

**OPENING A WINDOW OR BUILDING A WALL? THE EFFECT OF
EIGHTH AMENDMENT DEATH PENALTY LAW AND ADVOCACY
ON CRIMINAL JUSTICE MORE BROADLY**

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Why care about the American death penalty at all? It constitutes only a tiny part of the criminal justice system. Fewer than 50 people were executed and slightly over 100 people were sentenced to death nationwide in 2007,¹ while considerably over two million people remain incarcerated in the non-capital criminal justice system. The death penalty does not even constitute a substantial part of our system for punishing *homicide*. In a country that has experienced between 15,000 and 20,000 homicides per year nationwide over the past decade,² the number of capital sentences and executions last year looks particularly trivial. The relative paucity of death sentences and executions does not disappear if we focus on the high-water marks for death-sentencing and executions in the modern era, with highs for death sentences in the 300s (per year, nationwide)³ and executions hovering close to 100 (per year, nationwide).⁴

By any metric, capital punishment receives a disproportionate share of popular, political, and legal attention. The sheer number of films, books, magazine, and newspaper articles discussing and depicting capital cases would suggest that capital prosecutions, sentences,

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1 Death Penalty Information Center, Executions by Year, <http://www.deathpenaltyinfo.org/executions-year> (last visited Nov. 5, 2008) (specifying 42 executions in 2007); Death Penalty Information Center, Death Sentences by Year: 1977–2007, <http://www.deathpenaltyinfo.org/death-sentences-year-1977-2007> (last visited Nov. 5, 2008) (specifying 110 death sentences in 2007).

2 U.S. Department of Justice, Bureau of Justice Statistics, <http://www.ojp.usdoj.gov/bjs/homicide/hmrt.htm#counts> (last visited Nov. 5, 2008).

3 Death Penalty Information Center, Death Sentences by Year: 1977–2007, <http://www.deathpenaltyinfo.org/death-sentences-year-1977-2007> (last visited Nov. 5, 2008) (showing a high of 326 death sentences in 1995).

4 Death Penalty Information Center, Executions by Year, <http://www.deathpenaltyinfo.org/executions-year> (last visited Nov. 5, 2008) (showing a high of 98 executions in 1999).

and executions are far more common than they actually are. On the political side, state legislatures devote considerable attention to prevailing capital procedures and proposed reforms, despite, in relative terms, the extraordinary infrequency of capital cases and the increasingly large share of state resources consumed by non-capital incarceration. At the federal level, Congress, which has virtually nothing to say about state non-capital policies, has sought to influence state postconviction procedures in capital cases by creating special rules in federal habeas for states that adopt preferred postconviction standards for representation in capital cases.⁵ The complete absence of any federal policy addressing the states' unprecedented experiment with mass incarceration stands in notable contrast to Congress's attention to the ways in which federal review of capital cases can influence state capital policies.

On the legal side, observers have long noted the disproportionate presence of capital cases in state and federal litigation of criminal issues. One reason the death penalty remains more expensive than long-term incarceration (even incarceration for life) is the fact that states give capital defendants—and only capital defendants—the right at several different stages to challenge their convictions and sentences. Whereas non-capital inmates often are afforded only discretionary review to the highest state court on direct appeal, capital inmates have review as of right. Whereas indigent non-capital inmates have no right to counsel in state postconviction and federal habeas proceedings, and must therefore litigate *pro se* (if at all), indigent death-sentenced inmates are generally provided counsel in both state and federal postconviction litigation. As a result, criminal litigation at the highest levels, even of non-capital issues, disproportionately occurs in capital cases. Moreover, the growth of distinctive doctrines surrounding the administration of capital punishment (concerning *voir dire* practices, the adequacy of state capital statutes, and proportionality limits on the imposition of the death penalty) has contributed to the disproportionate presence of capital cases on the docket of the Supreme Court. Whereas capital defendants account for considerably less than one-tenth of one percent of criminal defendants prosecuted for crime in any given year, capital cases have occupied somewhere between one-quarter and one-half of the state criminal cases within the Court's docket over the past decade. Indeed, if one's exposure to the American criminal justice system were confined to

⁵ See 28 U.S.C. §§ 2261–2266 (2006).

attending arguments and reading opinions of the U.S. Supreme Court, one might believe that capital prosecutions greatly outnumber speeding violations, burglaries, or drug offenses.

Given the astronomical rise in our non-capital prison population and the enormous social, political, and economic consequences of such growth, what could explain or justify the extraordinary attention directed toward our prevailing capital practices? One answer that progressive reformers of the criminal justice system might offer is that the drama and high political salience of capital punishment opens a window to the entire criminal process and generates constitutional doctrines and criminal justice policies that might never otherwise come into being as a consequence of the much greater indifference that courts, policy makers, and the general public display toward non-capital criminal proceedings. To bolster such a claim, such reformers could point to cases like *Norris v. Alabama*⁶ or *Strickland v. Washington*,⁷ in which the Supreme Court generated important constitutional holdings for all criminal defendants in cases involving capital trials. Or they could point to the reforms that were promoted and adopted in the wake of dramatic death row exonerations, including DNA preservation and testing, mandatory videotaping of confessions, and higher evidentiary thresholds for the admission of jailhouse informant testimony. Such reforms have the potential to benefit non-capital criminal defendants, though it took the horror of the possibility of executing innocent persons to galvanize such reforms. The death penalty, on this view, keeps criminal justice issues at the forefront of political and legal debate, and concerns about the fairness and reliability of the death penalty might trickle down to the much larger non-capital realm.

This is a comforting story, but there is a potentially darker story here as well. The advocacy efforts and the procedural and substantive successes of the abolitionist movement may contribute to the “walling off” or even affirmative disadvantaging of “ordinary” non-capital criminal defendants. In this Article, we focus on several ways in which the salience of the death penalty in American criminal justice debates and litigation might entrench attitudes and practices detrimental to the non-capital side of the docket.

In terms of advocacy, the focus on innocence in the capital context, though it has brought some salutary reforms, also tends to de-

6 294 U.S. 587 (1935) (holding that defendant was denied equal protection based on the exclusion of persons of his race from the jury).

7 466 U.S. 668 (1984) (recognizing constitutional right to effective assistance of counsel).

flect focus from non-innocence related issues such as discrimination, inadequate representation, and excessive punishment (even for those guilty of the underlying offense). We believe that these issues are of far greater significance and deserving of more attention than the issue of wrongful convictions in the capital context, though we recognize that concerns about executing the innocent have struck a chord in popular sentiment and produced a wave of critical attention focused on the American death penalty. It is too early to tell whether the innocence revolution will lead to the beginning of the end of the American death penalty or stabilize the death penalty by prompting the adoption of reforms intended to reduce the risk of executing innocents.

At the same time, an innocence focus on the non-capital side seems like a less promising tradeoff for those concerned about the prevailing pathologies within our non-capital system. Innocents are undoubtedly included in the growing ranks of the incarcerated. But the problems with mass incarceration as a social policy extend far beyond “wrongful convictions.” In particular, the sheer punitiveness of our current non-capital system is unlikely to be challenged by a focus on innocence. Many of the reforms generated by an innocence focus tend to reinforce the basic “justice” of non-capital convictions and sentences of the “guilty,” thereby deflecting more encompassing challenges to the status quo. In addition, trumpeting the vindication of the innocent as the highest value within our criminal justice system undermines the appropriate and traditional role of defense lawyers in their representation of clients, including the guilty.

Another major policy focus on the abolitionist side has been to support life-without-possibility-of-parole (“LWOP”) as a sentencing alternative to the death penalty. The widespread adoption of this alternative has likely contributed substantially to the extraordinary decline in death sentencing nationwide—a greater than 50% decline over the past decade. Here, too, reform of the death penalty has had its costs for non-capital inmates. In order to prevent death sentences and executions, abolitionists have championed LWOP as a workable and humane alternative to the death penalty. Over the past decade, the number of inmates sentenced to LWOP has climbed astronomically, and it may well be that the widespread adoption of LWOP, achieved in part because of the alliance of the abolitionist left and tough-on-crime right, has significantly increased the sentences of the many in order to make less likely the already unlikely execution of the few.

On the doctrinal side, some of the most significant limitations on the implementation of the death penalty have been achieved only by expressly relegating non-capital defendants to lesser protections. The Court's increasingly robust proportionality doctrine in capital cases has been withheld from non-capital defendants, with the result that there are virtually no judicially-imposed limits on the length of sentences for non-capital offenders, even for non-violent offenses. Similarly, the constitutional regulation of counsel has increased substantially in capital cases over the past decade, at least in the Supreme Court, while the performance of counsel in non-capital cases remains largely unregulated. In both of these areas, the additional protections for capital defendants may not have *caused* the Court to forego greater protections for non-capital defendants, but the methodology of treating capital cases differently has tended to both obscure and normalize the pathologies that afflict non-capital criminal punishment.

