

# Opting for Real Death Penalty Reform

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*The capital punishment system in the United States is broken. Studies reveal growing delays nationwide between death sentences and executions and inexcusably high rates of reversals and retrials of capital verdicts. The current system persistently malfunctions because it rewards trial actors, such as police, prosecutors, and trial judges, for imposing death sentences, but it does not force them either to avoid making mistakes or to bear the cost of mistakes that are made during the process. Nor is there any adversarial discipline imposed at the trial level because capital defendants usually receive appointed counsel who either do not have experience trying capital cases or who receive inadequate resources from the State to pay litigation expenses. Instead, the appellate system is forced to deal with large amounts of error, creating backlog and delays. This article proposes a radical trade-off for capital defendants in which they agree to give up existing post-conviction review rights in return for a real assurance of better qualified, higher quality trial counsel. This proposal will avoid the traps of window dressing reforms, save states a good bit of the expense of appellate review, and make the capital punishment system more fair, efficient, and effective.*

## I. A BROKEN SYSTEM

Recently, colleagues and I issued a report documenting chronically high reversal rates in thousands of death sentences imposed over decades in the United States and concluding that the nation's death penalty system is broken.<sup>1</sup> We came to this conclusion from two directions.

### A. Risk

First, we considered the risk that capital trials will miscarry, condemning the innocent or others for whom the law does not permit death as a punishment. We found that 68% of the thousands of death sentences imposed and fully reviewed

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<sup>1</sup> See James S. Liebman, Jeffrey Fagan, & Valerie West, *A Broken System: Error Rates in Capital Cases*, at [http://www.law.columbia.edu/instructionalservices/liebman/liebman\\_final.pdf](http://www.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf) (June 2000) [hereinafter *A Broken System*], reprinted in part in James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973–1995*, 78 TEX. L. REV. 1839 (2000) [hereinafter *Capital Attrition*]. The views expressed in this article are mine alone and do not reflect those of my colleagues in the death penalty study of which *A Broken System* is a part. The goal of that project is to use quantitative analysis as a basis for identifying reform proposals that are immediately available to policymakers. The goal of this article is to consider more radical solutions that are less immediately achievable.

in the United States between 1973 and 1995 were overturned by the courts.<sup>2</sup> Of those reversals:

—90% were reversed by elected state judges, whose usual dispositions are to let even flawed criminal judgments stand—using, *inter alia*, the harmless error rule<sup>3</sup> absent serious reliability concerns;<sup>4</sup>

—80% at the state post-conviction stage, where data are available, were based on violations requiring the condemned person to demonstrate a probable effect on the outcome or inherent prejudice;<sup>5</sup> and

—82% at the same stage, where again data are available, did in fact result in a different outcome on retrial, including 7% ending in acquittal.<sup>6</sup>

Furthermore, reliability-impairing malfunctions were persistent and widespread:

—Reversal rates were greater than 50% in all but three years out of the twenty-three studied and in all but two states out of the twenty-eight states studied.<sup>7</sup>

—Even after state direct appeal courts turned back 41% of the capital verdicts they reviewed as too flawed to be carried out, and state post-conviction courts turned back at least 10% (and probably considerably more) of the remaining verdicts, federal courts still found reversible error in 40% of the remaining, twice-reviewed cases.<sup>8</sup>

—And even the entire, three-tiered inspection process is not infallible. In a number of cases, a full complement of courts cleared prisoners for execution, leaving the discovery of the prisoners' innocence to a motley of extra-judicial actors: a film maker in one case, journalists in several others, a group of intrepid undergraduate students in a well-known Illinois case, and a burglar in a less-remarked Florida case.<sup>9</sup>

—Over decades, exonerations of innocent death row inmates have persistently occurred at a rate of about one for every seven executions.<sup>10</sup>

Thus, although the rate at which innocent individuals are executed is unknown—official resistance to post-mortem inquiry makes that rate unknowable<sup>11</sup>—all the evidence suggests that it is not zero. And the rate of

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<sup>2</sup> *Capital Attrition*, *supra* note 1, at 1846–50.

<sup>3</sup> *See infra* note 46 and accompanying text.

<sup>4</sup> *Capital Attrition*, *supra* note 1, at 1855.

<sup>5</sup> *Id.* at 1850.

<sup>6</sup> *Id.* at 1851–52.

<sup>7</sup> *A Broken System*, *supra* note 1, at 76 fig.12; *Capital Attrition*, *supra* note 1, at 1853–54.

<sup>8</sup> *A Broken System*, *supra* note 1, at 5, 26–27, 49–52, 53 tbl.5, 130 n.39, 141 n.132, C-1 to 2.

<sup>9</sup> James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2050–51 n.84, 2095 n.160 (2000) [hereinafter *Overproduction*] (collecting sources).

<sup>10</sup> *Id.* at 2048–50 n.84.

<sup>11</sup> *See, e.g.*, Frank Green, *DNA Tests Not Likely After an Execution: Va. Opposing Third Request of its Kind*, RICHMOND TIMES-DISPATCH, March 26, 2001, at A-1 (describing resistance of state officials to requests for DNA samples and other evidence in police files that could potentially demonstrate that executed individuals were innocent). For an editorial discussing

executions of people for whom death is not a legal punishment, though some other penalty may be, is probably substantial.

### B. *Cost and Effectiveness*

The views of people who express at least some support for capital punishment provided us with a second evaluative perspective. This standpoint is important because even though the number of death penalty supporters has declined for five years, they still make up three-fifths to two-thirds of the American public.<sup>12</sup> For them, the tendency of capital justice to miscarry is not the only concern. They additionally want to know whether the resources devoted to the capital system, including to correcting its mistakes, are well-spent given its overall contribution to justice. People taking this perspective might conclude that if capital verdicts single out enough deserving killers and are carried out often and quickly enough to credibly punish past murders while deterring future ones, then some amount of error is tolerable—especially absent proof that errors escape detection before irreparable damage is done or that the cost of detecting them is excessive.

Assuming that the job of the death penalty is to identify offenders for whom

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this issue, consider the following:

The Virginia attorney general's office won a round earlier this month when a court in the Commonwealth turned down petitions to perform posthumous DNA testing on evidence left over from a controversial execution. The case was that of Roger Keith Coleman, who was convicted of the rape and murder of his sister-in-law and was put to death in 1992. A group of newspapers—including *The Post*—and a New Jersey charity that investigates wrongful convictions had sought to do modern DNA testing on the remaining evidence to resolve lingering doubts about the case. There was no good reason not to do so. But Attorney General Mark Earley, who has since stepped down to run for governor, nonetheless opposed the requests, arguing that there was no legitimate controversy about Mr. Coleman's guilt. The question now is whether Virginia will destroy the evidence and thereby prevent the truth from ever becoming known.

The attorney general's . . . opposition to posthumous testing is inconsistent with its obligation to seek truth and acknowledge errors when they happen. Virginia seems more interested in protecting itself from embarrassment. As a lawyer for the office put it at a hearing in an earlier posthumous DNA case, "it would be shouted from the rooftops that the Commonwealth of Virginia executed an innocent man" if the tests went badly for the state.

The attorney general's zeal to protect convictions at all costs is dangerous . . . .

Editorial, *Justice Before Victory*, WASH. POST, June 24, 2001, at B6.

<sup>12</sup> Bill Blakemore, *Support for Death Penalty Drops* (ABC World News Tonight, May 2, 2001), discussed in Richard Morin & Claudia Deane, *Support for Death Penalty Eases; McVeigh's Execution Approved, While Principle Splits Public*, WASH. POST, May 3, 2001, at A9 (noting that, even when questioned on the eve of the widely supported execution of Timothy McVeigh, only 63% of Americans—the lowest proportion measured in years—expressed support for the death penalty in a recent ABC News-*Washington Post* poll).

the law prescribes death as a punishment and to carry out the sanction with the swiftness and sureness needed to deter and express revulsion for those offenses, one arrives at the same conclusion: The current system is broken. To see why, consider the answers that honestly would have to be given to the spouse or other close relative of a murder victim who has just watched a jury sentence the defendant to die and who asks, "What happens now?" As our study found:

—From 1973 to 1995, the average time from death sentence to execution was close to ten years and rising.<sup>13</sup> The Justice Department recently reported that for executions occurring in 1999, the average time from verdict to execution was twelve years.<sup>14</sup>

—Only about 5% of the nearly six thousand death sentences imposed from 1973 to 1995 were carried out in that period.<sup>15</sup>

—In no year since states began readopting the death penalty<sup>16</sup>—including in 1999 when ninety-eight men and women were executed<sup>17</sup>—have more than 3% of the people on death row been executed. The average is less than 1.5%.<sup>18</sup>

In other words, if we were honestly to advise the public and victims about the likely result of imposing any given death verdict, we would have to say that it will probably remain under review for a decade or more, and then be reversed and replaced on retrial with a noncapital verdict.<sup>19</sup> Additionally, we would have to

<sup>13</sup> *A Broken System*, *supra* note 1, at 9–10.

<sup>14</sup> U.S. DEP'T OF JUSTICE BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT 1999, at <http://www.ojp.usdoj.gov/bjs> (last modified Jan. 16, 2001).

<sup>15</sup> *A Broken System*, *supra* note 1, at 109–12, 118 fig.35.

<sup>16</sup> In 1972, the United States Supreme Court provisionally overturned the death penalty nationwide. *Furman v. Georgia*, 408 U.S. 238 (1972). States began readopting the penalty in 1973.

<sup>17</sup> NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., DEATH ROW U.S.A.: SPRING 2001 7, at <http://www.deathpenaltyinfo.org> (Apr. 1, 2001).

<sup>18</sup> *Capital Attrition*, *supra* note 1, at 1859–60.

<sup>19</sup> The families of victims—whom courts and prosecutors fail to inform, and even misinform, about the frequent delays and reversals of capital verdicts—often face anguish as a result:

When James Strong was sentenced to death in Pennsylvania for the murder of my cousin Jane's husband nearly two decades ago, there was a bitter sense of relief for our family. It wasn't that it was over—nothing like that can really be over—but at least Jane and their 9-year-old son, Jay, could begin to reorganize their lives. Jane moved out of the motel near the court, where she had been staying for the trial. She went back to her job, back to her house; and Jay came home from the neighbors' house where he had been staying while Jane was at the trial.

Justice had been served. The man who killed John Strock, would die for his crime. Or so we believed.

But it didn't work that way. The death sentence—with its protracted process of appeals—locked Jane into a 17-year relationship with her husband's murderer and even with his family. And it's not over yet.

