Research on the Death Penalty: Comment

Assessing Capriciousness in Capital Cases

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In their article in this symposium Berk, Weiss, and Boger (1993) have presented a unique approach in the examination of the issue of capriciousness in capital charging decisions. They define capriciousness as one of two forms of arbitrariness. One form of arbitrariness, discrimination, concerns the use of inappropriate factors such as the defendant's social class or victim's race. In the second form of arbitrariness, capriciousness, it is not the use of inappropriate factors that is problematic; rather it is the inability to identify the factors that "meaningfully" differentiate the few defendants given a capital charge from the many who could have been charged with a capital crime but were not.[1] Berk and his colleagues only concern themselves with capriciousness.

[1] It might also be considered capricious rather than discriminatory if the capital charging decision was systematically based on an impermissible factor such as the jurisdiction within the state where the charging takes place, the particular prosecutor the case was assigned to, or some other arbitrary variable. Traditionally, an examination of discriminatory treatment has focused on such usual suspect variables as race, social class, and gender. There is no conceptual reason, however, why one could not also refer to discrimination by place or decisionmaker. This conceptual dispute is not important for the concerns of Berk and his colleagues' article and my own comments. This dispute involves more than a disagreement over the type of arbitrariness involved here. There may be disagreement that such differential treatment reflects any form of arbitrariness at all. Is it arbitrary, for example, for different jurisdictions to have different capital charging rates? Such within-state variation may simply reflect (legitimate?) differences in local moral sentiments. These more important conflicts over the nature and substance of capriciousness do affect the arguments put forth in both of our articles but cannot be resolved here.

In making their charging decisions, prosecutors have traditionally been given abundant and virtually unreviewable discretion (Alschuler 1968). Even in homicide cases, charging discretion is exercised with great frequency. Prosecutors charge homicide defendants with a capital crime in only a small proportion of death-eligible[2] cases (Baldus et al. 1990; Berk et al. 1993). The issue of charging capriciousness concerns our attempt to understand why some defendants are charged with a capital homicide while others are not. Theoretically, since not all death-eligible homicides result in a capital charge, the prosecutor should reserve it for only the most heinous offenders and those cases where the evidence is more incontrovertible. This implies that the prosecutor's charging decision should be reasonably determined by relevant case characteristics such as the brutality of the offense, the criminal history of the defendant, and the strength of the evidence.

In attempting to retrospectively "predict" prosecutors' charging decisions, researchers such as Berk and his colleagues have found that the case factors they have examined cannot explain a great deal of the variation in such decisions across offenders. That is, even accounting for important case characteristics, it appears as if the charging decision is, to a large extent, a matter of chance or luck. The element of chance takes the form of charging inconsistency; different offenders are not treated differently and like offenders are not treated alike. More specifically, some defendants are charged with a capital offense while similarly culpable others are not, and others far less culpable are.

Capriciousness in the capital punishment system, therefore, has been taken by Berk and his colleagues to be reflected in the amount of unexplained variation in prosecutors' decisionmaking. To the extent that the outcomes of prosecutors' charging decisions are not fully or reasonably "predicted," that is, to the extent that defendants' fates are influenced to some degree by chance or luck, they have likened the process to a lottery. They then illustrate the lottery analogy by analyzing a set of capital charging data from San Francisco (California is an active death penalty state). They believe that their empirical results are consistent with the lottery analogy and conclude that the outcomes of the charging process at work are indistinguishable from those that would have been produced had the charging been conducted as a lottery.

There is much to commend in Berk and his colleagues'

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[2] A homicide is death eligible when it satisfies a state's statutory requirement for a capital offense. In California, for example, a death-eligible homicide must involve a murder plus one or more "special circumstance" listed in the statute. One such special circumstance would be the commission of another felony (e.g., rape, or armed robbery) in addition to the murder.

work. I would like to offer two observations of my own about their capriciousness argument.