In addition, perceived problems on the capital side have generated pro-prosecution reforms that have had severe adverse consequences for non-capital inmates. Legislative reform of federal habeas corpus, for example, designed to reduce delays in capital litigation and accelerate executions, resulted in significant and unprecedented limitations on the availability of federal review of federal issues arising out of state criminal cases. These limitations were applied broadly to both capital and non-capital offenders. In this circumstance, the salience of the death penalty and the visible delays in capital litigation were used to justify widespread restrictions on the ability of state non-capital inmates to challenge their convictions and sentences in federal court.

These varied examples suggest that the interests of capital defendants as a group and the interests of the much larger class of ordinary criminal defendants may diverge much more frequently and substantially than their lawyers and (few) advocates acknowledge. Death penalty "reforms" may undermine the prospects for reform of our growing non-capital system. We do not offer a strategic account for balancing the interests of non-capital and capital defendants. How these conflicts should be addressed within the small community of activists and lawyers who work on capital and criminal justice issues and cases remains a difficult and open question. The obvious starting point, however, is to recognize that such conflicts exist.

I. ABOLITIONIST ADVOCACY: THE INNOCENCE REVOLUTION AND THE
EMERGENCE OF LIFE-WITHOUT-POSSIBILITY-OF-PAROLE AS AN
ALTERNATIVE TO DEATH

We are now in the second reformist moment of the modern American death penalty.⁸ The animating concern for this era of reform is the danger of executing innocents. This focus differs considerably from the concerns of the earlier era, which focused more broadly on the arbitrary and discriminatory implementation of the death penalty as well as its unnecessary severity. In the account that follows, we describe how the earlier period of reform linked the problems of the death penalty to the broader criminal justice system and viewed abolition or reform of the death penalty as consistent with a more encompassing critique of American criminal justice practices. Today, the abolitionist or reformist focus on the horror of wrongful convictions is largely distinctive to the death penalty and tends to obscure, and perhaps even entrench and legitimize, pathologies on the non-capital side.

A. *A Period of Convergence: Critiques of the Death Penalty Tied to Broader Reform of American Criminal Justice*

Although the United States is widely viewed as an outlier among Western democratic countries both in its retention of the death penalty and in its punitive non-capital system, the United States was an outlier in the other direction soon after its founding. The colonies that formed our nation inherited the death penalty from England, and throughout the seventeenth and eighteenth centuries the death penalty was an accepted and unremarkable part of colonial criminal justice.⁹ Soon after independence, though, Enlightenment ideals prompted criminal justice reform.¹⁰ In several states, such reform included radically limiting the reach of the death penalty, even in cases

8 See Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587, 589–96 (2005) (discussing the period of capital punishment reform in the modern era).

9 RAYMOND PATERNOSTER, CAPITAL PUNISHMENT IN AMERICA 5 (1991) (indicating that “the institution of capital punishment in the colonies was merely an extension of an English legal tradition”).

10 WILLIAM J. BOWERS, EXECUTIONS IN AMERICA 3–6 (1974) (discussing the influence of the work of Italian abolitionist Cesare Beccaria on Pennsylvania reformers, including Dr. Benjamin Rush, Benjamin Franklin, and Pennsylvania’s Attorney General William Bradford).

of murder.¹¹ The desire to cabin the death penalty was motivated in part by an emerging belief in the redemptive potential of incarceration. It is no accident that the center of early death penalty reform in the United States—Pennsylvania—was also the birthplace of the American penitentiary. In 1794, Pennsylvania restricted the death penalty to “first degree” murder and punished lesser offenses with imprisonment.¹² Within a few decades, Pennsylvania embarked on its experiment with large-scale penitentiaries which promised to replace corporal punishments (including the death penalty) with lengthy solitary confinement.

By the mid-nineteenth century, several states had abolished the death penalty (Michigan, 1846; Rhode Island, 1852; and Wisconsin, 1853), but most retained it. Few jurisdictions joined these abolitionist states during the latter half of the nineteenth century. Although numerous jurisdictions abolished the death penalty toward the end of the Progressive Era (nine states between 1911 and 1917),¹³ many restored it in the wake of the First World War and the Red Scare.¹⁴ The most significant change in capital practices concerned the rejection of the *mandatory* death penalty; retentionist jurisdictions steadily moved toward sentencer discretion in capital cases beginning in the 1830s, with the result that the mandatory death penalty was virtually abolished nationwide by the 1960s.¹⁵

From the Founding Generation until the 1960s, the American death penalty was almost entirely a function of state law beyond the reach of federal regulation. The federal Constitution supplied few protections for state defendants beyond the general rights to due process and equal protection, which the Supreme Court construed quite narrowly; until the 1960s, the detailed list of procedural and substantive guarantees contained in the Bill of Rights ran against only federal authorities. Accordingly, the few capital claims that reached the Court, including challenges to modes of execution (such as electrocution), were almost uniformly rejected. The notable exception was the Court’s recognition in one of the “Scottsboro Boys” cases of the right to state-appointed counsel in cases where the death penalty is at issue.¹⁶

11 *Id.* at 5 (discussing Pennsylvania, Virginia, and Ohio).

12 *Id.*

13 *Id.* at 6.

14 *Id.*

15 *Id.* at 7–9.

16 *See Powell v. Alabama*, 287 U.S. 45 (1932).

The death penalty as an American practice reached its height during the Depression, with a national average of more than 165 executions per year in the 1930s.¹⁷ Executions began to decline, though, and by the first half of the 1960s, the nationwide average fell to 36 per year.¹⁸ One explanation for the decline in executions is the decline in the raw number of homicides; the number of homicides nationwide exceeded 10,000 per year throughout most of the 1930s, a number that would not be reached again until the mid-1960s.¹⁹ But the number of executions *per homicide* decreased steadily as well, with a high of about 2 executions per 100 homicides during the peak period in the 1930s and a low of less than 0.5 executions per 100 homicides during the first half of the 1960s.²⁰

The modern era of death penalty reform began in the 1960s with a confluence of events. On the political side, the death penalty was a natural target for the Civil Rights Movement given the unmistakable racial aspects of its use. By the late 1950s, the Southern face of the death penalty had become more pronounced as death sentences and executions were increasingly confined to southern and border states. The racial tilt of the death penalty was particularly evident in capital rape prosecutions, as literally *all* of the 455 executions for rape after 1930 in the United States occurred in southern states, border states, and the District of Columbia.²¹

On the legal side, the Supreme Court began to reform states' criminal justice systems generally and hinted at the reform of the death penalty in particular. In a series of landmark decisions, the Warren Court extended most of the protections of the Bill of Rights to state criminal proceedings, including rights to counsel and trial by jury, and rights against double jeopardy, compulsory self-incrimination, and unreasonable searches and seizures (as well as accompanying prophylactic exclusionary rules); most importantly for capital punishment, in 1962 the Court incorporated and extended

17 WILLIAM J. BOWERS, *LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864–1982*, at 25–26 (1984) (detailing executions, homicides, and execution rates by year for the United States from 1930 to 1967).

18 *Id.*

19 *Id.*

20 *Id.*

21 Marvin E. Wolfgang, *Racial Discrimination in the Death Sentence for Rape*, in BOWERS, *supra* note 10, at 109, 113.

against the states the Eighth Amendment prohibition against cruel and unusual punishments.²²

With respect to the death penalty, in 1963 the Court signaled its unprecedented willingness to subject capital punishment to constitutional constraint. Despite the near total absence of federal constitutional law regarding the death penalty, three Justices issued a dissent from denial of certiorari on the question of whether the death penalty is disproportionate for the crime of rape.²³ Although the dissenting Justices did not mention race in their opinion, the clearest evidence that the death penalty constituted excessive punishment for rape was its racially discriminatory imposition: African Americans accounted for about 90% of the defendants executed nationwide for rape during the period between 1930 and 1967, but for less than 50% of those executed for murder.²⁴

The Court's message spurred the NAACP's Legal Defense Fund ("LDF") to increased action on the death penalty, and the LDF's principal argument against the death penalty focused on its arbitrary and discriminatory use. From the LDF's perspective, limitation or abolition of the death penalty was part of the same project to improve the rights of African American criminal defendants in the South—the persistence of the death penalty was yet another manifestation of the distinctive form of Southern justice.

In response to the Court's opinion, the LDF funded empirical research to document the influence of race in capital sentencing for rape.²⁵ The LDF also embarked on a more ambitious "moratorium" strategy to end executions in the United States.²⁶ The moratorium strategy was rooted in the belief that the death penalty had essentially run its course. Executions had declined substantially and become even more geographically confined, and public opinion, especially in the wake of the Vietnam War, was skeptical of governmental power to end life. A 1966 Gallup Poll revealed for the first—and only—time

22 *Robinson v. California*, 370 U.S. 660 (1962) (holding that imprisonment for status of being an addict constituted cruel and unusual punishment).

23 *Rudolph v. Alabama*, 375 U.S. 889 (1963) (Goldberg, Douglas, and Brennan, JJ., dissenting from denial of certiorari).

24 MICHAEL MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* 75 (1973).

25 *See id.* at 75–78.