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[F]our years ago Jane got a call. It wasn't the call she had expected. "Just a routine

describe the high costs of this process, including:

—hundreds of thousands or even millions of additional dollars spent at trial and on appeal, solely because the original sentence was death;<sup>20</sup>

—untold anguish for those most intimately involved—victims<sup>21</sup> and wrongly condemned prisoners;<sup>22</sup>

hearing,” she reported being told. “You don’t even need to come up.” But Jane felt she had to go. . . .

Jane called me when she got back. . . .

“[W]hat about the hearing?” I asked. “I could hardly follow it,” she said. “It seemed like they went over the same old thing. But they told me when it was over: No problem. That it was all routine.”

I heard nothing more until last December, when a large manila envelope arrived in my mail. It looked like a calendar, probably a Christmas present, from Jane. I opened it and discovered it was an opinion from the Pennsylvania Supreme Court. Strong’s conviction had been overturned. “This matter is remanded for a new trial,” the document read.

The grounds for that decision were that letters had just come to light suggesting that the DA’s office had made a deal at the time of Strong’s trial with the attorney for his partner in the crime, James Alexander, and had failed to disclose this to the court or to the jury—or even to the assistant DAs who prosecuted the case. . . .

And so it continues. Within the next few months, the whole process will begin again—with a new trial set for September and pretrial motions due in June. Only this time it’s quite possible that Strong will leave the courtroom a free man. Alexander, whose testimony probably wouldn’t have been believable anyway once the jury heard there had been a deal, has since died of a heart attack. . . .

Of course, there could have been a reversal in any case. Nobody wants a decision to be made on incomplete evidence, or a prosecutor to fail to disclose relevant facts. Nobody wants an innocent man to be put in prison for life, let alone put to death. . . .

My point is that the death sentence had lulled Jane and the rest of us into believing that she could put one part of her life behind her, that Strong’s death would indeed bring her closure.

I won’t ever know for sure how Jane would have felt if Strong had been executed. Given the questions that have prompted the new trial, that could not have been a good thing for the cause of justice. The delays that have characterized this case are typical, though. And because of them, Jane has watched and waited year after unsettling year, only to discover now that the man whom she believed all these years murdered her husband may go free. . . .

So Jane’s uneasy relationship with the man convicted of murdering her husband continues. Whatever some people believe about the value of the death penalty, it hasn’t solved anything for our family, and has probably made it all the worse.

William H. Brill, *Finality? Not for Us, and It’s 17 Years Later*, WASH. POST, Apr. 29, 2001 (Outlook), at B3; see also *Overproduction*, *supra* note 9, at 2133–34, 2134 n.247 (giving other examples).

<sup>20</sup> *Overproduction*, *supra* note 9, at 2130–33 & nn.244–46.

<sup>21</sup> See *supra* note 19.

<sup>22</sup> See, e.g., Maria Glod, *Exonerated Inmates Seeking Safeguards for Justice*, WASH. POST, June 28, 2001, at B1. She describes the plight of former death row inmate Michael Graham:

Michael Graham said he paced in his prison cell for 14 years yearning for the opportunity that came yesterday. Graham, a Roanoke roofer who spent those years on death row

—a discredited criminal justice system whose chief function appears to be making mistakes, then taking years in a sometimes vain effort to correct them;<sup>23</sup> and  
 —the collapse of any pretense of credible deterrence or retribution.<sup>24</sup>

These two descriptions of the death penalty's malfunction—one focused on the risk of miscarriage, the other on cost and delay—are not new. They are the standard critiques of the penalty from the left and the right.<sup>25</sup> What *is* new, besides some documentation and quantification, is the demonstration that the two critiques are manifestations of the same problem: high and persistent rates of serious error.

## II. FIX OR ABOLISH?

To say the system is broken is to imply that it can and should be fixed. In another segment of this Symposium, Professors Carol and Jordan Steiker raised a threshold question: *whether* we should try to fix it.<sup>26</sup> Even if death penalty skeptics agree with supporters on the underlying problem, the former must still decide whether to make common cause with the latter on reforms, rather than pursuing immediate abolition.<sup>27</sup>

For me, the question of abolition does not arise. The capital punishment machine continues to kill. Indeed, as Part III explains, the machine's appetite for that outcome may be at the root of most of its existing problems, so reform almost inevitably must run in the direction of fewer death sentences.<sup>28</sup> As long as death

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before he was released last year, testified [before a committee of the United States Senate] in favor of sweeping reforms intended to safeguard against the execution of innocent people.

*Id.*

<sup>23</sup> *Overproduction*, *supra* note 9, at 2134–35, 2134 n.248 (collecting sources).

<sup>24</sup> *Id.* at 2057–59 n.104, 2133–34.

<sup>25</sup> Compare *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from the denial of certiorari) (declaring Justice Blackmun's resolve “[f]rom this day forward . . . no longer [to] tinker with the machinery of death,” and instead to vote against affirming all death sentences, because “[t]he basic question—does the system accurately and consistently determine which defendants ‘deserve’ to die?—cannot be answered in the affirmative” and because “the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants”), with *Coleman v. Balkcom*, 451 U.S. 949, 956–57 (1981) (Rehnquist, J., dissenting from the denial of certiorari) (declaring then-Justice Rehnquist's desire to grant certiorari in every capital case that came before the Court on discretionary writ of certiorari, so that the Court's affirmance of the death verdict could provide a *res judicata* bar to all subsequent review, forestalling ever-lengthening court delays).

<sup>26</sup> See Carol Steiker & Jordan Steiker, *Should Abolitionists Support Legislative “Reform” of the Death Penalty*, 63 OHIO ST. L.J. 417, 421 (2002).

<sup>27</sup> See *id.*

<sup>28</sup> See *infra* notes 35–38 and accompanying text.

penalty opponents cannot simply unplug the machine—and they probably cannot any time soon, given how popular the death penalty remains<sup>29</sup>—there is good reason on all sides to attend to how, and how many, the death machine kills, and how well it serves its assigned purposes.

Parts IV and V proceed, therefore, from the assumption that, viewed from many perspectives, the capital punishment system is broken, and they ask what can be learned by contemplating its reform. First, however, Part III analyzes the issue of causation: Why does the existing death penalty system so often misfire, making system-defeating, as well as life-threatening, mistakes?

### III. PERPETUAL MALFUNCTION

Statistical analyses showing a positive relationship between how frequently a jurisdiction imposes the death penalty for every one hundred homicides and the likelihood that any resulting death verdict will be tainted by serious error,<sup>30</sup> as well as the developing literature on the causes of miscarriages and mistakes in particular cases,<sup>31</sup> suggest the following causal explanation:<sup>32</sup> At great risk to both reliability and efficiency, and apparently more so than in other parts of the criminal justice system,<sup>33</sup> capital trial and appellate procedures and incentives reward the imposition of death verdicts based on factors other than the evidence and the law. This tendency in turn disposes capital trials to outcomes the evidence and law forbid and forces ill-equipped appellate judges to play the role of surrogate sentencers in an effort to clean up the resulting mess. Put differently, capital procedures and incentives handsomely reward trial actors on a per-death sentence basis (for example, police, prosecutors, and trial judges), while shifting the cost of mistakes made in the process to actors with too small or infrequent a stake in the process to defend themselves and adequately protect their interests (for example, state taxpayers, appellate courts, victims, and wrongly condemned prisoners). And these actions in turn reward a different set of repeat actors—defense-side capital appellate lawyers—on a per-reversal basis. Like a perpetual

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<sup>29</sup> See *supra* note 12 and accompanying text.

<sup>30</sup> See, e.g., John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. CAL. L. REV. 465, 469 (1999) (“The [per-murder] rate at which states impose [death] sentences strongly correlates with the rate at which [post-sentence] relief was obtained from those sentences.”); *Overproduction*, *supra* note 9, at 2068.

<sup>31</sup> *Overproduction*, *supra* note 9, at 2078–79 & n.137, 2102 & n.175 (collecting sources).

<sup>32</sup> I only briefly revisit this explanation here, having presented it in-depth in an earlier article. *Id.* at 2073–136.

<sup>33</sup> See Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61 LAW & CONTEMP. PROBS. 125, 135 (1998) (explaining that the pressure to identify, arrest, and convict suspects for homicides is greater than for any other type of violent crime); *Overproduction*, *supra* note 9, at 2053–54 n.90 (estimating a 5% to 10% reversal rate in noncapital cases), 2078–82 (offering reasons why more error may be committed in capital than in other criminal cases).

motion machine, these effects render stable over time a system defined by the chronic instability and reversal of most of its outcomes.<sup>34</sup>

More specifically, the process appears to work as follows: Heinous killings frighten communities and generate understandable and appropriate pressure to find and decisively punish the responsible parties.<sup>35</sup> In all capital-sentencing jurisdictions, but particularly in ones where the political rewards of capital punishment are high and direct (for example, where elections for district attorney and trial judge are frequent and partisan and where voters favor the death penalty) and in ones that believe themselves to be under siege from violent crime,<sup>36</sup> such offenses create incentives to move swiftly and surely from arrest to conviction to capital verdict.<sup>37</sup>

Things get off-track at the very start of capital cases when these pressures lead police and prosecutors to define a death sentence as the only just result—and any other result as a defeat—even where a capital conviction or sentence is a stretch given the evidence and the mitigating circumstances.<sup>38</sup> Thus, marking a case as capital trumps the usual institutional pressure to compromise and blocks the plea bargaining that resolves most criminal cases.<sup>39</sup> That in turn dampens the usual exchange of information between the two sides. And it vastly expands the defense lawyer's role—and skill level and resources that are required—from that of a negotiator of routine deals good enough to dissuade defendants from taking their chances at trial, to that of an investigator of a serious, often unwitnessed crime; a mental health and forensic specialist; an expert on a complex and ever-changing body of specialized statutory and constitutional law; and a trial litigator whose craft includes the difficult and distinct arts of convincing a jury not to believe beyond a reasonable doubt the state's claim that the defendant committed a capital crime and, failing that, convincing it to believe the defendant's claim that he had a good reason for doing what he now admits he did and says he will not do again.<sup>40</sup> Suddenly, the set of potential defense lawyers *qualified* to represent the defendant dwindles to a handful, if it does not evaporate entirely. And the subset

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<sup>34</sup> See *Overproduction*, *supra* note 9, at 2155.

<sup>35</sup> See *id.* at 2078–82.