First, I offer a more skeptical view of their charge that unexplained variation in capital charging decisions can be taken as evidence of capriciousness. In my argument, it is important to roughly calibrate the amount of capriciousness that may be at work in a capital charging system. Is the system completely based on chance and therefore rife with inconsistency? Or is there a good deal of rationality to it? In addition, in my more skeptical position it is necessary to be convinced that the observed unexplained variation is really due to chance. What may appear as unexplained variation in prosecutors' charging decisions may be due to things other than luck or chance. It may reflect the failure of the researcher to adequately specify the statistical model or the effect of difficult-to-capture but appropriate charging factors. I will suggest that in order to understand the problem of charging capriciousness we need to complement Berk and his colleagues' focus on the distribution of the conditional probability of a capital charge with a critical examination of the amount of inconsistency and the composition of the error term.

In response to Berk and his colleagues' charge of capriciousness I offer the counterargument that their data analysis indicates that a *rough consistency* in treatment has in fact been achieved in the San Francisco prosecutor's office. When measured by available case characteristics, Berk et al.'s own analysis reveals that offenders of different culpability are treated differently. In their multi-urn analogy, offenders who commit more heinous homicides are placed in urns where they face a substantially higher probability of being charged with capital murder than those committing less egregious crimes. There is nothing compelling in the size or distribution of these urns to suggest that the driving force behind the charging process is chance. Equally important, however, is the fact that in this multi-urn lottery, offenders within urns are treated consistently because while they do not share the same ultimate fate, they do share the same *expected penalty*. The multi-urn lottery they describe is also fair, then, because like cases are treated alike; it imposes equal odds on equal elements within each urn. I also suggest that statistical recreations of the charging process may inflate the amount of capriciousness that exists.[3] Some unknown but perhaps substantial part of the unexplained variation they observe in this multi-urn lottery might very well be

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[3] I must admit here that I have estimated statistical charging models of my own and have similarly concluded that a considerable amount of capriciousness exists (Paternoster & Kazyaka 1988, 1990). My comments now reflect a profound rethinking about the nature and sources of capriciousness in the capital punishment process.

due to unexamined factors and legitimate charging factors that are very difficult for researchers to calibrate.

My second observation is that the rough consistency that I perceive in the San Francisco charging study reported by Berk et al. (and my skepticism about the composition of the "error" term) is important in validating the charging system as an instance of pure procedural justice. My position is that since the charging system *tends* to treat like cases alike, in a decisionmaking realm where a just or fair outcome is morally elusive, this rough consistency may be enough to treat (almost) any outcome reached by these charging procedures as fair, ipso facto.

I conclude by briefly discussing the implications of viewing existing charging systems as instances of pure procedural justice and what this implies about the nature of capriciousness in capital charging.

I. Empirical Evidence of Capriciousness in Capital Charging

In their article Berk and his colleagues have argued that a capricious capital charging system would be analogous to a lottery. This is a characterization with which at least two Supreme Court justices would agree.[4] In a pure lottery the determination of the "winner" (and losers) is determined by chance and therefore is not dependent upon any personal attribute. As an illustration of how one such lottery could operate in the domain of capital charging, Berk et al. discuss the case of a single urn. Within this urn are ten *identical* balls, three red balls and seven white balls. For every death-eligible homicide defendant the decision to charge a capital or noncapital offense is made by shaking this urn and blindly selecting a single ball with replacement. If the ball is red, the defendant is charged with a capital offense; if white, she is charged with a noncapital homicide. In this particular system the proportion of all defendants charged with a capital offense is 30%. More important, each individual offender would have the same probability of a capital charge (.30). In this single-urn scheme there are no offenders who have either a lower or higher probability.

If a capital charging system were to work precisely the way Berk et al.'s one-urn model does, there would be convincing evidence that it indeed was a capricious one. In this one-urn type of lottery homicide defendants are truly "exchangeable" because offense and offender attributes do not affect the

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[4] In his opinion in the case of *Furman v. Georgia* (1972), Justice Brennan likened the Georgia scheme of allocating capital punishment to a lottery. In his own *Furman* opinion, Justice Stewart complained that being sentenced to death in Georgia had the same degree of rationality as being struck by lightning. The Georgia statute in operation produced capital sentences that he described as "wanton" and "freakish."

probability of selection (the balls are identical). That is, regardless of substantial differences in their culpability, homicide defendants are treated as a completely homogenous group, and the selection of who gets charged with a capital offense is truly a matter of chance. There would be little dispute that a one-urn scheme such as this would be capricious.