26 *Id.* at 107.

that more Americans opposed than supported the death penalty as punishment for murder.²⁷

The moratorium strategy was facilitated by the Court's recognition of new criminal protections in state proceedings, but the LDF also raised new challenges distinctive to the death penalty. These claims centered on three features of American capital punishment: the practice of excluding jurors with any reservations about the death penalty from capital juries, the failure of capital jurisdictions to specify the criteria justifying the imposition of death (or life), and the refusal of some states to permit evidence or arguments related solely to the appropriate punishment (apart from guilt or innocence of the underlying offense).

Remarkably, the moratorium strategy succeeded, at least as measured by the goal of bringing a halt to executions in the United States. Beginning in 1967, the United States went almost a decade without executions, the longest such period in American history. The claims raised by the LDF shared common themes. First, the death penalty, though widely available in the United States, had declining support, and the procedures states used (such as death-qualifying juries and unitary proceedings) tended to obscure society's emerging reservations about the death penalty. Second, the broad schemes of death eligibility and the absence of standards to guide sentencer discretion had transformed the American death penalty into a national lottery—there was no reason to believe that the few offenders sentenced to death were more deserving than the much larger group of offenders who were spared. Third, the extraordinary discretion afforded capital sentencers at a time of declining support for the death penalty contributed to its discriminatory (race- and class-based) imposition; the death penalty could be tolerated in part because of its infrequency coupled with its use only against marginalized populations.

These critiques of the death penalty borrowed from the larger critique of American criminal justice. Too much discretion throughout the criminal justice system—beginning with the work of police and extending to the work of prosecutors and juries—contributed to an inequitable system in which certain groups, particularly racial minorities, enjoyed fewer freedoms and experienced greater punishments than the rest of society. The Warren Court response on the non-capital side was to craft bright-line rules limiting discretion with the hope of establishing a general rule of law. On the capital side, the

27 Robert M. Bohm, *American Death Penalty Opinion, 1936–1986: An Overview*, in *THE DEATH PENALTY IN AMERICA: CURRENT RESEARCH* 115, 116 (Robert M. Bohm ed., 1991).

Warren Court suspected that the death penalty was already on a course toward extinction and that if capital practices were modified to ensure equal participation on juries and equal treatment of offenders, the American public would in fact reject the death penalty.

The reform movement culminated with the Court's invalidation of existing state statutes in *Furman v. Georgia*.²⁸ The terse per curiam opinion for the Court simply declared that "the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment."²⁹ Each of the five Justices who supported the judgment wrote separate opinions defending this conclusion, and the common thread of their opinions focused on the arbitrary imposition of the punishment. Justice Douglas amplified the theme of discrimination, indicating that the prevailing practice which reserved the death penalty only for the poor and unpopular could not be salvaged simply because such discrimination was not found on the face of state statutes.³⁰ Justices Marshall and Brennan went further and argued that the death penalty could no longer be squared with prevailing standards of decency.³¹

Noticeably absent, from a present perspective, was any serious attention to the problem of wrongful convictions. This paucity of treatment is especially telling given that the collection of opinions in *Furman* constituted the longest decision in the Court's history at the time of its issuance. In a time of declining executions (with no executions in the four years preceding the decision), the Court's focus was on the *rarity* of the punishment and the problems associated with infrequent application of a broadly available sanction. The death penalty was not deemed abhorrent because of its careless, overzealous, indiscriminate use, but its virtual disuse. As Justice White argued, the death penalty could not possibly serve any valid penological purpose (such as deterrence or retribution) if it was so seldom imposed.³² Justice White's critique pointed to the same conclusion advanced by Justices Marshall and Brennan: if the death penalty no longer secured any obvious social benefits, the punishment was excessive and unnecessary. But Justice White was not prepared to embrace this conclusion as a constitutional matter without giving the states a chance to reform their systems.

28 408 U.S. 238 (1972) (per curiam).

29 *Id.* at 239–40.

30 *Id.* at 255–56 (Douglas, J., concurring).

31 *Id.* at 286 (Brennan, J., concurring); *id.* at 369 (Marshall, J., concurring).

32 *Id.* at 312–13 (White, J., concurring).

The *Furman* Court clearly misread the public mood. Given the option of repealing or reforming their capital statutes, most capital jurisdictions chose the latter. Many of these states even seemed to prefer a much broader capital regime (with the promise of many more executions) by creating mandatory death penalty schemes that required the imposition of death for murder (and, in some cases, other offenses). A larger group of states sought to address the problem of unbridled sentencer discretion by specifying “aggravating factors” that would structure the capital sentencing decision. With rising rates of violent crime and the resulting popular backlash against the Warren Court’s reforms, the states sought to reassert their prerogative to punish murder with death.

When the Court addressed the new statutes in 1976, it upheld the guided discretion statutes and invalidated the mandatory ones.³³ Although the mandatory statutes held out greater promise of addressing one of the central problems *Furman* had identified—that the sheer rarity of death sentences and executions rendered its few applications arbitrary and unnecessary—the Court rejected the mandatory statutes on the ground that they denied offenders individualized treatment, precluded sentencers from considering relevant mitigating factors, and departed significantly from longstanding American practices.³⁴ The guided discretion statutes that the Court embraced raised new problems of their own: although they purported to narrow sentencer discretion by requiring jurors to find an aggravating circumstance (beyond the plain fact of murder) to impose the death penalty, they preserved considerable sentencing discretion to withhold the death penalty for virtually any reason. Whereas *Furman* condemned the arbitrary and discriminatory results of unfettered discretion, the 1976 decisions and their progeny viewed discretion as an unavoidable part of capital sentencing. More importantly, those decisions appeared to treat the constitutionality of the American death penalty as turning on whether state statutes *sought* to guide discretion in a meaningful manner, not on whether states actually

³³ See, e.g., *Roberts v. Louisiana*, 428 U.S. 325 (1976) (invalidating Louisiana’s mandatory death penalty sentencing scheme); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion) (invalidating North Carolina’s mandatory death penalty sentencing scheme); *Jurek v. Texas*, 428 U.S. 262 (1976) (upholding Texas’s special issue scheme against facial challenge); *Proffitt v. Florida*, 428 U.S. 242 (1976) (upholding Florida’s guided discretion statute against facial challenge); *Gregg v. Georgia*, 428 U.S. 153 (1976) (upholding Georgia’s guided discretion statute against facial challenge).

³⁴ *Woodson*, 428 U.S. at 289–301.

achieved any discernible level of consistency in the application of the death penalty.

The 1976 decisions stabilized the American death penalty, and executions resumed shortly thereafter. By the early 1980s, with the newly declared War on Drugs in response to the influx of crack cocaine and the much higher violent crime rate that accompanied it, the politics of criminal justice veered markedly away from reform. Constitutional regulation of criminal practices was widely viewed as an obstacle to successful anti-crime efforts, and the Warren Court's effort to promote social justice through criminal justice reform was rejected as naïve and misguided. Incarceration rates, both absolute and per capita, rose sharply, as both the federal government and states responded to the threat of disorder with increased punitive measures.

In this context, the Court addressed the most serious challenge to the death penalty. Just as it had in the 1960s, the LDF sought to expose the role of race in capital sentencing. After soliciting a comprehensive study of the administration of the death penalty in Georgia, the LDF insisted that sophisticated statistical analysis revealed the prominent role of race—particularly the race of victims—in capital punishment decisionmaking. Whereas *Furman* had relied on suspicions of arbitrariness and discrimination to invalidate the death penalty, the LDF now supplied what appeared to be an empirical demonstration of the race-based administration of capital punishment. The LDF's hope was that the Court would not tolerate continued use of the death penalty in light of such evidence.

In 1987, the Court rejected the claim in *McCleskey v. Kemp*,³⁵ though it assumed for purposes of its decision that the study fairly identified race-based disparities in capital decisionmaking. According to the Court, such disparities were likely the inevitable result of the constitutionally required discretion in capital cases. Moreover, the Court was unwilling to treat the death penalty differently than incarceration: if race-based disparities condemned the death penalty, then they might condemn incarceration as well. According to the Court, because “[t]he Eighth Amendment is not limited in application to capital punishment, but applies to all penalties[,] . . . if we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty.”³⁶

³⁵ 481 U.S. 279 (1987).

³⁶ *Id.* at 315 (citations omitted).

McCleskey marked not only the end of arbitrariness- or discrimination-based challenges to the death penalty, but also highlighted the importance of framing constitutional challenges to the death penalty in uniquely capital terms. Given the Court's increased hostility to Warren Court supervision of criminal justice policies and its decreased enthusiasm for policing the fairness of the non-capital system, attacks on capital practices had to prevent spillage over to the non-capital side.

In the wake of *McCleskey*, with the Court's rejection of what seemed to be the last global challenge to the American death penalty, executions increased substantially and the death penalty as a practice seemed secure for at least another generation. Death-sentencing rates rose to modern era highs in the mid-1990s, and executions went from about eighteen per year nationwide in the last half of the 1980s to about sixty-six per year in the late 1990s.³⁷ Previously abolitionist New York joined the ranks of death penalty states in 1995, and the Oklahoma City bombing resulted in congressional legislation intended to accelerate executions.