<sup>36</sup> See Tina Rosenberg, *Deadliest D.A.*, N.Y. TIMES, July 16, 1995 (Magazine), at 22 (attributing Philadelphia District Attorney Lynne Abraham's self-confessedly "passionate" commitment to capital punishment, notwithstanding her doubts whether it deters crime, and her use of it more often per homicide than any other prosecutor in the nation, to her conclusion that it gives citizens "the feeling of control demanded by a city in decay" especially in light of her observation that "[w]e feel our lives are not in our own hands. . . . This is Bosnia").

<sup>37</sup> Gross, *supra* note 33, at 127–28, 133–36, 149; *Overproduction*, *supra* note 9, at 2082–100.

<sup>38</sup> *Overproduction*, *supra* note 9, at 2087–98.

<sup>39</sup> Gross, *supra* note 33, at 144–45; *Overproduction*, *supra* note 9, at 2099–100.

<sup>40</sup> See Vivian Berger, *The Chiropractor as Brain Surgeon: Defense Lawyering in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 245, 247–51 (1990–1991); *Overproduction*, *supra* note 9, at 2108 & nn.186–89 (citing other authorities).



of those lawyers, if there are any, who are *willing* to take the case shrinks still further, given the lucrative, competing opportunities from paying clients and given the paltry compensation available for representing indigent capital defendants—often the same hourly rate or even the same capped fee that the state has designed to compensate negotiators of routine pleas in run-of-the-mill cases.<sup>41</sup> For all these reasons, capital defense all too often falls to the worst lawyers the bar has to offer—frequently lawyers who can find no other work<sup>42</sup>—while placing the highest demands on them.

The same pressures that lead district attorneys to make death sentences the

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<sup>41</sup> See, e.g., American Bar Ass'n & Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 16, 69 (1990) (concluding, after a detailed study, that "inadequate compensation of counsel at trial" is one of the "principal failings of the capital punishment systems in the states today"); Ruth E. Friedman & Bryan A. Stevenson, *Solving Alabama's Capital Defense Problems: It's a Dollars and Sense Thing*, 44 ALA. L. REV. 1, 21–39 (1992) (criticizing Alabama's built-in monetary disincentive—maximum compensation of \$20 per hour for any work done out of court and \$40 per hour for in-court activity, with a \$1000 reimbursement cap—against thorough representation at the trial level); Anthony Paduano & Clive A. Stafford Smith, *The Unconscionability of Sub-Minimum Wages Paid Appointed Counsel in Capital Cases*, 43 RUTGERS L. REV. 281, 282 (1991) (examining the problem of "statutory limitations on the fees paid to appointed counsel"); Albert L. Vreeland, II, Note, *The Breath of the Unfee'd Lawyer: Statutory Fee Limitations and Ineffective Assistance of Counsel in Capital Litigation*, 90 MICH. L. REV. 626, 628 (1991) (arguing that "fee limitations deprive indigent defendants of their right to effective assistance of counsel"); see also Marcia Coyle et al., *Fatal Defense: Trial and Error in the Nation's Death Belt*, NAT'L L.J., June 11, 1990, at 30 ("Wholly unrealistic statutory fee limits on defense representation—such as Mississippi's flat, unwaivable \$1,000 cap [on compensation for capital defense lawyers], equivalent to a fee of about \$5 per hour for many lawyers act as disincentives to thorough trial investigation and preparation."); Dirk Johnson, *Shoddy Defense by Lawyers Puts Innocents on Death Row*, N.Y. TIMES, Feb. 5, 2000, at A1 (providing evidence that capital defendants "are often represented by lawyers who are paid a few thousand dollars, or less, and spend only two days on a case" and that a proper defense in a death penalty case takes months of research and costs \$250,000 or more); Sara Rimer, *Questions of Death Row Justice for Poor People in Alabama*, N.Y. TIMES, Mar. 1, 2000, at A16 (noting that Mississippi's flat, unwaivable \$1,000 cap on defense lawyer compensation was in effect as late as March 2000); Rosenberg, *supra* note 36, at 21 (comparing capital representation by appointed lawyers who handle close to 80% of Philadelphia capital cases for a flat fee of \$1,700 plus \$400 for each day in court and \$300 for an investigator, with an average cost to the county in 1995 of \$2,700 per capital case, to the rare representation by a retained lawyer for whom the going rate in Philadelphia is \$50,000 per case); Stan Swofford, *A Reasonable Doubt: Are There Innocent People on North Carolina's Death Row*, GREENSBORO NEWS & REC., Aug. 6, 2000, at A1 (comparing North Carolina's \$85 per hour cap on compensation for defense attorneys appointed to represent indigent capital defendants to the going rate of \$200 or more per hour for such representation by experienced, retained criminal defense lawyers in the state).

<sup>42</sup> *Overproduction*, *supra* note 9, at 2102–06, 2103–08 nn.176–85 (citing numerous examples of low quality attorneys handling capital cases).

*sine qua non* of justice also discourage elected trial judges<sup>43</sup> from assiduously enforcing legal and ethical boundaries that might keep the state from overreaching in capital cases—assuming any transgression is even visible to the judge.<sup>44</sup> Nor is the slack likely to be taken up, except in extremely weak cases, by jurors forced to decide between a noncapital verdict they typically, if erroneously, believe would soon set loose a heinous killer on the community and a death sentence they typically, if also erroneously, believe will be reversed on appeal if a lesser sentence is more appropriate.<sup>45</sup>

But why is the jurors' latter belief erroneous? Why not rely on appellate courts to catch invalid death sentences in the present, and why not rely on them, via enough painful raps on reversed prosecutors' and trial judges' knuckles, to keep capital verdicts within what the facts and law will bear in the future?

To begin with, the main function of appellate judges is to cure occasional procedural errors, not to redress chronic substantive mistakes. This is partly because there are too few appellate judges responsible for too many cases containing too many errors. More fundamentally, although prejudice and harmless error rules keep procedure from trumping substance when only procedural errors occur,<sup>46</sup> no comparable doctrines allow substance routinely to trump procedure when even grave substantive errors occur without a procedural miscue. Consequently, if jurors reach the wrong outcome, there is no assurance that appellate judges have the power, even if they otherwise have the perspicacity, to cure the mistake.<sup>47</sup> Undoubtedly, therefore, some substantive error (along with reams of "harmless" procedural error) goes undetected by the courts—as in the cases noted earlier in which a full complement of courts cleared innocent prisoners for execution.<sup>48</sup>

Still, as our study of error rates shows, appellate courts do frequently reverse capital verdicts.<sup>49</sup> A puzzle, therefore, is why preceding rounds of reversals do not

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<sup>43</sup> Elected judges preside at nearly all state capital trials. See *A Broken System*, *supra* note 1, at 133 n.54.

<sup>44</sup> *Overproduction*, *supra* note 9, at 2111–14.

<sup>45</sup> *Id.* at 2114–19.

<sup>46</sup> See, e.g., *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (discussing "materiality" and "prejudice" standards for purposes of proving prosecutorial suppression of evidence and ineffective assistance of counsel in violation of the United States Constitution); *Brecht v. Abramson*, 507 U.S. 619, 639 (1993) (establishing a heightened standard of harmfulness that must be shown before habeas corpus relief may be granted based on constitutional error); *Chapman v. California*, 386 U.S. 18, 21–22 (1967) (barring relief on direct appeal from most errors if it can be shown that the error was harmless beyond a reasonable doubt).

<sup>47</sup> See, e.g., *Herrera v. Collins*, 506 U.S. 390, 390–91 (1993) (holding that there is no constitutional bar to convicting, and even executing, an innocent prisoner, leaving no remedy for innocent prisoners seeking federal habeas relief absent proof of a procedural violation in their case).

<sup>48</sup> *Overproduction*, *supra* note 9 and accompanying text.

<sup>49</sup> *A Broken System*, *supra* note 1 and accompanying text.

deter succeeding generations of error. The answer is that the feedback mechanisms running from the appellate and post-conviction stages to the trial phase are so anemic that, for the crucial trial-level actors, error is a nearly costless by-product of the death sentences they find it politically profitable to (over)produce.<sup>50</sup> Those trial-level actors thus make more than the optimal level of mistakes because they (1) benefit from those mistakes, yet (2) do not have to internalize the costs of the mistakes. In the first regard, the political, professional, and psychological *benefit* to local actors of each new death sentence is high.<sup>51</sup> Yet, in the second regard, the *cost* of each flawed death sentence remains very low whether there is a 10% or a 70% likelihood that the sentence eventually will be overturned because of its flaws. Prosecutors, trial judges, and juries thus have incentives both to generate more death sentences and, in their search for new prospects, to move from the core set of capital murders to, and well beyond, the periphery of what the law defines as potentially capital offenses.

Erroneous death sentences clearly are not costless, however. Rather, their substantial costs are borne by others.<sup>52</sup> State and federal appellate courts must undertake the substantive winnowing task that trial courts are supposed (and are much better suited) to accomplish. Taxpayers throughout the state and nation, not just those in the actual death-sentencing jurisdiction, must foot the bill. This in turn renders local officials unaccountable to the vast majority of taxpayers who pay for the officials' mistakes. Low-status line attorneys in the state attorney general's office, to whom local prosecutors almost always hand off their flawed handiwork, get the blame when, as so often happens, the flaws prompt reversal on appeal. Victims bear even worse costs. Prosecutors almost never inform victims of the error rates and delays characterizing most death sentences, so the agonizing delays, reversals, and retrials are unexpected and excruciating.<sup>53</sup> And this is not to mention the egregious burdens imposed directly on wrongly condemned defendants themselves.<sup>54</sup>

Ironically, there is another conspirator in this process of absorbed benefits and shifted costs: the death penalty defense bar, of which I have long been a member. Too small and thinly financed to appear at the trial phase of every potential capital case, this group of lawyers concentrates its resources at the small number of strategic bottlenecks through which all actual capital sentences thereafter must flow. At best, it focuses on state appellate and post-conviction courts; wherever possible, on the entire federal habeas proceeding; and at the very least, on federal circuit and United States Supreme Court review on habeas.<sup>55</sup>

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<sup>50</sup> *Overproduction*, *supra* note 9, at 2119–29.

<sup>51</sup> *Id.* at 2078–82, 2078–80 nn.137–39 (collecting sources that describe benefits of capital sentences to repeat trial actors).

<sup>52</sup> *Id.* at 2129–36 (documenting these various costs).

<sup>53</sup> *See supra* note 19.

<sup>54</sup> *See supra* note 22.