Berk and his colleagues then discuss the more likely case of a many-urn model of charging. In this multi-urn scheme there are several urns, with different proportions of red and white balls in each urn reflecting differing probabilities of a capital charge. Defendants are assigned to a particular urn on the basis of their culpability; those committing very aggravated homicides are assigned to urns with a larger number of red balls while those committing less aggravated murders are placed in urns with fewer red balls. As with the one-urn case, the charging decision is made by shaking the urn and blindly selecting a ball with replacement; if a red ball is picked, the defendant is charged with a capital offense. The probability of a red ball being selected does, of course, depend on the particular urn one is using, but once in an urn a defendant's selection is presumed to be a matter of chance.

Berk and his colleagues argue that a consideration of the *distribution* of these urns would be very useful in understanding capriciousness in the capital charging system. A hypothetical charging system in which most urns were clustered near a probability of 0 or 1 would not appear to be very capricious. In this case a large proportion of egregious offenders would be given a capital charge and a large proportion of far less blameworthy offenders would not. A different hypothetical charging system consisting instead of a large number of urns that cluster around a capital charge probability of .50 would be more conclusive evidence of capriciousness. In this latter case, *ceteris paribus*, one half of offenders committing comparable crimes are charged with a capital offense. Implied in this distribution of probabilities is that the decision to charge a defendant with a capital crime is comparable to a coin flip (50–50).

While the urn analogy is very helpful in conceptualizing capriciousness, hypothetical urn schemes only go so far. The critical question is, What kind of urn scheme characterizes real capital charging systems? Although single-urn and some multi-urn schemes may make a convincing case for capriciousness, there is no evidence to date to suggest that capital charging systems actually operate in this clearly lawless fashion. What kind of urn scheme characterizes "real-world" capital charging systems? Berk et al.'s empirical analysis of their San Francisco data reveals the existence of a complex multi-urn scheme. In their Figure 1, we see that a large proportion of cases fall into urns where the conditional probability of a capital charge is

quite low (probability less than .25), and a smaller proportion of cases fall into urns where the conditional probability is quite high (probability greater than .75). There are also a large number of urns where the conditional probability of a capital charge is far less certain (probability between an approximate range of .30 to .70). What does this urn scheme tell us about capriciousness among San Francisco homicide cases?

The first observation I would like to make is that once an appeal is made to the viability of a *multi-urn* scheme such as that found in Berk et al.'s analysis, we must be careful about characterizing it as a pure lottery. The San Francisco data are not compatible with the notion of a hypothetical single urn wherein each element is "exchangeable." Clearly, these data show that there are defendants with very different conditional probabilities of a capital charge. Nor do we have the multi-urn scheme where there are a large number of urns whose conditional probabilities cluster around .50. The conditional probabilities in these urns range from 0 to over .80. In fact, in at least one very important sense, the urn scheme portrayed in Berk et al.'s Figure 1 belies the existence of a pure lottery.

In understanding this, it should be kept in mind that in Berk et al.'s San Francisco study the placement of offenders into a particular urn does not come about as the result of a random process. Instead, Berk et al.'s own empirical results reveal that with a knowledge of certain case characteristics defendants can be sorted into meaningful categories or urns whose conditional probabilities of a capital charge vary substantially. Clearly, in Berk's San Francisco lottery some things do matter, and the things that matter are legally relevant (number of victims, brutality of the offense, criminal history of the offender).[5]

As Berk et al. note, what their multi-urn scheme illustrates is that there is substantial defendant heterogeneity across urns. What we have, then, is not a pure form of lottery but a *conditional lottery*. The notion of a conditional lottery implies that we can first successfully group offenders into meaningfully ordered categories of culpability. The process of assigning offenders to urns, then, does not operate as a lottery. Rather, urn placement is a function of culpability or moral blameworthiness. Further, the distribution of these urns suggest that at least for most homicide defendants in San Francisco the charg-

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[5] It is true that the Berk et al. study also reveals that the capital charging decision is also affected by extralegal characteristics such as the race of the victim and offender and the victim's gender. These findings are not at issue here, however, because they provide evidence of discrimination at work, not capriciousness. As I suggested in note 1, however, if their findings suggested that other factors were at work, such as the particular judicial jurisdiction within the state where the case resided, it would be more problematic if such findings constitute evidence of discrimination, capriciousness, or the exercise of legitimate prosecutorial discretion.

ing decision is not at all like a coin flip. Those defendants who commit highly aggravated murders are far more likely to be charged with capital murder than those committing unaggravated murders.