B. A New Reformist Era Focusing on Wrongful Convictions

But public and professional opinion seemed to shift quickly and dramatically with the discovery of numerous wrongful convictions in Illinois. The issue emerged as lawyers and journalists uncovered more than a dozen cases of innocents who had been erroneously sentenced to death.³⁸ In one particularly alarming case, the inmate, Anthony Porter, had come perilously close to execution before journalism students exposed the actual perpetrator of the crime.³⁹ The circumstances of his case and the post-conviction investigation made clear that it was entirely a matter of fortuity that Porter had not been executed before his innocence had been established. A broader investigation into Illinois capital practices revealed numerous systemic defects, including prosecutorial misconduct. As these defects came to light, George Ryan, the Republican Governor, declared a moratorium on executions and ultimately commuted the sentences of the 167 inmates on Illinois' death row. Ryan developed a national reputation as a crusader against wrongful convictions (though he was later

³⁷ See Executions by Year, *supra* note 1.

³⁸ See Ronald J. Tabak, *Finality Without Fairness: Why We Are Moving Towards Moratoria on Executions, and the Potential Abolition of Capital Punishment*, 33 CONN. L. REV. 733, 739-41 (2001).

³⁹ *Id.* at 739.

prosecuted for and convicted of unrelated corruption), and the events in Illinois prompted other states to reexamine their capital systems.

The newfound skepticism about the accuracy of convictions was reinforced by the emerging use of new DNA technology to uncover wrongful convictions (both capital and non-capital). The capacity of such technology to expose error was vividly illustrated with the 2000 publication of *Actual Innocence: Five Days to Execution and Other Dispatches From the Wrongly Convicted*,⁴⁰ which detailed the successful efforts of Barry Scheck and Peter Neufeld in their pioneering use of DNA to exonerate convicted capital and non-capital inmates. These and other DNA exonerations fueled public concerns about the fallibility of our criminal justice system.

Concerns about wrongful convictions generated two types of reform. First, states enacted backward-looking provisions authorizing post-conviction DNA testing in cases where genetic material is available and new technology could cast doubt on the reliability of the existing conviction; many states also established compensation funds for those wrongly convicted and exonerated through post-conviction testing. Second, states have looked closely at the sources of error in the wrongful conviction cases and considered some reforms to prevent such errors in the future. The wrongful conviction cases provide a promising starting point to “audit” prevailing investigative and prosecutorial practices, and they have revealed some common sources of error: misidentification by eyewitnesses, inappropriate reliance on “junk” forensic science, misuse of jailhouse informant testimony, and the exaction and use of false confessions, especially in cases involving youthful or mentally disabled suspects.

To date, although many states have enthusiastically embraced the “backward-looking” reforms providing for post-conviction access to DNA testing and for compensation in cases of wrongful conviction, few have actually reformed their systems regarding the investigation and prosecution of crime.⁴¹ Only a handful of states have altered

⁴⁰ JIM DWYER ET AL., *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* (2000).

⁴¹ *Compare* Innocence Project, Reforms by State, <http://www.innocenceproject.org/news/LawView1.php> (last visited Nov. 5, 2008) (showing states that have adopted compensation schemes), *and* <http://www.innocenceproject.org/news/LawView2.php> (last visited Nov. 5, 2008) (showing states that provide access to DNA testing), *with* Innocence Project, Reforms by State, <http://www.innocenceproject.org/news/LawView3.php> (last visited Nov. 5, 2008) (showing states that require recorded interrogations), *and*

their policies regarding the recording of interrogations, embraced new procedures for eyewitness identifications, or created criminal justice reform commissions to prevent wrongful convictions in the future.⁴² Given the relatively small number of actual DNA exonerees over the past decade or so (somewhere between 200 and 250), and the reluctant embrace of related criminal justice reform by states, it appears that the innocence “revolution” has had much less practical significance for incarcerated inmates than for the American death penalty.

On the capital side, concerns about executing the innocent may have contributed to the precipitous and astonishing drop in capital sentences over the past eight years. Moreover, concerns about wrongful executions have no doubt contributed to the palpable shift in momentum from expansion to contraction of capital punishment within the United States. Whereas the 1980s and 1990s saw many states expand their categories of death-eligible offenses and revamp their procedures to facilitate increased executions, the post-Illinois experience has produced increased circumspection about capital punishment. States have entertained—and in some instances embraced—serious proposals to enhance accuracy in capital cases, to halt executions pending further study, and to abolish the death penalty altogether. Indeed, New York declined to revive its death penalty after its courts found correctible errors in the state capital statute, and New Jersey recently joined the cohort of abolitionist states through legislative abolition. Executions have declined dramatically (2007 saw fewer than half the number of executions nationwide than were conducted in 2000),⁴³ propelled by a judicially-enforced national moratorium on executions in the wake of litigation surrounding the constitutionality of existing lethal injection protocols.

Moreover, concern about wrongful convictions has surfaced in several high-profile judicial opinions, suggesting that the courts have recognized the emerging power of such an appeal in restraining the reach of the death penalty. In 2002, a federal district judge in New York found the federal death penalty unconstitutional because of the excessive risk of wrongful convictions (though the decision was

<http://www.innocenceproject.org/news/LawView5.php> (last visited Nov. 5, 2008) (showing states that have reformed eyewitness identification procedures), and <http://www.innocenceproject.org/news/LawView6.php> (last visited Nov. 5, 2008) (showing states with criminal justice reform commissions).

⁴² See *supra* note 41.

⁴³ Executions by Year, *supra* note 1.

quickly reversed by the Court of Appeals).⁴⁴ In *Kansas v. Marsh*,⁴⁵ a relatively insignificant case focusing on a highly technical issue within Kansas's capital statute, four Justices joined a remarkable dissent highlighting the risk of wrongful capital convictions. *Marsh* addressed whether a state statute can require jurors to impose death where the aggravating and mitigating factors in the case are in equipoise. At the time the issue reached the Court, Kansas had a death row population under ten and had not executed any offenders in over four decades. The Court's majority opinion was unremarkable, holding that previous cases permit the death penalty to be imposed in such circumstances. Justice Souter's dissent, joined by three other Justices, developed a sustained critique of the American death penalty in light of the recent documentation of wrongful convictions. According to Justice Souter, the uncovering of pervasive error in capital cases amounts to a "new body of fact [that] must be accounted for in deciding what, in practical terms, the Eighth Amendment guarantees should tolerate."⁴⁶ His dissent recounts the experience in Illinois, discusses the role of DNA in identifying innocents on death row, and offers statistics about the number of "exonerated" inmates in recent years. In light of such evidence, Justice Souter argues for a new death penalty principle that would invalidate any state procedures that unnecessarily increase the risk of error in capital cases. Just as the challenged Kansas procedure allowed "ties" to generate death sentences, Justice Souter seemed to advocate for a new rule of capital jurisprudence that invalidates any questionable state procedural policies in capital cases.

Justice Souter's opinion seems self-consciously designed to bring the public debate about the reliability of the American death penalty into the Court's jurisprudence. This approach is markedly different from the *Furman*-era focus on the arbitrary and discriminatory character of the administration of the death penalty. Indeed, a little over a decade before *Marsh*, the Court seemed notably unmoved by the claim that the risk of error in capital cases requires special post-conviction procedures to prevent the execution of the innocent: the Court refused to recognize a due process right to a judicial forum to present newly discovered evidence of innocence in capital cases.⁴⁷

⁴⁴ United States v. Quinones, 196 F. Supp. 2d 416 (S.D.N.Y. 2002), *rev'd*, 313 F.3d 49 (2d Cir. 2002).

⁴⁵ 548 U.S. 163 (2006).

⁴⁶ *Id.* at 207–08 (Souter, J., dissenting).

⁴⁷ *Herrera v. Collins*, 506 U.S. 390 (1993).

Moreover, Justice Souter's opinion is sweeping in its potential. He insists that the events in Illinois and elsewhere have ushered in a "period of new empirical argument about how 'death is different,'"⁴⁸ and his declaration that "it is far too soon for any generalizations about the soundness of capital sentencing across the country"⁴⁹ seems to signal that such generalizations may well be on the horizon.

More recently, Justice Stevens, who co-authored the joint opinion reviving the death penalty in the wake of *Furman* (but who joined Justice Souter's dissent in *Marsh*), announced his view that the American death penalty has essentially run its course and can no longer be squared with the Constitution. In so doing, Justice Stevens joined three of his retired colleagues (Justices Brennan, Marshall, and Blackmun) in declaring that the death penalty had become unconstitutional, though he indicated that he would not act on his view until an appropriate case raised the issue. In this respect, Justice Stevens, like Justice Souter, chose a somewhat odd vehicle to issue broad pronouncements respecting the death penalty: Justice Stevens announced his new view in *Baze v. Rees*,⁵⁰ the case upholding prevailing lethal injection protocols against constitutional challenge. Justice Stevens concurred in the result, though he also suggested that states wishing to avoid further constitutional and practical difficulties "would do well" to reconsider their current protocols.⁵¹

Justice Stevens then offered a lengthy critique of American capital punishment, insisting that the retention of the death penalty by various actors (including state legislatures, Congress, and the U.S. Supreme Court itself) was, in his view, the "product of habit and inattention rather than an acceptable deliberative process that weighs the costs and risks of administering that penalty against its identifiable benefits."⁵² Justice Stevens detailed numerous defects in the American system of capital punishment, including its diminishing or unproven contribution to any valid penological goals (including deterrence or retribution), its arbitrary and discriminatory use, and its reliance on skewed jury pools for its continued viability. But the factor Justice Stevens identified as of "decisive importance" was its irrevocability, coupled with the recent experience of an "unacceptable

48 *Marsh*, 548 U.S. at 210 (Souter, J., dissenting).