<sup>55</sup> *Overproduction*, *supra* note 9, at 2073–78, 2135–36.

Having strategic positions on the heights leading into, or out of, the few narrow canyons through which all death sentences must pass on their journey through the appellate process, these lawyers are well-situated to intercept many—but regrettably not all—of the unfit and unsuitable death sentences that prosecutors, jurors, and judges have imposed. The success these lawyers attain at the later stages of the review process, picking off many of the mistakes made at trial, leads them to devote substantial resources to protecting their positions above the strategic narrows and resisting proposals for changing the process.

The result is an uneasy but powerful alliance for preserving the basic components of the existing system, from trial through the post-conviction review process. And so arises the implacable stability of a system of frenetic instability—i.e., of reversal, retrial, and eventual rejection of death sentences.<sup>56</sup>

#### IV. BREAKING THE CYCLE

Describing the problem this way suggests the general outlines of a solution. The goal is to make trial-level actors bear the costs of their mistakes in the course of capital sentencing and to create incentives for them to avoid error and to limit their attention to core capital cases. Similarly, the logical cure for an error-prone system that chronically cycles products from a shoddy fabrication process to a long, expensive inspection process and back again is to devote more resources to the fabrication process in hopes that quality control eventually will require fewer resources.

For some jurisdictions, these considerations might suggest a wholesale solution, such as the abolition of, or at least a moratorium on, capital punishment.<sup>57</sup> Any government system is prone to misfeasance and malfeasance, and for decades the death penalty system has succumbed to both. Why continue to take the risk when lives are at stake and when effective risk controls are expensive, uncertain, or unknown?

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<sup>56</sup> *Id.* at 2155.

<sup>57</sup> In all, “major campaigns to suspend executions have been launched in nineteen [actually twenty] states” in 2001, including moratorium and death-penalty study bills in Alabama (passed the Senate Judiciary Committee), Arkansas, Connecticut (passed the Senate Judiciary Committee), Delaware, Illinois, Indiana, Kentucky, Louisiana, Maryland (passed the entire House and the Senate Judiciary Committee), Missouri, Mississippi, Nevada (passed the Senate), New Jersey, North Carolina, Oklahoma, Pennsylvania, Tennessee, Texas (passed committees in both houses), Virginia, and Washington. Bill Blakemore, *Support for Death Penalty Drops* (ABC World News Tonight, May 2, 2001). Abolition bills came close to passing in the Winter 2001 legislative cycle in New Hampshire and New Mexico, and they were proposed in Illinois, Indiana, Kentucky, Louisiana, Missouri, Mississippi, Montana (hearings held in the House Judiciary Committee), Nebraska, New Jersey, New York, Oregon, Pennsylvania, Tennessee, and Virginia. DEATH PENALTY INFORMATION CENTER, CHANGES IN THE DEATH PENALTY AROUND THE U.S., at <http://www.deathpenaltyinfo.org/Changes.html> (last modified Oct 26, 2001).

Other jurisdictions, however, are not drawn to these solutions. The remainder of this article addresses those counties and states, where the choices are real reforms, cosmetic tinkering, or resignation.<sup>58</sup>

### A. *Self-Sustaining Defense Systems*

For this latter set of jurisdictions, one trial-level reform is obvious. In our adversarial system, the most fundamental check and balance on prosecutorial over-reaching and over-charging is a determined defense attorney. Prosecutors who expect to lose at trial when they charge a marginal case capitally will be more disposed to treat the case like most other criminal matters and plead it. If they think cutting corners will be exposed, they are much less likely to cut corners. And if other local officials and, ultimately, local taxpayers have to pay defense lawyers to exercise those functions, the payors will exert additional pressure to keep marginal cases out of court.

My focus here is on the system as well as the case. The result of reforms should be a financially stable and expert capital defense bar in or accessible to each local capital-sentencing jurisdiction.<sup>59</sup> Whether that bar is privately or publicly employed is less important than its attractiveness to skilled and energetic attorneys who want to take capital cases that too often in the past have been

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<sup>58</sup> For a discussion of death penalty reform legislation considered during the Winter-Spring 2001 legislative cycle, see Tom Brune, *Nation Examines Death Penalty: Amid Capital Punishment Concerns, Federal, State Executions Declining*, NEWSDAY, June 10, 2001, at A5; Laurie Goodstein, *Death Penalty Falls From Favor as Some Lose Confidence in its Fairness*, N.Y. TIMES, June 17, 2001, at A14; John Harwood, *Despite the McVeigh Case, Curbs on Executions Are Gaining Support*, WALL ST. J., May 22, 2001, at 1; Eric Lichtblau, *Death Penalty Reforms Gather New Momentum: With Dozens of Death Row Inmates Freed, a Cry Rises for Precautions, Such as DNA Tests*, L.A. TIMES, June 25, 2001, at A1; Emilie Lounsberry, *Death Penalty's Fairness Debated Nationwide*, PHILA. INQ., June 8, 2001, at A1; see also Innocence Protection Act of 2001, H.R. Res. 912, 107th Cong. (proposing a reform package that includes some of the reforms discussed in this article). The recent work of the Committee to Prevent Wrongful Executions is also instructive. This Committee is "a nonpartisan panel of judges, former prosecutors and victims advocates," some of them "strong death penalty supporter[s]," that recently "spent a year studying capital punishment in the United States" and made "18 proposals . . . intended to make the death penalty more reliable and less open to chance." Brooke A. Masters, *Standards for U.S. Executions Proposed; Nonpartisan Committee Seeks Broad Consensus on Reforming Death Penalty*, WASH. POST, June 27, 2001, at A4. Several of the Committee's proposals are similar to ones made in this article, including recommendations to "[s]et mandatory-minimum standards for defense lawyers and pay them adequately, and make it easier for death row inmates to get new trials if they had bad lawyers"; "[f]ully inform juries by giving them the explicit option of life without parole"; "[p]reserve and test DNA after convictions and make it easier for inmates to get new trials based on newly discovered evidence"; and "urge[ ] prosecutors to open all their files to the defense before trial." *Id.*

<sup>59</sup> *Overproduction*, *supra* note 9, at 2147 & n.279.

assigned to incompetent lawyers.<sup>60</sup>

There are four components to any stable system of quality capital-defense representation: (1) minimum lawyer qualifications;<sup>61</sup> (2) at least two lawyers per case; (3) adequate compensation for lawyers and ample funds for experts and investigators;<sup>62</sup> and (4) appointment mechanisms that prevent patronage and cost-saving concerns from trumping quality.<sup>63</sup> Useful points of reference in this regard are provided by capital-defense systems in federal cases,<sup>64</sup> the states of

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<sup>60</sup> See *supra* notes 41–42 and accompanying text.

<sup>61</sup> William S. Sessions, *Primary Goal Is Justice, Not Execution*, SAN ANTONIO EXPRESS NEWS, July 19, 2000, at 5B (when the State seeks to take a defendant's life, "the standards of competence for defense lawyers should be high, clear and enforced").

<sup>62</sup> In a recent report, the American Bar Association described a variety of disturbing techniques that insufficient funding has forced state appointing officials to use in order to secure defense representation in capital cases, including patronage selections from a general list of all local attorneys, regardless of capital, or even criminal, experience; contract systems under which all cases over a particular period go to the lowest bidder (with a flat fee bid covering all experts and other expenses), including complex and unanticipated capital cases that suddenly appear on the county's docket; reimbursement schemes that limit lawyers to, for example, \$2,500 for the entire representation "plus \$50 for each motion . . . filed up to five motions—with the result that the number of motions filed in almost every case is exactly five—or \$1,000, including expenses for expert and investigative assistance"; or what amounted to "\$15 to \$20 per hour and \$11.84 per hour" to represent two innocent men who were sentenced to die but were eventually released for lack of evidence of guilt. Randall Coyne & Lyn Entzeroth, *Report Regarding Implementation of the American Bar Association's Recommendations and Resolutions Concerning the Death Penalty*, 4 GEO. J. ON FIGHTING POVERTY 1, 16, 18 (1996) (emphasis added). Other sources have comprehensively documented the limited resources available for capital defense. See, e.g., Norman Lefstein, *Reform of Defense Representation in Capital Cases: the Indiana Experience and its Implications for the Nation*, 29 IND. L. REV. 495, 496–500 (1996) (stating that "compensation for attorneys representing indigent capital defendants is perversely low"); Joe Margulies, *Resource Deprivation and the Right to Counsel*, 80 J. CRIM. L. & CRIMINOLOGY 673, 678 (1989) (stating that "inadequate funding forces appointed counsel to ration his or her time, which inevitably compromises his or her ability to prepare the case"); Michael D. Moore, *Tinkering with the Machinery of Death: An Examination and Analysis of State Indigent Defense Systems and Their Application to Death-Eligible Defendants*, 37 WM. & MARY L. REV. 1617, 1632 (1996) (arguing that low compensation for attorneys representing indigent capital defendants leads to problems of attorney "inexperience, lack of training, and overburdening"); Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 334 (1995) (stating that the low levels of compensation given to attorneys representing indigent capital defendants has had a "disastrous impact on the quality of defense services provided"); Coyle, *supra* note 41, at 30.

<sup>63</sup> Cf. Paul M. Barrett, *Lawyer's Fast Work on Death Cases Raises Doubts About System*, WALL ST. J., Sept. 7, 1994, at A1; Mary Flood, *What Price Justice? Gary Graham Case Fuels Debate Over Appointed Attorneys*, HOUSTON CHRON., July 1, 2000, at A1 (stating that in some Texas counties in the 1970s and 1980s, "courthouse appointment lists were often an informal string of each judge's friends and campaign contributors; some were competent and trained, others were not," and there were "no requirements for experience, no classes, no tests").

<sup>64</sup> Raymond Bonner, *Charges of Bias Challenge U.S. Death Penalty*, N.Y. TIMES, June 24,

Connecticut,<sup>65</sup> Colorado,<sup>66</sup> Indiana,<sup>67</sup> New Jersey,<sup>68</sup> and New York;<sup>69</sup> the city of

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2000, at A1 (explaining that in federal capital cases, federal law requires the appointment of two lawyers for indigent defendants, at least one of whom must be experienced in capital litigation; consequently, “claims of ineffective assistance of counsel do not mark the federal system”).