What I think the San Francisco Prosecutor's Office has successfully accomplished, then, is a *rough consistency* between deserved treatment and received treatment. Murder defendants who are by case characteristics more blameworthy are more likely to be charged with a capital crime. While it is true that some defendants who commit low aggravation homicides are charged with a capital offense and some who commit very aggravated homicides are not so charged (a point I will examine momentarily), it is still nonetheless the case that the system *tends* to treat different cases differently, and in a rational manner.

While we may find some solace in the fact that more culpable defendants *generally* receive a more punitive charge, it may disturb us that this is not always the case. As noted above, some low-culpability defendants are charged with a capital offense when most are not and some high-culpability defendants are not charged with a capital offense when most are.[6] Moreover, there is the issue of the large number of urns in which the likelihood of a capital charge is far less certain than at the margins (probability between .30 and .70). A given defendant's placement into a particular urn, therefore, may only be partially determined by relevant case characteristics. Moreover, since offenders in each urn are presumed to be homogenous, selection from *within* an urn to be charged with a capital offense is based on chance. These observations, if true, would suggest that in spite of some rationality, there remains a great deal of unpredictability in the capital charging system.

To examine this issue, we should call to mind how the number and distribution of urns were created. The distribution of charging probabilities illustrated in Berk et al.'s Figure 1 (and their accompanying multi-urn analogy) is derived from a logistic regression equation of the following form:

$$Y^* = x\beta + u,$$
$$Y = 1 \text{ if } Y^* > 0,$$
$$Y = 0 \text{ if } Y^* \leq 0,$$

where Y^* represents the prosecutor's charging decision in a

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[6] We find the former more troubling than the latter. When a few high-culpability defendants are not given as punitive a treatment as other defendants of equivalent culpability, we consider such cases as isolated instances of mercy, something not offensive to the Constitution. We are more likely to view as capricious those instances when low-culpability defendants are given a more punitive sanction than similarly situated defendants. Both kinds of inconsistency, however, make up the total amount of capriciousness in a charging system.

particular case, x represents a vector of variables,[7] β a vector of coefficients, and u represents an error term that is assumed to be stochastic.

An assumption of this model is that most of the important factors used by San Francisco prosecutors in making their charging decisions have been included in the equation. In this case, the error term, u, reflects the element of chance. Berk et al.'s model did contain several important explanatory variables (number of prior felonies and homicides, the victim-offender relationship, the number of victims). There may, however, be important determinants of the prosecutor's charging decision that were omitted from the estimated equation, such as the quality and strength of the evidence, public clamor for punitive treatment, and the quality of defense counsel. Prosecutors' charging decisions are also undoubtedly influenced by various subjective factors ("judgment calls") that are legitimate but cannot easily be measured and so are also not included in the model. In addition to having all or most of the correct variables, the estimated equation should also contain the correct functional form of the model. The correct model, for example, may contain interactive terms and other nonlinear components. If these terms are omitted from the estimated model, the error term will not just reflect chance but will contain the influence of these omitted factors. If this is indeed the case, defendants within urns will not be homogeneous as assumed but will differ on these other legally relevant but unmeasured factors. If these unmeasured factors had been included in the model, the amount of heterogeneity within a given urn would be reduced, the number and distribution of the urns would be different, and the amount of unexplained variation and capriciousness would consequently be diminished. What this means is that our differentiation of homicide defendants into urns of varying culpability would become more precise, and the influence of chance on the charging decision would be reduced. How much capriciousness we think exists in the San Francisco data, then, depends to some extent on our confidence in the assumption that the composition of the error term in Berk et al.'s model reflects mostly random noise (chance) and not unmeasured defendant heterogeneity derived from legitimate charging factors.