49 *Id.*

50 128 S. Ct. 1520 (2008).

51 *Id.* at 1546 (Stevens, J., concurring).

52 *Id.*

number” of defendants wrongfully convicted of capital murder.⁵³ According to Justice Stevens, “[t]he risk of executing innocent defendants can be entirely eliminated by treating any penalty more severe than life imprisonment without the possibility of parole as constitutionally excessive.”⁵⁴

Thus, the problem of wrongful convictions has tipped the scales for at least one member of the Court from constitutional permissibility to constitutional violation. The Stevens concurrence in *Baze* and the Souter dissent in *Marsh* suggest that the innocence revolution might provide the framework for the ultimate judicial abolition of the death penalty, a prospect that seemed remote at best not more than a decade ago.

Notwithstanding the apparent popular and political traction of the wrongful conviction issue, and its potential leverage in constitutional adjudication in restraining or abolishing the death penalty, we have previously expressed concerns about the potential costs of an innocence focus in capital law and advocacy.⁵⁵ First, we rejected the claim that executing innocents is categorically different from a range of other harms that are present in the capital punishment system. Moreover, we maintained that these latter problems—including the arbitrary and discriminatory administration of the death penalty and the execution of guilty but undeserving or impaired offenders—are far more ubiquitous than the problem of wrongful executions.⁵⁶ We also feared that an innocence focus in the capital context might overshadow or affirmatively undermine other important critiques of the American death penalty, including challenges based on claims of fairness or human dignity.⁵⁷ Lastly, we lamented the potential of the innocence revolution to undermine traditional public defense values by bolstering the message that actual innocence is the true measure of a defendant’s worthiness of representation (as illustrated by new innocence projects that explicitly condition representation on a colorable claim of actual innocence).⁵⁸

Despite these concerns, we remain unsure whether the new focus on innocence marks the first substantial step down the path to abolition or whether it is a transient phenomenon sustained by an unusual

53 *Id.* at 1551.

54 *Id.*

55 *See* Steiker & Steiker, *supra* note 8, at 607–23.

56 *Id.* at 606.

57 *Id.* at 615–16.

58 *Id.* at 618–21.

confluence of social and political factors (including stable or declining violent crime rates, an unpopular war, and growing skepticism about the benign character of government). Given the legal landscape prevailing just five or ten years ago, we would not have expected the questions surrounding wrongful convictions to have surfaced as quickly and as powerfully as they recently have in the Souter and Stevens opinions discussed above. These decisions suggest that the innocence revolution might well have significance for the constitutional status of the death penalty—an undoubtedly extraordinary development.

Here, though, we raise slightly different concerns about the innocence revolution. The transformative capacity of the innocence revolution on the capital side—its potential to reform or abolish the death penalty—seems much greater than its capacity to improve or transform our non-capital system. As noted above, the legislative reaction to the problem of wrongful convictions has focused primarily on post-hoc DNA testing and compensation for the wrongfully convicted. Broad reform of investigative and prosecutorial practices has been tentative and more controversial. Whereas numerous advocates, public officials, and judges regard the fallibility of the death penalty as a plausible ground for its rejection, no one regards the fact of wrongful convictions as a basis for jettisoning incarceration. The prospect of wrongful convictions becomes a basis for increasing our reliance on incarceration and reducing executions, not necessarily a basis for reducing incarceration overall.

Perhaps more importantly, many of the costs of an innocence focus are even more acute on the non-capital side. Over the past three decades, we have embarked on an unprecedented experiment with mass incarceration. The jail and prison population of the United States has grown eight-fold over the past thirty-five years. In addition to imprisoning the most inmates in absolute terms worldwide, the United States also has an incarceration rate that is five to eight times higher than other Western industrialized nations; we have recently achieved the dubious distinction of imprisoning more than one out of every hundred American adults. Much of the expansion of the prison population is attributable to more punitive sentencing regimes, especially for non-violent offenders. National spending on incarceration has reached unprecedented levels, with estimates that states and the federal government spend over \$65 billion annually to house the more than 2.3 million inmates held nationwide. Moreover, the rate of incarceration in minority populations is particularly high,

with one in nine black males between the ages of 20 and 34 behind bars.

Despite the enormous social and political costs of our mass incarceration policies, reform efforts have been unable to reverse the remarkable trends. We fear that the presence of the death penalty, as well as the focus on actual innocence, undermines the prospects for non-capital reform. First, the innocence critique tends to focus on the *selection* of those to be incarcerated rather than on the pathologies of incarceration policy. Tinkering with the investigation and prosecution of crime will leave untouched the prevailing punitive framework. The one important link between wrongful convictions and excessive punitiveness is frequently missed in public and professional debate: the presence of extremely harsh sanctions encourages plea-bargaining, and when the plea-bargain discount is sufficiently high, excessive punishments encourage the innocent to plead guilty. But few advocates of reform have sought to attack the problem of wrongful convictions by reducing the harshness of our current sanctions. Second, the focus on innocence also tends to legitimate and entrench the justice of harshly punishing the guilty. Likewise, the more precariously held values of fairness, non-discrimination, adequate representation and procedural regularity are endangered by equating “injustice” with inaccuracy.

Apart from the focus on innocence, current abolitionist advocacy tends to reinforce rather than question increasingly punitive sanctions. This dynamic is most evident in death penalty opponents’ support for harsh incarceration sanctions (including LWOP) as a way of undermining support for the death penalty. In this respect, abolitionists deflect arguments about the ways in which lengthy incarceration (and the absence of alternative sanctions) undermines human dignity: lengthy incarceration is viewed as a “lesser” evil instead of as an evil in itself.

It remains unclear whether and to what extent opposition to the death penalty has facilitated the now near-universal embrace of life-without-possibility-of-parole in American jurisdictions. LWOP is an extraordinarily recent phenomenon, and its adoption coincided with both the rise in violent crime rates and the destabilization of the death penalty that began in the 1970s.⁵⁹ Some states clearly adopted LWOP in direct response to the Court’s constitutional regulation of the death penalty: Alabama, Illinois, and Louisiana adopted such

⁵⁹ Note, *A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment*, 119 HARV. L. REV. 1838, 1840–41 (2006).

statutes for the first time in response to *Furman*, fearing that the abolition of the death penalty would leave no other means of protecting the community from violent murderers.⁶⁰ But LWOP has also emerged in virtually all capital *and* non-capital jurisdictions,⁶¹ making it difficult to understand LWOP merely as an alternative to death.

In some jurisdictions, however, the connection between anti-death penalty advocacy and the adoption of LWOP is unmistakable. In Texas, for example, death penalty opponents long sought the adoption of LWOP as the alternative punishment to death in cases of capital murder. Texas prosecutors, fearing that the LWOP alternative would reduce the prospects for death verdicts, consistently and vigorously opposed the LWOP alternative. Only after the Court invalidated the death penalty as applied to juvenile offenders were death penalty opponents able to overcome prosecutorial resistance, and only because prosecutors now viewed LWOP as *increasing* rather than decreasing the maximum punishment available for juveniles.⁶²

The benefits and costs of the abolitionist embrace of LWOP are uncertain. Abolitionists clearly believe that the LWOP alternative will reduce use of the death penalty, and opinion polls consistently show significantly lower support for the death penalty where LWOP is offered as an alternative punishment. Moreover, the astonishing decline in death sentencing over the past decade is likely attributable in part to the increased availability of LWOP as an alternative sentencing option.⁶³

But the obvious cost of this abolitionist strategy is to normalize and legitimate LWOP as a punishment. And the number of poten-

⁶⁰ *Id.* at 1841.

⁶¹ Every state but New Mexico and Alaska currently permits the imposition of LWOP. See Death Penalty Information Center, Life Without Parole, <http://www.deathpenaltyinfo.org/life-without-parole>.

⁶² The developments in Texas are recounted in *A Matter of Life and Death*, *supra* note 59, at 1843–44.