<sup>65</sup> Richard Pérez-Peña, *The Death Penalty: When There’s No Room for Error*, N.Y. TIMES, Feb. 13, 2000, at WK3 (contrasting high capital-sentencing states like Alabama and Georgia, where there is “a culture of habitually appointing” lawyers in capital cases who “don’t know capital law, are cozy with the judges and are underpaid,” with three states that finance expert statewide capital defense units: (1) Colorado, which although “a Western state where the death penalty is popular,” has had only about three capital prosecutions a year, “in part, experts say, because [prosecutors] believe that the Colorado Office of the Public Defender will defeat all but the strongest cases”; (2) Connecticut, which also has a capital defense team of experienced state public defenders and has had few capital prosecutions during the last twenty-seven years; and (3) New York, whose “gold standard” Capital Defender Office employs twenty-one highly trained trial lawyers and seventeen investigators and has an annual budget of fifteen million dollars; has appeared in 524 cases in which a capital charge was a possibility; and has limited the number of capital charges actually brought to thirty-nine with only five death sentences actually imposed).

<sup>66</sup> Rimer, *supra* note 41 (discussing capital defense systems in Colorado, New Jersey, and New York); *supra* note 65.

<sup>67</sup> Lefstein, *supra* note 62, at 496–504, 506–07, 509–12, 518–26, 533 (discussing the apparent effect of Indiana’s adoption in the early 1990s of legislation making state funds available to local jurisdictions that satisfy a state commission’s guidelines for appointment of qualified counsel in capital cases; explaining the commission’s incorporation within its guidelines of a state supreme court rule (1) requiring the appointment of two lawyers in capital cases with recent extensive training in capital defense and with, respectively, at least five and three years criminal litigation experience that includes at least five and three felony jury trials; (2) disqualifying lawyers with excessive workloads; (3) setting minimum hourly rates that are relatively generous, though they remain well below the rates prevailing among retained attorneys; and (4) assuring “adequate funds for investigative, expert, and other services necessary to prepare and present an adequate defense at every stage of the proceeding, including the sentencing phase”; noting that prosecutorial requests for death sentences dropped from twenty-three per year in the two years before the reforms to ten per year in the three years afterwards; reporting agreement among state capital prosecutors and defense counsel interviewed before the data were available that the reforms (1) had improved the quality of capital defense lawyering in the state, especially by increasing the use of expert witnesses at the mitigation phase; (2) had attracted more and better defense lawyers to the work; (3) had probably generated better police and prosecutorial preparation and decreased the likelihood that the resulting (smaller number of) capital judgments would be reversed on appeal; and (4) in the words of prosecutors, “ha[d] definitely put a damper on [their] asking for the death penalty,” “put some economic judgment into the decision-making about whether to seek the death penalty,” and made them “‘think two or three times’ before filing a death penalty request,” not only because of the greater cost of trying cases but also because of the increased “risk [of] losing”; comparing the Indiana experience to that of Ohio, which adopted similar reforms but compensated defense lawyers at only two-thirds the rate in Indiana, provided funds for expert witnesses and mitigation specialists far less frequently than in Indiana, and experienced smaller declines in its death-sentencing rate than Indiana; and concluding that there is “strong[ ]” reason to believe that the “ability of defense counsel, the cost of the prosecution, and the burden on the

Philadelphia, Pennsylvania in the minority of cases assigned to the public defender;<sup>70</sup> recent reforms in Illinois;<sup>71</sup> American Bar Association standards;<sup>72</sup> and some other recent reforms.<sup>73</sup>

Jurisdictions also need to establish registries of qualified capital defense attorneys from which trial judges must select capital defense counsel. A national registry assembled by the Administrative Office of the Court is a component of a capital reform bill now pending in Congress.<sup>74</sup> Alternatively, registries may be created by individual states,<sup>75</sup> by private entities representing prosecutors and

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prosecutor's staff," which in turn are affected by the quality and resources of defense counsel, affect prosecutorial charging decisions in capital cases); cf. Matthew S. Galbraith, *State Law Seeks to Provide a Strong Defense: Most Capital Cases Are Handled Well, but Examples of Inadequate Representation Show Lapses in the System*, STAR PRESS (Muncie, Ind.), Nov. 1, 2001, available at <http://www.thestarpres.com> (last visited Jan. 17, 2002) (confirming some of Professor Lefstein's conclusions but identifying remaining "shortcomings" in the Indiana capital defense system).

<sup>68</sup> See Rimer, *supra* note 41; *supra* note 65.

<sup>69</sup> Daniel Wise, *Prosecutors Show Caution Seeking Capital Sentences*, N.Y. L.J., Sept. 13, 1999, at 1 (discussing well-funded and highly trained and qualified lawyers in New York's Capital Defender Office); see also *supra* notes 41, 65.

<sup>70</sup> *Overproduction*, *supra* note 9, at 2102 n.175.

<sup>71</sup> Jo Thomas, *New Death Penalty Rules Are Issued in Illinois*, N.Y. TIMES, Jan. 24, 2001, at A17 ("The Supreme Court of Illinois has adopted new rules governing the way death penalty cases are handled. The rules . . . set requirements for training and experience for all defense lawyers and assistant prosecutors handling the cases.").

<sup>72</sup> AMERICAN BAR ASSOC., GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES (1989).

<sup>73</sup> Flood, *supra* note 63 (discussing new requirements for capital defense lawyers in Harris County, Texas, where "first-chair" capital attorneys may be certified only after trying serious felony cases for at least five years, taking a three-day class sponsored by Harris County judges, and passing a one hundred-question multiple choice test); Sandy Hodson, *Death Row Gets Fit Counsel*, AUGUSTA CHRON., July 23, 2000, at B1 (discussing the Georgia Supreme Court's adoption, in early 2000, of new rules for defense attorneys appointed in death penalty cases, which closely resemble ABA standards, requiring ten hours of training annually for defense lawyers and directing judges to appoint defense lawyers who are "experienced and trained"); see also Maurice Possley & Ken Armstrong, *Revamp Urged in Handling of Capital Cases*, CHI. TRIB., Nov. 4, 1999, at 1 (reporting that several states "have established minimum standards for defense attorneys in capital cases," which typically "require that at least two attorneys be appointed in capital cases and that they have a certain number of years of experience in trying criminal matters").

<sup>74</sup> H.R. Res. 912, 107th Cong. (2001); S. Res. 486, 107th Cong. (2001); see, e.g., Mike Dorning, *Death Penalty Reforms Gain Backers in D.C.*, CHI. TRIB., Mar. 31, 2000, at N1; *Leahy to Introduce Innocence Protection Act*, U.S. NEWSWIRE, Feb. 4, 2000; Jim Yardley, *Death Penalty Politics: Bush Ensnared in Capital Punishment Debate*, N.Y. TIMES, Dec. 17, 2000, at WK4; see also *supra* note 58.

<sup>75</sup> Florida's recent supplementation of its state-funded Office of Capital Collateral Representation with a registry of private defense lawyers is one example, although its relatively weak standards, 840-hour cap on billable attorney hours, and mandatory agreements requiring



defense lawyers (for example, some combination of the American Bar Association, the National Association of Attorneys General, the National Association of Criminal Defense Lawyers, the National Association of District Attorneys, and the National Legal Aid and Defenders Association), by a consortium of private and public actors, or by regional organizations serving several participating states. Some of the jurisdictions listed above have created statewide or local capital defense registries of the sort contemplated here.<sup>76</sup>

Two other devices can help broaden the pool of well-qualified capital defense lawyers and improve the balance of forces at trial. The first device is a stated goal of demonstrable parity or near-parity between defense and prosecution resources. Methods of achieving this parity or near-parity include: (1) mechanisms for joint preparation of legislative budget requests by prosecutors, public defenders, and criminal trial courts and for tying funding levels for capital defense to those for prosecutors and judges;<sup>77</sup> and (2) statutes assuring adequate public defense

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lawyers to avoid making certain arguments on their clients' behalf have been a source of deserved criticism. *See, e.g.,* Jo Becker, *System May Be Slowing Appeals*, ST. PETERSBURG TIMES, July 17, 2000, at 1B (stating that the minimum qualifications for the private attorneys in the Florida capital registry "fall below those recommended by a state Supreme Court committee"); Flood, *supra* note 63 (discussing capital defense lawyer registry used in Houston, Texas).

<sup>76</sup> The salutary effects of requirements of these four types are most carefully documented in Lefstein, *supra* note 62, which combines a statistical study with the results of interviews with capital prosecutors and defense lawyers. The fact that an indigent client has secured private counsel is not necessarily a reason to deny him all financial assistance. California and Florida have recognized, for example, that providing support services (for example, necessary investigators and experts) to defendants who exhaust their own resources in the process of compensating retained counsel can save the state money by encouraging defendants to retain their own attorneys while also helping to broaden the range of available lawyers, improve the quality of capital representation, and approach defense-prosecution parity. *See* Rimer, *supra* note 41.

<sup>77</sup> *See, e.g.,* CONN. GEN. STAT. ANN. § 51-293 (West Supp. 2001) (requiring public defenders to receive salaries "comparable to those paid to state's attorney"); TENN. CODE ANN. §16-2-518 (1994) (providing that every dollar increase in funding for the "district attorney general" will be accompanied by a seventy-five cent increase in funding to the public defender's office); Alan Berlow, *The Wrong Man*, THE ATLANTIC MONTHLY, Nov. 1999, at 21 (proposing assurance of funding parity or near parity as one way to increase reliability of capital verdicts); Steven Lee, Jim Liebman, Jonathan Sacks, & Anne Voighton, *Galvanizing Gideon: Diffuse Experiments and Democratic Experimentalism in Search of Improved Indigent Defense Services* 50-55, 58-63 (June 1999) (unpublished manuscript on file with author); Spangenberg Group et. al, *Tennessee Weighted-Caseload Study 8* (Apr. 1999) (final draft report, at <http://www.comptroller.state.tn.us/orea/reports/publdef.pdf>) (devising an "empirical method of measuring the amount of work required to be performed by public defenders on . . . various types of cases" in order to determine "public defender staffing needs" and to help devise formulas for assuring parity in state funding for the prosecution and defense of the same cases). *See generally* ANDY HARDIN, *STRANGE BEDFELLOWS: A JOINT WORKLOAD STUDY FOR DEFENDERS, PROSECUTORS AND JUDGES CAN SERVE EVERYBODY'S FUNDING NEEDS* (1998).

funding.<sup>78</sup>

The second device is peer evaluation of capital defense systems and lawyers. Peer evaluation would serve a variety of goals. At a minimum, it would monitor each individual lawyer's performance in each case, with successful evaluation being a prerequisite for subsequent appointment. In addition, it could enable capital-sentencing jurisdictions to cooperatively devise workable measures of the adequacy of capital defense systems and to learn from each other's successes and failures. Finally, it would enable defense lawyers, prosecutors, and judges to examine defense systems in neighboring districts without confidentiality or other ethical problems.<sup>79</sup>

### *B. Reformed Roles for Prosecutors, Trial Judges, Jurors, and Appellate Courts*

Improved counsel is necessary, but it is not sufficient. Other needed improvements include: (1) a longer waiting period before prosecutors decide whether to proceed capitally in murder cases, during which a meaningful exchange of information and plea bargaining with defense lawyers can take place; (2) police and prosecutorial open files policies that cover, among other things, the

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<sup>78</sup> See, e.g., MINN. STAT. ANN. § 611.27 (West Supp. 2001) (ordering the state commissioner of finance to pay for necessary expenses in indigent defendants' appellate and post-conviction cases when the state public defender's office does not have sufficient funds); NEV. REV. STAT. ANN. 34.750 (Michie 2001) (requiring allocation of funds from the "statutory contingency account" to the state public defender's office if the funds appropriated to the public defender for the "necessary [defense] costs and expenses" of indigent defendants have been exhausted); cf. John North, *Revamping the Indigent Defense System Ordered*, KNOXVILLE NEWS-SENTINEL, Aug. 22, 1994, at A4 (explaining the directives of the Tennessee Supreme Court to "increase the hourly rate the state will pay private lawyers to represent poor clients" and to create a commission with the power to "recommend a complete reconstruction of Tennessee's indigent defense system").