Much to their credit, Berk and his colleagues warn us that it is impossible to ever have complete information regarding how prosecutors make their charging decisions. In defending their inclusion of a small number of explanatory variables in a simple additive model, they suggest that because human decision-

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[7] For Berk et al., these would include the offender's race, victims's gender, number of prior felonies, number of victims, and the victim-offender relationship.

makers are not optimally but minimally rational, they can only retain small amounts of information and process this information with simple heuristics. In addition, they subject the model they estimated to rigorous goodness-of-fit diagnostics and find that it fits the data well. They also, however, acknowledge that there may be important legally relevant variables omitted from their model (I have suggested a few) and that other models may fit the data as well or better. If this is true, the amount of unexplained variation, and hence the amount of capriciousness, in their specific multi-urn model may be exaggerated. A more fully specified model than the one estimated by Berk et al. may reveal far less capriciousness in capital charging decisions.

At the end of their empirical analyses, Berk and his colleagues concluded that "the charging process looks stochastic." Based on my own assessment and skepticism of their model, I would draw a more optimistic, and probably more controversial, conclusion. As suggested earlier, it appears to me that San Francisco prosecutors have been successful in achieving a rough consistency in their charging of homicide cases. There are apparent and meaningful distinctions between those who are more likely to be charged with a capital offense and those who are less likely to be so charged. The capital charging system at work in San Francisco does not operate like a pure or traditionally conceived lottery but instead *tends* to produce just results in the sense of treating different cases differently and like cases comparably.

If the multi-urn scheme that describes the San Francisco data is an example of a lottery, I think it operates not as a game of chance but as a generally fair penal lottery. As described by Lewis (1989), in a fair penal lottery like cases are treated alike not because they receive the same exact penalty but because they face the same *expected penalty*.[8] In the San Francisco charging data at hand, defendants enter the penal lottery facing two possible outcomes, a capital or noncapital charge. The probability of receiving a capital charge is a function of the defendant's culpability (which varies across urns in a multi-urn charging lottery), but the system confers the same odds on similarly culpable defendants (the odds do not vary for those within the same urn). In my view, then, the San Francisco data examined by Berk and his colleagues do a fairly good job of treating cases that differ differently and like cases alike.

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[8] I am very grateful to David Wasserman who brought this argument and Lewis's article to my attention.

II. Charging Systems as an Instance of Pure Procedural Justice

If the empirical analysis conducted by Berk and his colleagues does not suggest to me the existence of substantial capriciousness in the San Francisco charging system, but rather a generally fair and rational process, let me conclude by offering a few brief suggestions as to what this may imply. As I have tried to argue above, these data suggest to me that the San Francisco charging system does generally produce fair results. There is a rough consistency between defendants' culpability and the probability that they will receive a capital charge. Defendants who differ in their blameworthiness are treated differently, and those who are comparably culpable are treated alike in that they face the same expected treatment. I have concluded from this that the system *tends* to produce just and consistent outcomes.

The importance of this consistency is that it validates the San Francisco capital charging system as an instance of pure procedural justice. According to Rawls (1971:86), "pure procedural justice obtains when there is no independent criterion for the right result: instead there is a correct or fair procedure such that the outcome is likewise correct or fair, whatever it is, provided that the procedure has been properly followed." In adopting Rawls's argument, we do not have to accept his view that cases of pure procedural justice only arise in instances when there is no right or fair outcome.[9] Rather than Rawls's own atheist position, for our purposes we can adopt a more agnostic view (Wasserman 1987, 1992) that there is a fair charging outcome for each case (that a capital charge is just when the culpability of the defendant is high enough) but that because of the complexity and inherent subjectivity in weighing appropriate charging factors, we can rarely if ever ascertain if we are acting justly in a particular case.

If we may rarely be sure that we are making a just or right charging decision in a particular case, how can we ever know if we are acting fairly? Following Rawls, I suggest that in adopting fair procedures we may *assume* that as long as we follow these procedures, the outcomes produced are fair; adherence to fair procedures, then, produces presumptively fair outcomes. I admit that in doing so we are giving fair procedures a particularly important default role in validating our capital

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9 The example given by Rawls of pure procedural justice is a series of fair bets. The outcome, measured in terms of the distribution of money after the bets, is presumed to be fair and correct if a fair procedure has been followed. A fair gamble occurs when the expectation of gain for each participant is zero, no person cheats, and all betting was done voluntarily. Since any distribution of the money stemming from a series of fair bets could have been produced, there are no independent criteria of a correct outcome.

charging system. Our faith in proper procedure will not be absolute, however, because we may reasonably wonder if our procedures are in fact fair. Herein lies the significance of fair outcome patterns. I suggest that generally fair outcome patterns validate the general accuracy and fairness of the procedures.