⁶³ *See id.* at 1850 (arguing that the enactment of LWOP statutes is correlated with a small decrease in death sentences). We believe that the correlation might be greater than suggested by this article because the author focuses on whether declines in death sentences were *immediately* realized after the adoption of LWOP. The most significant reason for the enormous decline in death sentences over the past decade is the willingness of prosecutors to accept pleas to LWOP. We believe that this institutional shift in prosecutorial attitudes and practices does not happen overnight in response to legislative change, even if the legislative change in fact *permits* the shift in policy. Indeed, the presence of LWOP makes it easier for prosecutors to respond to *other* concerns about the death penalty (e.g., the possibility of wrongful convictions) with greater willingness to accept pleas, because fear of a defendant's eventual release is often the biggest obstacle to persuading victims' families to support a negotiated settlement.

tially death-sentenced defendants spared because of the LWOP alternative pales in comparison to the enormous number of non-death-eligible inmates who are now without hope of parole because of LWOP's widespread adoption.⁶⁴ Anti-death penalty advocacy may not be wholly responsible for the widespread entrenchment of LWOP, but it certainly undermines the emergence of a progressive assault on the practice. Unless and until the death penalty is abolished, LWOP will be embraced by many progressive criminal justice reformers as a necessary but regrettable alternative to the perceived greater evil.

II. DOCTRINAL WALL-BUILDING

It should not be surprising that the distinctiveness of capital litigation produces legal doctrine that has different salience in capital versus non-capital litigation. After all, if the special context of capital punishment creates distinctive incentives in the arena of advocacy, as discussed above, we should expect the results of that advocacy—whether in judicially created constitutional doctrine or legislation—to reflect the same potentially troubling double edge. Though there are many examples, large and small, of ways in which the distinctiveness of capital punishment law might redound to the detriment of ordinary criminal defendants, here we will highlight three of the most significant and overarching areas. The first—constitutional limits on excessive punishment—is an example of a single constitutional provision (the Eighth Amendment's proscription of cruel and unusual punishments) that has resulted in two formally distinct lines of doctrine in the capital and non-capital contexts. The second—the constitutional regulation of the effectiveness of defense counsel—is an example of a doctrine that does not purport to distinguish formally between capital and non-capital cases, but that nonetheless has distinctive consequences in the two contexts. The third—judicial and legislative revamping of the scope of federal habeas corpus review—is an example of the “specialness” of capital punishment leading to narrowed protection for all convicted offenders, rather than to special protections limited only to capital defendants. Each of these areas of law offers insight into how the settled acceptance that “death is different” may obscure or normalize pathologies that afflict non-capital criminal punishment.

⁶⁴ *Id.* at 1851–52 (detailing the extraordinary increase of state inmates sentenced to LWOP in recent years, including inmates otherwise ineligible for the death penalty).

A. *Constitutional Proportionality Doctrine*

The divergence of constitutional doctrine in capital and non-capital cases is nowhere more evident than in the Supreme Court's treatment of excessive or disproportionate punishment under the Cruel and Unusual Punishments Clause of the Eighth Amendment. Though the Court has recognized that the Eighth Amendment places substantive limits on both capital and non-capital punishments, the Court has developed two distinct lines of doctrine for the two different contexts. Indeed, these two lines of doctrine have diverged radically from their common constitutional origins in the Eighth Amendment, remaining virtually hermetically sealed from each other and resulting in two quite differently demanding thresholds for judicial invalidation of legislatively sanctioned punishment.

Consider first the development of the Court's proportionality doctrine in capital cases. Just one year after the Court reauthorized capital punishment in *Gregg v. Georgia* and its accompanying cases⁶⁵ (rejecting the global claim that capital punishment is in all cases cruel and unusual punishment), the Court invalidated the death penalty as being a disproportionate punishment for the particular crime of the rape of an adult woman in *Coker v. Georgia*.⁶⁶ In *Coker*, the four-person plurality opinion established the basic framework that the Court has used ever since—though with some important recent refinements—for considering claims that the imposition of the death penalty constitutes “excessive” punishment under the circumstances. Insisting that the Court's judgment of the excessiveness of a punishment “should be informed by objective factors to the maximum possible extent,”⁶⁷ the *Coker* plurality sought “guidance in history and from the objective evidence of the country's present judgment” about the acceptability of the death penalty for rape.⁶⁸ The plurality first considered the record of state legislation on the issue, noting that at no point in the fifty years preceding its decision had a majority of states authorized the death penalty for the rape of an adult woman. Moreover, at the moment of its decision, the state of Georgia was the *only* jurisdiction in the country to authorize capital punishment for that particular crime.⁶⁹ The plurality then turned its attention to jury de-

⁶⁵ 428 U.S. 153 (1976). See *supra* note 33 for a list of accompanying cases.

⁶⁶ 433 U.S. 584 (1977) (plurality opinion).

⁶⁷ *Id.* at 592.

⁶⁸ *Id.* at 593.

⁶⁹ Prior to the Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), sixteen states had authorized capital punishment for the rape of an adult woman, but by 1977, Georgia was

cisions in capital rape sentencings, noting that Georgia juries had imposed the death penalty for rape only six times since *Furman*, a number that represented less than 10% of all rape sentencings during that period. Finally, the plurality explained that consideration of objective evidence is only part of the required Eighth Amendment analysis, “for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.”⁷⁰ Here, the plurality emphasized that rape, in contrast to murder, does not end life: “Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair.”⁷¹

Five years later, Justice White, the author of the *Coker* plurality opinion, wrote for a majority of the Court in *Enmund v. Florida*,⁷² applying *Coker*'s methodology to invalidate the death penalty for a defendant who had served as the getaway car driver in a felony murder but who had neither participated in the killing, nor attempted nor intended to kill. Once again, the Court considered the number of jurisdictions (eight) that authorized capital punishment under these circumstances and the number of such defendants (three) whom juries had actually sentenced to death in the post-*Furman* era. The Court elaborated a bit on its criteria, appearing to create a hierarchy among legislative data by noting particularly that none of the eight *most recently enacted* death penalty statutes authorized use of the penalty in such circumstances. Moreover, the Court acknowledged that prosecutorial charging decisions (though harder to document than jury verdicts) also constitute relevant objective evidence of changing societal values. And the Court counted actual executions in addition

alone. The state of Georgia and the *Coker* dissenters argued, with some plausibility, that the precipitous decline in such statutes reflected some states' attempts to respond to *Furman* by passing mandatory capital statutes, which required them to narrow capital categories more than they might otherwise have done. The majority acknowledged that this dynamic may have played some role in the decline, but concluded that it was not a large enough role to overcome the overwhelming lopsidedness of the snapshot count of current state legislation (forty-nine to one). See *Coker*, 433 U.S. at 595.

⁷⁰ *Coker*, 433 U.S. at 597.

⁷¹ *Id.* at 598. The Court recently extended its holding in *Coker* to include the rape of children, striking down a Louisiana statute allowing the death penalty for child rapists. *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008). The analysis in *Kennedy* closely tracked that of *Coker* and of the Court's more recent decisions in *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Roper v. Simmons*, 543 U.S. 551 (2005). See *infra* text accompanying notes 80–97.

⁷² 458 U.S. 782 (1982).

to jury verdicts, remarking that there had been no executions of non-triggerman felony murderers since 1955.

In bringing its own judgment to bear (“it is for us ultimately to judge”⁷³), the Court noted that Enmund, like Coker, had not actually taken a life. Here, too, the Court further elaborated, considering whether the use of the death penalty in this context measurably contributed to either of the “two principal social purposes” of capital punishment—“retribution and deterrence of capital crimes by prospective offenders.”⁷⁴ Deterrence failed as a justification for Enmund’s punishment, reasoned the Court, because the threat that the death penalty will be imposed for murder will not deter those who do not kill or intend to take life. Moreover, retribution failed because Enmund’s lack of intent suggested that his criminal culpability should be limited to his participation in the underlying felony (a robbery) rather than extend to the murder committed by co-defendants more culpable than he.

Although the Court modified the *Enmund* holding five years later in *Tison v. Arizona*,⁷⁵ it nonetheless reaffirmed its *Coker/Enmund* methodology. The *Tison* Court emphasized that the legislative head count had been altered by “substantial and recent legislative authorization of the death penalty for the crime of felony murder regardless of the absence of a finding of an intent to kill”⁷⁶ and that the jury verdict picture had been altered by the willingness of state courts to impose and uphold death sentences even absent findings of intent.⁷⁷ In bringing its own judgment to bear, the Court explained that the mental state of reckless disregard for human life was equivalent in moral culpability to an intent to kill and noted that both the common law and the Model Penal Code treated a high degree of recklessness as a legal equivalent to intent in their definitions of murder.⁷⁸

The Court’s story of Eighth Amendment restrictions on the substantive scope of the death penalty seemed to come to a close in 1989, when the Court rejected two key challenges to the scope of the death penalty, upholding capital punishment for juvenile offenders

⁷³ *Id.* at 797.

⁷⁴ *Id.* at 798 (quoting *Gregg v. Georgia*, 428 U.S. 153, 183 (1976)).

⁷⁵ 481 U.S. 137 (1987) (authorizing under the Constitution capital punishment for nontriggerman felony murderers who played a substantial role in the underlying felony and evinced reckless disregard for human life).

⁷⁶ *Id.* at 154.

⁷⁷ *Id.* at 154–55.