<sup>79</sup> The subjects of peer review might include: (1) the jurisdiction's standards for determining lawyer qualifications and the number of lawyers per case; (2) its appointing mechanism; (3) its compensation and support service levels; (4) the overall, or average, adequacy and preparedness of either attorneys on the jurisdiction's roster of qualified capital-defense lawyers or of the defense teams used in particular cases; and (5) the jurisdiction's method of measuring defense/prosecution parity, or near parity, and its success in achieving that goal. If a registry system is used, the authorities responsible for that system might be given the responsibility of designing and carrying out a peer evaluation process.

Peer evaluation teams might be composed of practicing defense attorneys, and even prosecutors and trial judges from other jurisdictions. If the subject of peer review is, for example, a local county, peer evaluators might appropriately come from other counties in the state. If the subject of review is the state system, evaluators might come from other capital-sentencing states. Assistance in identifying evaluators might be provided by state and national associations of criminal defense attorneys, district attorneys, trial judges, and public financial officers.

past informing and testimonial records of jailhouse informants; (3) videotaped confessions; (4) truth-in-sentencing instructions on the actual length of time people convicted of murder must serve if they are not sentenced to death; (5) enhanced, substantive direct review of death sentences designed to define and limit capital verdicts to “core” capital cases; (6) more effective feedback to the trial officials responsible for errors leading to reversal by, for example, personally identifying the trial judges, prosecutors, and defense counsel whose mistakes caused the reversal and requiring the trial prosecutor to appear on the brief and in court as counsel of record in all tribunals in which capital verdicts are undergoing review; and, crucially, (7) collecting information—comparable across jurisdictions statewide—on each defense attorney’s, prosecutor’s, prosecuting office’s, trial judge’s, and trial court’s reversal rates on post-trial review of capital cases, and disclosing that information to the public and media. In the last regard, disclosure may occur on web sites; in court briefs and decisions addressing claimed legal and ethical breaches of recidivist defense lawyers, prosecutors, and judges; and to victims whose views are solicited on whether to charge cases capitally.<sup>80</sup>

### C. A Trade

Commentators often begin and end with a set of proposals like these.<sup>81</sup> For two reasons, I decline to do so here. First, I doubt that many jurisdictions will adopt a meaningful and adequately funded package of these reforms if the package contains only proposals like those laid out above.<sup>82</sup> Second, a comprehensive solution to the problem of an irrational displacement of costs from the trial to the review process requires a conscientious shifting of costs in the other direction.<sup>83</sup> The decisive question is whether a conscientious trade of trial for post-trial procedures can induce a meaningful reform package.

The trade I propose is a real one, unlike the ineffectual options offered by Chapter 154 of the Federal Antiterrorism and Effective Death Penalty Act of 1996<sup>84</sup> and the half-a-loaf Powell Commission proposal made in 1989.<sup>85</sup> As

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<sup>80</sup> The reforms proposed in this paragraph are discussed in detail in *Overproduction*, *supra* note 9, at 2144–54. See also *supra* note 58 (discussing the Innocence Protection Act and the proposals of the National Committee to Prevent Wrongful Executions).

<sup>81</sup> See, e.g., *Overproduction*, *supra* note 9; see also *supra* note 58 (summarizing reform packages proposed by others).

<sup>82</sup> See Steiker & Steiker, *supra* note 26, at 422–23 (discussing the temptation to adopt meaningless or window dressing reforms that either “do little to change the underlying practice but may offer the appearance of greater regularity than they actually produce,” or that make people “more comfortable than they otherwise would be with the underlying practice” and, consequently, reduce incentives for adopting further reforms).

<sup>83</sup> See *supra* notes 52–54 and accompanying text (describing the undesirable shift of costs away from trial-level actors).

<sup>84</sup> The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C.

tempting as such partial or window dressing reforms may be—especially ones that offer only minor new trial protections in return for drastic cuts in existing appellate protections—such approaches are not comparable to the comprehensive, self-evaluative, and self-correcting reforms I propose. In return for a genuine assurance of the trial and direct appeal protections outlined above, capital defendants would agree to give up state post-conviction review and a significant amount of federal habeas review.

This feature of my proposal has three objectives. First, it aims to establish trial and direct appellate protections that are improved and certain enough to convince each capital defendant, knowingly and intelligently, to trade existing post-conviction review rights for those protections. Second, the reform package is designed to be sufficiently attractive to state officials to encourage them to adopt it. To achieve this goal, the package must, among other things, compensate those officials for the loss of strategic advantages they now achieve through the state

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§§ 2261–66 (Supp. IV 1998), includes a set of “Special Habeas Corpus Procedures in Capital Cases” that substantially limit federal habeas review and relief in capital cases from “opting-in” states that put modest additional resources into the least important part of the process, namely, state post-conviction procedures. § 2261.

Notably, five years after the AEDPA’s adoption, not a single state has been willing to provide the resources needed to qualify for the significant habeas advantages the Act would then make available. 1 JAMES S. LIEBMAN & RANDY HERTZ, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* § 3.3a (3d ed. 1988 & Supp. 2000); Alexander Rundlet, Comment, *Opting for Death: State Responses to the AEDPA’s Opt-In Provisions and the Need for a Right to Post-Conviction Counsel*, 1 U. PA. J. CONST. L. 661, 708 (1999) (discussing “States’ failure to respond to the [AEDPA’s] opt-in provisions”). This reluctance implies that providing more meaningful state post-conviction review, as opposed to improved trial proceedings, is not a cost-effective strategy. These provisions have generated other criticism. See, e.g., Fred Cheesman et al., *A Tale of Two Laws: The U.S. Congress Confronts Habeas Corpus Petitions and Section 1983 Lawsuits*, 22 LAW & POL’Y 89, 90, 95, 99, 105 (2000) (drawing conclusion from a statistical study that the AEDPA has had “virtually no impact” on the number of habeas petitions filed and has had an “almost complete lack of success” in moderating the burdens such petitions place on state lawyers and the federal courts); *Overproduction*, *supra* note 9, at 2043, 2136–37; Claire Cooper, *Death Penalty Rules Blasted*, SACRAMENTO BEE, Apr. 15, 2000, at A1 (“[A] growing number of lawyers and judges say [the] AEDPA’s measures designed to improve efficiency are stalling appeals more than ever before.”); Howard Mintz, *The Capital Punishment Gridlock: Federal Reform Fails to Speed Up Process*, SAN JOSE MERCURY NEWS, Mar. 13, 2000, at 8A (concluding that, four years after its enactment, the AEDPA “has had little effect in states notoriously slow in processing death penalty appeals”).

<sup>85</sup> JUDICIAL CONF. OF THE UNITED STATES, COMMITTEE REPORT ON FEDERAL HABEAS CORPUS IN CAPITAL CASES (1989), *reprinted in* 45 CRIM. L. REP. 3239, 3242 (1989) (stating that “few would argue that the current state of death penalty administration is satisfactory,” especially in light of the fact that the current system is filled with unnecessary delays and under-qualified counsel); see also Vivian Berger, *Justice Delayed or Justice Denied?—A Comment on Recent Proposals to Reform Death Penalty Habeas Corpus*, 90 COLUM. L. REV. 1665, 1668, 1674–85 (1990) (providing careful analysis of Powell Commission report and criticizing it as a “band-aid solution” to “what ails the system”).

post-conviction proceedings the proposal will suspend.<sup>86</sup> Finally, the package

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<sup>86</sup> A plan to eliminate state post-conviction proceedings must reallocate responsibility for resolving claims—mainly of ineffective assistance of trial counsel and prosecutorial suppression of evidence—that require post-trial factual development and thus are not typically capable of being adjudicated on state direct appeal. Under federal law, states may insist that capital prisoners exhaust available state collateral remedies for these violations before asserting them on federal habeas corpus, which gives state courts the ability to preclude federal evidentiary proceedings and fact findings by providing their own (assuming theirs are, respectively, reasonable and not manifestly erroneous). 28 U.S.C. §§ 2254(b), 2254(d)(2), 2254(e) (Supp. IV. 1998). State court determinations of “mixed questions of law and fact” also get some deference in later federal habeas proceedings. *Williams v. Taylor*, 529 U.S. 362, 386 (2000) (interpreting § 2254(d)(1)). As a result, eliminating state post-conviction review while leaving no other available state remedy for ineffective assistance of counsel, suppression of evidence, and the like might sometimes replace state court with federal court responsibility for hearing evidence and deciding factual and “mixed” questions. Resistance to ceding this advantage might deter states from adopting reforms of the sort proposed here. There are three alternative ways to approach this issue.