While we cannot, or can only with great difficulty, determine the fairness of our treatment of any single person, we can assess the *general tendency* of the procedure to produce fair outcomes. If the system *tends* to produce fair results, then we can assume that our procedures are fair. In a decisionmaking realm where justice is morally elusive, such as deciding to charge a defendant with a capital offense, a rough consistency in treatment may be enough to regard (almost) any outcome reached by these procedures as *ipso facto* fair. There are, then, boundaries to our deference to procedural justice, and our examination of outcome patterns can tell us if our results are within these boundaries. This is what Wasserman (1992:16–17) has termed *bounded* pure procedural justice:

> While we may rely on procedural indices of fair treatment, our deference is not boundless. It is only within a limited range of outcomes that procedural fairness will be dispositive. There may be disparities in allocation too great to be justified by a belief in the long-term equity of the allocative process, and factual findings about which reasonable people could not differ.

While we have an initial faith in the procedure to produce fair outcomes, we must nonetheless examine outcome patterns to determine if our confidence is warranted.[10] If the procedure tends to produce fair outcomes, we assume that it is fair and any outcome produced by that procedure is also fair. In sum, the San Francisco capital charging system tends to produce fair and consistent results. Since it appears to be a generally fair procedure, I will assume it generally produces fair results.

III. Conclusion

In this comment I have attempted to provide some reasons why I did not come to the same conclusion as Berk, Boger, and Weiss in their empirical analysis of the San Francisco capital charging system. Their analysis led them to conclude that it is a capricious system; my conclusion was that it appears to be a fair

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[10] This is essentially what we do when judging the fairness of procedures in other realms involving pure procedural justice. For example, when we are out drinking with a friend, we may initially go along with his suggestion that who buys the beers should be a function of a coin flip, heads he buys, tails we buy. This strikes us as a fair procedure even though over time it may appear to us that we are buying a few more beers than our friend. We will be disinclined to continue with this procedure, however, if the coin comes up tails 10 times in a row. This outcome pattern is "beyond the pale," and we become convinced that the coin is not fair.

one. My own conclusion about the basic fairness of the charging system, however, does not mean that it is immune from critical scrutiny. I have suggested that we still need to examine the pattern of outcomes produced by a presumptively fair procedure since doing so provides an important way to validate it. Studies like those conducted by Berk and his colleagues are most important in that regard. In addition, the capital charging (and sentencing) system should be critically examined to determine if the proper procedures on which we rely for presumptively fair outcomes are being strictly adhered to.

In his discussion of pure procedural justice, Rawls (1971:86) was clear that any deference to procedural fairness must be premised on the belief that the designated procedures are actually followed, "[T]he procedure for determining the just result *must be carried out* . . . . A fair procedure translates its fairness to the outcome only when it is actually carried out" (emphasis added).

This implies that in the capital charging system defendants not only must have access to fair procedures but also the fair procedures must be actually implemented. If fair procedures are available to some but not all defendants, the system may be condemned as arbitrary. It may be arbitrary in both senses discussed in my introduction; discriminatory if fair procedures are systematically denied a particular group (indigent defendants), and capricious if access to fair procedures is determined by luck.

One very critical component of fair capital charging procedures, access to quality counsel, may be susceptible to charges of both kinds of arbitrariness. Experienced and competent counsel is available to rich but not poor defendants, while some very skilled *pro bono* or public assistance lawyers do some small proportion of capital cases. That is, while the quality of counsel in capital cases is generally poor (see Coyle et al. 1990), some lucky defendants do receive skilled and effective counsel. Since the quality of counsel is an important factor at the charging stage (White 1991) and other points (Baldus et al. 1990), it is an integral component of procedural fairness. There is reason to believe, then, that there are glaring inadequacies in access to procedural justice. This is true at the point of the prosecutor's charging decision and undoubtedly throughout our current system of capital punishment. Future research should certainly be focused on how adequately procedural justice is being met in these areas.

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