⁷⁸ *Id.* at 157.

and for offenders with mental retardation.⁷⁹ More than a dozen years passed without any further discussion by the Court of Eighth Amendment capital proportionality. Then, in its recent opinions in *Atkins v. Virginia*⁸⁰ and *Roper v. Simmons*,⁸¹ overturning the 1989 decisions, the Court endorsed the basic structure of its prior Eighth Amendment proportionality doctrine while radically expanding the scope of relevant considerations. In *Atkins*, the Court held that the death penalty may not constitutionally be imposed on offenders with mental retardation. It framed its analysis in the now-familiar terms of its prior capital proportionality cases, first considering “objective evidence” of national consensus and then bringing its “own judgment” to bear “by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators.”⁸²

On the straight numbers alone, *Atkins* did not look like a strong case for the existence of a national consensus against executing offenders with mental retardation. Of the thirty-eight states that retained the death penalty, only eighteen explicitly forbade the practice. The Court noted several key facts in support of its characterization of this head count as a consensus. First, the Court counted the twelve abolitionist states as states opposing the practice of executing offenders with mental retardation. Second, the Court noted that sixteen of the eighteen retentionist states that prohibited the practice had passed legislation doing so within the past dozen years: “It is not so much the number of these States that is significant, but the consistency of the direction of change.”⁸³ The Court observed both the generally unpopular nature of statutory protections for violent criminals and the overwhelming legislative support for the particular protection at issue (that is, the balance of votes for and against) in the legislatures that passed the ban. To this evidence of a legislative trend, the Court added the fact that only a relatively low number of states (five) actually performed executions of offenders with mental retardation in the almost thirteen years since *Penry*.

Most controversially, the Court added in a footnote that “[a]dditional evidence makes it clear that this legislative judgment re-

79 *Stanford v. Kentucky*, 492 U.S. 361 (1989) (finding no constitutional bar to the execution of juvenile offenders); *Penry v. Lynaugh*, 492 U.S. 302 (1989) (finding no constitutional bar to the execution of offenders with mental retardation).

80 536 U.S. 304 (2002).

81 543 U.S. 551 (2005).

82 536 U.S. at 312–13.

83 *Id.* at 315.

flects a much broader social and professional consensus.”⁸⁴ This additional evidence consisted of the official positions of “several organizations with germane expertise,”⁸⁵ the views of “widely diverse religious communities,”⁸⁶ the practices of “the world community,”⁸⁷ and domestic polling data.⁸⁸ The Court stated that “these factors are by no means dispositive,” but explained that “their consistency with the legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue.”⁸⁹

Turning from objective evidence of consensus to its own view, the Court considered “the relationship between mental retardation and the penological purposes served by the death penalty.”⁹⁰ As in *Enmund*, the Court limited itself to two purposes: retribution and deterrence. The Court found that neither purpose would be measurably advanced by the execution of offenders with mental retardation. As for retribution, the Court concluded that the cognitive deficiencies that characterize offenders with mental retardation diminish their personal culpability so as to exclude them from the category of those “most deserving of execution.”⁹¹ As for deterrence, the Court found that the limited ability of offenders with mental retardation to “process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information”⁹² suggested that executing such offenders would not measurably further the goal of deterrence. Finally, the Court’s own view was informed by procedural considerations regarding the risk of wrongful conviction as well—notably the greater likelihood that defendants with mental retardation might falsely confess, or that they might make poor witnesses at trial or sentencing, or that they might generate fears about their future dangerousness in light of their disability.

The Court emphatically underscored its *Atkins* analysis three years later in *Simmons*,⁹³ overturning its 1989 *Stanford* decision that had permitted the execution of juvenile offenders. The Court once again emphasized both objective evidence and the bringing of its own

84 *Id.* at 316 n.21.

85 *Id.* (citing amicus briefs from the American Psychological Association and the American Association on Mental Retardation).

86 *Id.* (citing amicus briefs from the United States Catholic Conference, et al.).

87 *Id.* at 317 n.21 (citing amicus brief from the European Union).

88 *Id.* (citing both state and national polls).

89 *Id.*

90 *Id.* at 317.

91 *Id.* at 319.

92 *Id.* at 320.

93 543 U.S. 551 (2005).

judgment to bear, explicitly overruling the *Stanford* Court's rejection of the relevance of the Court's independent judgment. The objective numbers in *Simmons* were almost identical to those in *Atkins*—eighteen of thirty-eight states prohibited the execution of juvenile offenders, and only six states had carried out executions of juvenile offenders in the years since *Stanford* (and only three states in the previous decade). The *Simmons* claim was weaker than that in *Atkins*, though, because fewer of the bans on executing juvenile offenders were very recent: there had been significantly less change on the ground since 1989, and thus it was harder to discern a newly emerging consensus. Nonetheless, the Court found such a consensus, observing that it would be “the ultimate in irony” to decline to find a consensus when the slower pace of change in the juvenile context was due to the earlier recognition of the inappropriateness of executing juveniles.⁹⁴

But the Court gave the most sustained treatment to its analysis applying “its own judgment.” The Court relied on important differences between juvenile and adult offenders to conclude that juveniles do not belong in the category of the “worst” offenders, in the sense of the most deserving. The Court invoked both “scientific and sociological studies” and what “any parent knows”⁹⁵ to draw a portrait of juvenile offenders as more impulsive, immature, irresponsible, and susceptible to negative influences, while at the same time more likely to change and mature over time, than adult offenders. These qualities, concluded the Court, make juveniles both less deserving (from a retributive perspective) of society's most severe sanction and less likely to be susceptible to deterrence. The Court also moved part of its controversial footnote 21 from *Atkins* into text in *Simmons*, offering a full-throated defense of the relevance of the views and practices of other nations. Noting that the United States was alone in the world in officially authorizing the execution of juvenile offenders, the Court firmly declared: “The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”⁹⁶

Though most famous and controversial for its defense of the relevance of world opinion, the Supreme Court's recent exposition of its capital proportionality doctrine in *Atkins* and *Simmons* is notable for

94 *Id.* at 567 (quoting *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 408 n.10 (Mo. 2003) (en banc) (reaching the same conclusion)).

95 *Id.* at 569.

96 *Id.* at 578.

our purposes—that is, in comparison to *non*-capital proportionality doctrine—in several other ways as well. First, the cases are striking simply for their results—the reversal of two relatively recent precedents, and the finding of national consensus against a particular death penalty practice in the face of disagreement by a majority of states that retained the death penalty. Second, the Court’s approach to the question of consensus makes relevant a radically more expansive range of information than earlier capital proportionality cases, ranging from more qualitative information about legislative change (its currentness, speed, degree of support, etc.) to information about the views of elites (experts, religious leaders, political elites abroad, etc.). Finally, the Court’s “own judgment” is shaped by considering two—and only two—recognized purposes of capital punishment, retribution and deterrence. The crucial exclusion of incapacitation from this list permits a plausible finding that the death penalty is inappropriate even for categories of offenders that include those who appear to pose a substantial risk of future danger.

The Court’s development of its non-capital proportionality doctrine over the same thirty-year period provides a study in sharp contrasts, despite the fact that the two doctrines derive from the same constitutional provision and draw upon the same foundational cases. In both the capital and non-capital contexts, the Court almost always begins its constitutional analysis by paying lip service to *Weems v. United States*⁹⁷ and *Trop v. Dulles*,⁹⁸ two non-capital cases that established that the Eighth Amendment prohibits excessive punishments that offend “the evolving standards of decency that mark the progress of a maturing society.”⁹⁹ Yet during the same period that the Court’s capital proportionality doctrine became more expansive in its scope of relevant considerations and more generous to criminal defendants in its outcomes, the Court’s non-capital proportionality doctrine became more limited in its scope of relevant considerations and so deferential to state interests as to make Eighth Amendment challenges to excessive incarceration essentially non-starters.

In the early 1980s, the Court dealt in quick succession with a series of cases challenging lengthy prison terms as excessive under the

97 217 U.S. 349 (1910) (holding that punishment of twelve years jailed in irons at hard and painful labor for the crime of falsifying records was constitutionally excessive).

98 356 U.S. 86 (1958) (holding that loss of citizenship by a native-born citizen upon conviction by a court-martial for wartime desertion was constitutionally excessive).

99 *Id.* at 101.

Eighth Amendment. In the first case, *Rummel v. Estelle*,¹⁰⁰ the Court upheld a life sentence (with possibility of parole) for a repeat offender convicted of obtaining \$120.75 by false pretences, who had previously been convicted of two even more petty frauds. Over a dissent by Justice Powell, a bare majority of the Court observed that “one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative.”¹⁰¹ Two years later, in *Hutto v. Davis*,¹⁰² the Court summarily reversed a grant of habeas relief to a defendant sentenced to forty years in prison and a fine of \$20,000 for possession and distribution of approximately nine ounces of marijuana, holding that its decision in *Rummel* clearly doomed Davis’s challenge. A single year later, however, the Court in *Solem v. Helm*¹⁰³ granted Eighth Amendment relief to a repeat offender who was sentenced to life without possibility of parole for writing a “no account” check with intent to defraud, despite the fact that Helm had a more serious criminal history than Rummel (who had been denied relief three years previously). Justice Powell, who had authored the dissent in *Rummel*, now authored the majority opinion in *Solem v. Helm*, laying out a proportionality test that, had it prevailed in later cases, would treat non-capital proportionality challenges roughly similarly to capital proportionality challenges.