First, states might expand direct appeal to include claims of ineffective assistance of counsel, suppression of evidence, and similar issues based on evidence outside the record. Doing so would preserve the states’ access to federal habeas rules requiring exhaustion of available state remedies while affording presumptive finality to state court hearings and factual and “mixed” determinations on these issues. This “unified appeal” solution has serious disadvantages, however. It gives up many of the savings from eliminating state post-conviction review because it retains important aspects of that review and simply fuses them onto direct appeal. Moreover, because an appellate lawyer cannot ethically litigate his or her own “effectiveness” at the trial of the same case, unified appeal procedures force states to appoint *new* lawyers on appeal. (Absent unified appeal, most states use the *same* defense lawyers at trial and on appeal.) As a result, the unified appeal process nearly doubles the number of lawyers needed to staff capital cases, and it increases the time and cost of appeals as new appellate lawyers familiarize themselves with the case. Because states have a constitutional duty to provide and fund “effective” appellate, but not post-conviction, lawyers, unified appeals increase counsel costs and the likelihood of post-appeal claims of the denial, or ineffective assistance, of appellate lawyers. Unified appeals thus force something like the enhanced collateral review that the 1996 Antiterrorism Act invited states to adopt in return for tactical advantages in habeas proceedings but that all states have thus far declined to adopt. *See supra* note 84.

California’s experiment with unified appeal procedures is instructive. Although California has eliminated state post-conviction review and combined it with direct appeal, its appeals process now takes *longer* than in virtually any other state. The main bottleneck is an average delay of *four years* after trial ends and before the appeal begins. During this period, state judges search for appellate lawyers willing and able to take the case, and the new lawyers review the trial record and begin preparing briefs. In non-unified appeal states, by contrast, the transition period from trial to appeal typically lasts a few weeks—the time it takes court reporters to prepare the record of trial. *See, e.g.,* Fox Butterfield, *Behind the Death Row Bottleneck*, N. Y. TIMES, Jan. 25, 1998, at WK1 (noting that because of a shortage of money for appellate attorneys, California capital defendants wait an average of four years to be assigned a new appellate lawyer and thus to *begin* their appellate proceedings); Paul Elias & Rinat Fried, *A Failure to Execute*, THE RECORDER, Dec. 15, 1999, at 12 (concluding that the counsel

attempts to solve the monumental “transition” problem presented by the 3,700 people currently on death row.<sup>87</sup> Because these people will not benefit from trial-level reforms, they have no reason to agree to reduced post-conviction review. They consequently will continue to require both existing levels of post-conviction spending and attention from the anti-death penalty bar for many years to come. This in turn will discourage the adoption of reforms that are likely to be attractive and effective only if they *cut* review costs and attract the anti-death penalty bar *away* from post-conviction review. The main mechanisms for achieving all three of these goals are three case-level markets for death penalty reforms—two focused on new capital cases and the other focused on preexisting ones.

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bottleneck at the beginning of California capital direct appeals is partly responsible for the fact that “[s]ince 1978, when . . . California . . . reinstat[ed] the death penalty, 647 men and women have been sentenced to death” but “[o]nly eight have been executed” and “[n]early four times as many . . . have died in San Quentin of causes other than execution”); Howard Mintz, *Slow Death: The Capital Punishment Gridlock*, SAN JOSE MERCURY NEWS, March 13, 2000, at A1 (citing similar statistics). As of 1995, 21% of the men and women on death row across the nation were awaiting direct appeal; in California, the comparable number was 47%. *A Broken System*, *supra* note 1, at 84, A-15, A-63.

A second approach allows one round each of state appellate and federal post-conviction review. This approach, which was used for a time in Arkansas, is now used by all states when they opt to “waive” the exhaustion rule in particular cases. 28 U.S.C. §§ 2254(b)(2), (3) (Supp. II 1996) (permitting state lawyers to waive the exhaustion requirement); *Granberry v. Greer*, 481 U.S. 129, 131 (1987) (also allowing state lawyers to waive the exhaustion requirement); 2 JAMES S. LIEBMAN & RANDY HERTZ, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* § 23.2a (3d ed. 1988 & Supp. 2000) (citing numerous cases in which states waived exhaustion). This strategy allocates all post-conviction claims—i.e., claims based on evidence outside the trial record, such as ineffective assistance of counsel—to federal habeas review. Because the switch to this system is preceded by substantial improvements in the qualifications (training and experience) and funding (compensation and support services) for defense counsel in capital cases, the likelihood of successful ineffective assistance claims declines substantially. The decrease in habeas relief helps compensate states for giving up the tactical advantage of presumptively decisive state court hearings and decisions of factual and “mixed” questions. Given evidence that federal judges are no more prone to grant relief than state courts, see *A Broken System*, *supra* note 1, at 39, and given recent legislation, such as the AEDPA, narrowing the time for and breadth of federal habeas review, the tactical advantage from state rather than federal evidentiary proceedings may be small in any event and worth ceding in order to achieve the significant cost and time savings from a system of one state appeal and one federal post-conviction review.

A third option is the one proposed here: to limit the number of “post-conviction claims” (based on facts outside the trial record) that appellants can raise in any state or federal post-trial proceeding. Because eliminating cognizable claims directly benefits states, without requiring the creation of cumbersome alternative post-trial inspection regimes, it is more likely to be attractive to states and effective in rationalizing the process.

<sup>87</sup> NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., *supra* note 17, at 1.

### 1. *Inducing Meaningful, Politically Palatable, Trial-Level Reforms*

If convicted, capital defendants have a right under existing law to raise every adequately preserved federal constitutional claim of trial error in both a state post-conviction and federal habeas petition.<sup>88</sup> These rights are certainly valuable. But they are less valuable than an immediately enforceable assurance of a fair trial in the first place.<sup>89</sup> If a fair-trial assurance is strong enough, therefore, properly advised criminal defendants should be willing to opt *into* a package of improved enforceable trial and direct appeal rights in return for opting *out of* the right to state post-conviction and federal habeas review that the package of new trial rights is designed to supplant.<sup>90</sup> For example, capital defendants assured of, among other things, the appointment of first- and second-chair attorneys from a registry of well-qualified lawyers who are adequately compensated and have received favorable periodic peer reviews, should be willing to waive state post-conviction review entirely and federal habeas review of right to counsel and ineffective assistance of counsel claims. The waiver would be contingent on two things: (1) the fully advised defendant's conclusion at the beginning of the process that what he gets is worth more than what he gives up; and (2) if the defendant is convicted, a post-trial judicial determination on federal habeas

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<sup>88</sup> See, e.g., *Herrera v. Collins*, 506 U.S. 390, 403 (1993) (habeas review is available for "any constitutional violation which had occurred at the first trial").

<sup>89</sup> Consider claims of ineffective assistance of counsel. This claim is a frequent basis for post-conviction relief in capital cases, but it is made far more often than it succeeds. This is because the legal standard for ineffective assistance includes a strong presumption of attorney competence and places a heavy burden on the defendant—a burden the Supreme Court has found satisfied only once. Compare *Williams v. Taylor*, 529 U.S. 362 (2000) (finding that ineffective assistance of counsel was proven), with *Lockhart v. Fretwell*, 506 U.S. 364 (1993), *Burger v. Kemp*, 483 U.S. 776 (1987), and *Strickland v. Washington*, 466 U.S. 668 (1984) (all rejecting ineffective assistance of counsel claims). To prevail on an "ineffective assistance" claim, a habeas petitioner (1) must "identify acts or omissions of counsel that are . . . not . . . the result of reasonable professional judgment [and that], in light of all the circumstances, . . . were outside the wide range of professionally competent assistance," and (2) must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 687–88, 690, 694. The vast majority of ineffective assistance claims are denied because (1) the defendant fails to prove, after the fact, that poor lawyering affected the trial outcome, or (2) the lawyer's challenged conduct is held to be the result of a tactical or strategic judgment, which immunizes it from a finding of unreasonableness. Given the vagaries of proving ineffective assistance on habeas, defendants should be willing to waive the chance to try in return for a strong assurance of well-qualified representation in the first place.

<sup>90</sup> Counsel appointed under either the pre-existing system or the new system would have a conflict of interest in advising the defendant, respectively, either to stick with the old trial system and not waive post-conviction rights or to opt into the new system and waive those rights. As a result, the state, or the bar on a voluntary basis, would have to supply attorneys to serve the single, preliminary role of advising defendants of what their rights would be under the pre-existing system and the new system so the defendant could make an informed decision.

corpus that he indeed got what he bargained for—two attorneys with the specified qualifications, compensated at the specified levels, and so forth.<sup>91</sup>

The proposed reform package thus would include its own litmus test of the reforms' value to capital defendants. In order to become operational, the reforms would have to provide an assurance of procedural fairness strong enough to induce criminal defendants to choose the reforms over some of their existing rights to post-conviction review. To emphasize the importance of causing substantial proportions of capital defendants to "vote with their feet" by opting into the new regime and out of the old one, the legislature should discontinue the entire reform package unless a majority of all capital defendants choose the new regime during a specified period of time.

But if the reforms are so valuable to capital defendants, why would states adopt them? First, abolishing state post-conviction review and limiting federal habeas corpus would greatly benefit states. State post-conviction review would be eliminated entirely in capital cases, instead of requiring the prolonged litigation it

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<sup>91</sup> The following parallel lists illustrate the kinds of trade-offs that would be included in the reform package:

*Three Exemplary Fair-Trial Components of a Meaningful Reform Package:*

1. Appointment of one "well-compensated" and "well-supported" first-chair attorney and one "well-compensated" and "well-supported" second-chair attorney from a list of "well-qualified" capital defense attorneys who have had successful periodic peer reviews through the time of trial and for some reasonable period of time thereafter. "Well-qualified," "well-compensated," and "well-supported" are defined by statute in clear, objective terms.
2. Defendant's ability, no later than a specified date before trial, to inspect all unprivileged documents and evidence on the relevant crime in police and prosecutor files.
3. Use at trial of legislatively specified, fair, and comprehensible instructions on: each element of capital murder; the state's burden of proof in regard to elements of the offense; the definition of each statutory aggravating factor alleged to be present in the case; the jury's obligation to determine whether, notwithstanding the presence of one or more aggravating factors, the mitigating factors outweigh the aggravating factors; each juror's obligation to assess the existence and weight of aggravating factors; and the parole consequences of a sentence other than death.

