipline for breaching ethical obligations in capital cases. If the police or the prosecutor fabricates evidence, improves testimony, fails to disclose the required information, or makes inappropriate arguments to the jury, they should be publicly sanctioned. The possible sanctions should include suspension from the duties of their public offices. Defense lawyers, likewise, who fail to fulfill their sacred obligation to the client facing death should be disciplined and, at the very least, removed from the roster of those eligible for appointment in a capital case. Judges who utilize catchy slogans about law and order to secure their positions should be publicly reprimanded; if they are incumbents, they should be censured publicly. They should certainly be disqualified from sitting in affected cases and perhaps suspended from their duties as well.

Only if the actors know that real consequences will follow their acts will they attempt to correct them. Moreover, making the public aware that the government will not tolerate unfair practices among those charged with this responsibility will cast a more serious light on their obligations as citizens.

Lawyers and judges are charged with the responsibility of reporting violations of the ethical codes.[204] Yet it is only rare that an appellate opinion finding prosecutorial misconduct is accompanied by a letter to the disciplinary authorities. If we purport to be a profession that polices its own, we must be aggressive about that function lest it become a farce.

In addition to taking a more serious approach to ethical violations that occur during capital trials, other systemic reforms should be considered. Any procedure that would assist in securing an accurate result should be embraced. Thus, for example, police should videotape complete encounters with the accused and witnesses. Evidence which might bear traces of DNA should be carefully preserved and tested. Eyewitness identifications should be subject to the most strenuous scrutiny.

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204. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 8.3 (2000); MODEL CODE OF JUDICIAL CONDUCT Canon 3(D) (1999).

The government should be barred from giving informants, so-called snitches or cooperators, tangible benefits for their testimony in capital cases, unless the informant is an eyewitness. Some method to review the prosecutor's decision to seek the death penalty should be implemented statewide, emphasizing consistency in the selection. Prosecutors who try capital cases should be required to prepare and argue their own appeals. Those prosecutors would then defend their own unprofessional or unconstitutional conduct before the appellate courts.

If the goal of capital punishment reform is to assure accurate and fair results in capital cases, judges must be held to the responsibility of disqualifying themselves when appropriate. Judges who have manifested a fixed opinion on capital punishment should be automatically disqualified from presiding in death penalty cases. Jurors should likewise be informed about the nature of incarceration and the meaning of a life sentence without parole in the particular jurisdiction.[205]

Many of these reforms would require a rethinking by courts. Rather than asking whether an act prejudiced the defendant or made the proceeding unfair or unreliable, the question would be whether the act assisted in the fair determination of the issues. Counsel's conduct would not be judged by the harmless error standard, but would be subject to sanction if it did not affirmatively contribute to the just trial of the cause.

To those who have practiced in the criminal justice system, particularly in the trial of capital cases, these suggestions sound bizarre. The last fifteen years have seen courts, Congress, and crafty counsel create more and more procedural bars to fairness in capital litigation.[206] Those efforts may have speeded up the process of execution; thus if our system's worth was to be measured by speed, then those efforts would have been on track.

But a system that undertakes to determine who lives and who dies should not pride itself on speed, but on accuracy and fairness. Recent efforts to expedite capital punishment may have succeeded in expedition, and they have certainly succeeded in rendering a more unfair, unreliable system.

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205. In two recent decisions, the Supreme Court has lessened the likelihood that judges will reform their jury instructions in capital cases. *See* Weeks v. Angelone, 528 U.S. 225, 233-34 (2000) (noting that judges are not required to clarify whether death penalty was mandatory upon a finding of an aggravating circumstance); Buchanan v. Angelone, 522 U.S. 269, 279 (1998) (holding that judges are not required to give an instruction on mitigating evidence).

206. *See* Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 28 U.S.C.); Calderon v. Thompson, 523 U.S. 538, 553-54 (1998); Brown v. Texas, 522 U.S. 940, 940-41 (1997) (Stevens, J. respecting denial of certiorari).

It has been said that "the way in which we choose those who will die reveals the depth of moral commitment among the living."[207] What is presently revealed would demonstrate a shallow moral commitment indeed. If, however, we wish to deepen that commitment to the end that no innocent person shall be executed by our government, then we must choose real, substantive reform. Costly? Perhaps. Difficult? Most certainly. But with the greater likelihood that whatever imperfections must remain in the administration of death, they will not include the execution of the innocent.

207. McCleskey v. Kemp, 481 U.S. 279, 344 (1987) (Brennan, J., dissenting).

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