*Three Parallel Claims that Defendants Might Be Asked to Waive When They Opt into the Reforms:*

1. Denial of pretrial and trial counsel; ineffective assistance of trial counsel.
2. Prosecutorial suppression of exculpatory and impeachment evidence and other discovery-related violations.
3. Constitutionally invalid instruction on: each element of capital murder; the state's burden of proof in regard to elements of the offense; the definition of each statutory aggravating factor alleged to be present in the case; the jury's obligation to determine whether, notwithstanding the presence of one or more aggravating factors, the mitigating factors outweigh the aggravating ones; each juror's obligation to assess the existence and weight of aggravating factors; and the parole consequences of a sentence other than death.



now consumes in every case. Moreover, one or more of the claims designated for waiver under the proposed system is raised in nearly every capital prisoner's federal habeas petition. Between 1973 and 1995, those claims—denial of counsel, ineffective assistance of counsel, prosecutorial suppression of exculpatory evidence, and constitutionally invalid jury instructions—accounted for about 75% of the grants of state post-conviction and federal habeas relief.<sup>92</sup> Moreover, federal habeas corpus would not be truncated by the usual method of adding procedural roadblocks—which often also *adds* litigation time<sup>93</sup>—but instead by eliminating altogether the most frequently litigated habeas claims.<sup>94</sup>

Nevertheless, the trial-level actors who now freely receive the concentrated benefits of the existing system<sup>95</sup> might oppose any such package of reforms. And their views are likely to carry great weight with state legislators. The solution is to extend the market for reforms to prosecutors, allowing them also to decline the reformed system. Concerns that no jurisdiction will opt into the reform package ignore a crucial discovery of both our study and others: Different jurisdictions within each capital-sentencing state have very different attitudes about the death penalty. Some counties use the death penalty sparingly; others use it lavishly.<sup>96</sup> Presumably, the former would gladly accept state money to help them do what they try to do anyway: use trials to reliably distinguish the few “core capital offenses” from the many peripheral and clearly noncapital cases. And, once opting-in counties begin reaping the benefits of state subsidies, faster post-trial review, and lower reversal rates for their dwindling number of death sentences, officials in jurisdictions that do not opt in might come under pressure to explain their decision to decline those benefits.

Moreover, legislatures should consider adopting a modest stick to complement the carrot of state funding.<sup>97</sup> For example, states could require

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<sup>92</sup> *Capital Attrition*, *supra* note 1, at 1850.

<sup>93</sup> CRIMINAL JUSTICE SECTION, AMERICAN BAR ASS'N, TOWARD A MORE JUST AND EFFECTIVE SYSTEM OF REVIEW IN STATE DEATH PENALTY CASES: A REPORT CONTAINING THE AMERICAN BAR ASSOCIATION'S RECOMMENDATIONS CONCERNING DEATH PENALTY HABEAS CORPUS AND RELATED MATERIALS FROM THE AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION'S PROJECT ON DEATH PENALTY HABEAS CORPUS 94–95 (Ira Robbins ed., 1990) (noting the “lengthy and time-consuming litigation of threshold questions,” “Sisyphean . . . procedural” maneuvers, and “satellite proceedings” that procedural limitations on federal habeas review have generated in an effort to “prevent the federal courts from reviewing [the merits of] constitutional claims,” thereby “delay[ing] the process of . . . review”).

<sup>94</sup> Waivers would be effective only if the specified trial component was actually afforded, but, as in the examples given in the text, that question in most instances could be answered instantaneously from the trial record or a police officer's or prosecutor's certificate.

<sup>95</sup> See *supra* notes 32–37 and accompanying text.

<sup>96</sup> See, e.g., *Overproduction*, *supra* note 9, at 2068–70 n.114; Richard Willing & Gary Fields, *Geography of the Death Penalty*, USA TODAY, Dec. 20, 1999, at 1A (finding that “[f]ifteen counties account for nearly a third of all prisoners sentenced to death [in the United States] but only one-ninth of the population of the states with capital punishment”).

<sup>97</sup> Or, after a predetermined waiting period, all jurisdictions with capital case reversal rates

jurisdictions that do not opt for the reforms to pay a percentage of the court costs in any case in which a post-reform capital verdict from their jurisdiction is reversed.<sup>98</sup> Even if the monetary penalty is nominal, it would amplify the warning signal sent to counties that both fail to opt into the new reforms and continue to have high error rates.

## 2. *Taming Transition Costs*

Thus far, I have evaluated the viability of a system of elective reforms only from the perspective of the system's effect on new cases. But what of the 3,700 old cases that will continue to impose the costs of the old-style, full-blown system of post-trial review on states, even while the state is trying to divert resources to the reformed trial process? It is the grueling, often mutually enraging demands of these preexisting cases that usually drive the reaction to reform proposals by both prosecutors and the anti-death penalty bar. Prosecutors fear that meaningful trial-level reforms will cast a cloud over the existing, pre-reform death verdicts. Defense attorneys oppose appellate-level reforms, even nonretroactive ones traded for real trial-level reforms. They worry that the impression that all trial-level problems have been solved will cause reviewing courts and the public to stop scrutinizing pre-reform death sentences.

An elective scheme might solve this problem by creating incentives for states' attorneys to offer or secure pleas in pre-reform cases to life imprisonment without parole, or some lesser sentence, in return for an agreement on the prisoners' part to waive all further appeals.<sup>99</sup> Many permutations are possible. For example, consider a law that gives prisoners serving pre-reform death sentences a brief opportunity in which to apply for a recommendation from an existing or ad hoc state board that they receive a lesser sentence, such as life without parole, in

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above the statewide average in the two previous years might be required to pay a percentage of the court costs in cases in which reversals occur. Opting for the reforms should enable jurisdictions to restart the clock.

<sup>98</sup> At a minimum, jurisdictions that do not opt in should have to pay such costs if, after an initial period, capital verdicts coming from their jurisdiction are reversed more often than the statewide average. The money might go into a fund to defray the costs of the new reforms.

<sup>99</sup> Another presenter at this Symposium has recently made a similar proposal:

Justice Paul E. Pfeifer of the Ohio Supreme Court recently suggested taking a closer look at the state's death penalty. A sponsor of Ohio's 1981 capital punishment law, Pfeifer, a Republican, has reconsidered his position and now votes against executions.

In April . . . Pfeifer called for Gov. Bob Taft to form a panel to evaluate all 201 Death Row cases to see how many could be commuted to life in prison without parole.

"We know we're not going to execute all these people on Death Row," Pfeifer said.

Alan Johnson, *Ohio Study of Execution Law Sought*, COLUMBUS (Ohio) DISPATCH, June 18, 2001, at A1.

return for waiving all future appeals.<sup>100</sup> Applications might be based on: the likelihood of success in post-trial review and retrial proceedings, doubts about guilt of the capital crime, the relative aggravating and mitigating factors, or reason to believe that a lesser sentence would be imposed if the case were tried under the newly reformed regime.<sup>101</sup> The board would then identify some predetermined and fairly large percentage of the applicants for whom a plea arrangement is most appropriate, given the relatively high likelihood of reversal or the relatively weak case for death.<sup>102</sup> At that point, local prosecutors could, for any or no reason, reject a plea in any case on the board's list. If prosecutors rejected a plea, however, their districts would have to pay half of the state's litigation and adjudication costs if the relevant death sentences were later overturned.<sup>103</sup>

The hope is that the market in settlements would be largely self-regulating. Prisoners would have an incentive to apply only if they thought there was a chance the board might endorse a plea in their case. Prosecutors would have an incentive to follow the board's recommendation in cases in which they agree with it or at least think there is a reasonable chance of either reversal or clemency. Courts and clemency officials might pay some attention to the board's recommendation, though uncertainties in the process and standards would moderate that effect. Overall, reopening cases to this extent would give prosecutors a chance to apply the heightened post-reform standards in re-evaluating pre-reform cases without entirely forcing their hands.

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<sup>100</sup> Filed with the application would be proof that the prisoner has been properly advised and has agreed to accept the proposed plea in return for waiver of all future appeals.

<sup>101</sup> Prosecutors, victims, or others could respond, although the board would not be permitted to give any weight to a prosecutor's statement that he or she would not accept any plea that might be offered in a particular case.

<sup>102</sup> If the board recommends a plea to a higher sentence than the prisoner agreed to, the prisoner need not accept the plea. The board's recommendation or refusal to make one could be brought to the attention of a reviewing court (and later to clemency officials) but would be due no deference in court and would not have to be explained in any administrative "decision."

<sup>103</sup> The prosecutor's acceptance of the board's proposal would immunize the district from any costs upon reversal. Money received from non-opting-in counties following reversal would go into a fund to defray the costs of the new reforms. Plea agreements directly between prosecutors and death row inmates, without the intervention of the administrative board, would also be authorized and might be used in lieu of pleas on the board's list.

Alternatively, local prosecutors could be authorized to reach plea agreements with death row prisoners in which the prisoners accept a sentence of life without parole in return for waiving all further appeals. The state's attorneys could decline to enter into any such agreements, but districts with three or more death row inmates that fail to offer qualifying pleas to at least one-half of those inmates would be required to pay some substantial proportion of the state's litigation costs if any pre-reform death sentence is overturned. Districts with two pre-reform death row inmates that fail to offer a plea to at least one such prisoner would also be subject to these costs.

## IV. CONCLUSION

Arguably, high rates of serious error in capital cases reveal problems whose scope and extent are too ambiguous to support any changes. On the other hand, the problems they reveal might be so serious, and have causes so inscrutable or incurable, that only a temporary or permanent ban on executions will suffice. Both arguments have been made recently.<sup>104</sup> But the outpouring of concern about the death penalty leading up to, and the myriad reform proposals made during, the 2001 state and federal legislative cycle<sup>105</sup> reveal substantial dissatisfaction with the status quo. And the rough sledding those reform proposals have encountered in some states suggests the need there for more finely tuned proposals. In that spirit, and for the consideration of the more adventuresome, reform-minded states, I offer these more comprehensive and nuanced proposals.

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<sup>104</sup> Compare Steiker & Steiker, *supra* note 26, at 421, with *Ensuring Competent Counsel in Death Penalty Cases: Hearing before the Senate Judiciary Committee on Protecting the Innocent*, 107th Cong., June 27, 2001, available at LEXIS, Legislation & Politics, U.S. Congress, Committee Hearing Transcripts (testimony of South Carolina deputy prosecutor Kevin Brackett) (explaining that the proposed Innocence Protection Act of 2001, H.R. Res. 912, 107th Cong. (discussed *supra* note 58):

... is premised on the supposition that incompetence and underfunding [of defense counsel] are rampant through the system. I know that this is the position taken by those who are opposed to capital punishment under any circumstances. I do not believe that an objective study of capital punishment in this country would support this premise, however. It would be much more practical to undertake a thorough, objective assessment of the system first, and then proceed to recommend positive changes).

<sup>105</sup> See *supra* notes 57–58 and accompanying text.