Justice Powell’s three-factor test required consideration of: (1) “the gravity of the offense and the harshness of the penalty”¹⁰⁴; (2) “the sentences imposed on other criminals in the same jurisdiction”¹⁰⁵; and (3) “the sentences imposed for commission of the same crime in other jurisdictions.”¹⁰⁶ Like the Court’s non-capital proportionality doctrine, this test requires consideration of how “other jurisdictions” treat the same offense; it suggests that the weight or trend of practice outside of the challenged jurisdiction is highly salient. Moreover, the test’s requirement that judicial decision-makers weigh the “gravity” of the offense against the “harshness” of the penalty implicitly requires the articulation of some normative framework for as-

100 445 U.S. 263 (1980).

101 *Id.* at 274.

102 454 U.S. 370 (1982).

103 463 U.S. 277 (1983).

104 *Id.* at 290–91.

105 *Id.* at 291.

106 *Id.* at 291–92.

sessing the fit of crime and punishment; any such assessment will inevitably resemble what the Court calls, in its capital proportionality cases, bringing its “own judgment” to bear. (The last factor, number (2) in Justice Powell’s test, is a way of testing fit by reference to a particular jurisdiction’s already articulated normative vision in its treatment of other offenses and offenders.)

Justice Powell’s three-part test in *Helm*, though not articulated in the same terms as the capital proportionality cases decided almost simultaneously,¹⁰⁷ invokes the same kind of “objective” evidence (inter-jurisdictional comparison) and “judgment” about proportionality (gravity weighed against harshness), roughly speaking. But this rough equivalence did not last long. In its more recent non-capital cases, the Court sharply narrowed its proportionality analysis, even as it opened up its capital proportionality analysis. In the very next non-capital proportionality case after *Helm*, *Harmelin v. Michigan*,¹⁰⁸ a majority of the Court rejected Justice Powell’s analysis—or rather, refined it right out of existence. The fractured majority consisted of two Justices who would have allowed *no* Eighth Amendment proportionality review in non-capital cases and a three-Justice plurality who believed that the Eighth Amendment contained a much narrower proportionality principle than Justice Powell recognized in *Helm*. According to the plurality, an Eighth Amendment challenge on proportionality grounds can proceed only in the “rare”¹⁰⁹ case in which the judicial decision-maker discerns a *gross* disproportionality between the gravity of the offense and the harshness of the punishment. If a challenge clears this threshold test, then the judicial decision-maker may go on to perform the intra- and inter-jurisdictional comparisons called for by *Helm* in order to complete the proportionality analysis. If the threshold test is not met, however, no consideration of the other two factors is necessary.

The application of this new threshold requirement of gross disproportionality has proven to be an insurmountable hurdle for Eighth Amendment challenges to long prison terms. In *Harmelin* itself, the Court upheld against constitutional challenge the imposition of a mandatory sentence of life without possibility of parole for a first-time felony offender convicted of possessing 672 grams of cocaine.

107 *Helm* was decided in 1983, building on Powell’s *Rummel* dissent of 1980. See *supra* notes 100, 102. *Coker* was decided in 1977, *Enmund* in 1982, and *Tison* in 1987. See *supra* notes 66, 72, 75.

108 501 U.S. 957 (1991) (plurality opinion).

109 *Id.* at 1005.

Adverting to the gravity of the threats posed by the distribution of illegal drugs, the Court reasoned that Harmelin's crime "threatened to cause grave harm to society"¹¹⁰ and that Michigan had "good reason" and "a rational basis"¹¹¹ for its extremely harsh treatment of such offenses. The use of the phrase "rational basis" is particularly telling here, because it echoes the Court's lowest tier of scrutiny for equal protection challenges to legislative classifications—challenges that almost never succeed.¹¹² The *Harmelin* dissenters, in contrast, demonstrated how the use of inter- and intra-jurisdictional analysis could make a crucial difference. Looking within the state, the only other offense (aside from drug offenses) in Michigan for which mandatory life without possibility of parole was authorized was first-degree murder; in contrast, second-degree murder, rape, and armed robbery did not carry such a harsh mandatory sentence. Looking to other jurisdictions, the dissenters noted that "[n]o other jurisdiction imposes a punishment nearly as severe as Michigan's for possession of the amount of drugs at issue here."¹¹³

The difficulty of meeting the gross disproportionality threshold requirement was underscored by the Court's most recent application of the test in 2003 in *Ewing v. California*.¹¹⁴ Ironically, this case was decided between the Court's two dramatic applications of its newly powerful capital proportionality doctrine in *Atkins* (2002) and *Simmons* (2005). In *Ewing*, the Court upheld the operation of California's "three-strikes-you're-out" law that resulted in a twenty-five-years-to-life sentence for a repeat offender convicted of attempting to steal three golf clubs from a golf course pro shop. In considering whether the sanction was grossly disproportionate to the offense, the Court insisted that legislatures must remain free to decide for themselves what purposes they seek to advance in the criminal justice systems. Reasoning that the state of California could reasonably believe that its harsh law would promote its interest in deterring crime (by inducing parolees to leave the state) and especially its interest in incapacitating offenders likely to recidivate, the Court held that *Ewing's* was not "the rare case in which a threshold comparison of the crime commit-

110 *Id.* at 1002.

111 *Id.* at 1004.

112 See generally Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans*, 32 IND. L. REV. 357 (1999) (cataloging and attempting to explain the few challenges that have succeeded under the Court's usually exceedingly deferential rational basis review).

113 *Harmelin*, 501 U.S. at 1026 (White, J., dissenting) (emphasis added).

114 538 U.S. 11 (2003) (plurality opinion).

ted and the sentence imposed leads to an inference of gross disproportionality.”¹¹⁵ In a choice of quotation that reveals just how difficult the non-capital proportionality test is meant to be, the *Ewing* Court reached back to repeat approvingly the *Rummel* Court’s observation that the proportionality principle would “come into play in the extreme example . . . if a legislature made overtime parking a felony punishable by life imprisonment.”¹¹⁶

While the two lines of Eighth Amendment proportionality review in the capital and non-capital contexts might be thought unremarkable considered separately, their juxtaposition inevitably creates a jarring contrast and generates difficult questions. Why is a national legislative head count the objective touchstone for Eighth Amendment analysis in capital cases, while consideration of what other jurisdictions do is not even part of the non-capital analysis unless some enormously high threshold of gross disproportionality is reached first? Why is constitutional consideration given to elite expert and world opinion and to trends in practices in the capital context, but none in non-capital cases? Why is incapacitation recognized as a legitimate purpose of non-capital punishment, but not of capital punishment (when death is surely the only completely reliable means of incapacitation)? How is it that the most serious drug sentence (by far) and the harshest “three strikes” statute in the entire country can withstand non-capital proportionality review, while on the capital side, a minority of retentionist jurisdictions can outlaw the execution of juvenile offenders and offenders with mental retardation everywhere? The Court never answers these questions directly. Indeed, it virtually never makes any explicit comparison between the two lines of doctrine. Rather, it tends to ritualistically intone some version of its “death is different” mantra. By implication, the Court seems to be suggesting that the unique severity and irrevocability of a sentence of death does and should make such sentences uniquely sensitive to a more heightened and sensitive proportionality analysis.

The upshot, however, is that the “difference” of death has cabined searching proportionality review outside of the capital context. One might argue that the development of more searching proportionality review on the capital side is actually a boon for all criminal defendants, because the more demanding death penalty doctrine may eventually spill over into the non-capital side, and, in any case, it pro-

115 *Id.* at 30 (quoting *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring in part and concurring in judgment)).

116 *Id.* at 21 (quoting *Rummel v. Estelle*, 445 U.S. 263, 274 n.11 (1980)).

vides a template for a more sensitive doctrine by expanding the range of relevant considerations and demonstrating how they might be deployed. There is no reason why this hopeful (from the perspective of defendants) prospect could never happen. But exactly the opposite is what has actually occurred, and there is some reason to think that the causal influences run exactly contrary to the hopeful view. A more pessimistic but probably more realistic view is that capital defendants can succeed only *on the condition* that their success does not spill over into the non-capital side.

First, the very same reasoning (from reduced culpability relative to other offenders) that excluded juveniles, offenders with mental retardation, and (some) non-triggermen from the ambit of the death penalty might also exclude them from the *next* most serious punishment, especially in jurisdictions that do not authorize capital punishment. For the Court to avoid backlash in response to its narrowing of the scope of capital punishment (a response with which it is familiar from its early death penalty cases), it needs to ensure that a very serious punishment remains unassailably available for those whom it exempts from death. The best way to ensure this availability is to maintain a different proportionality analysis on the non-capital side.

Second, the number of ordinary criminal defendants is larger, by orders of magnitude, than the number of capital defendants. Moreover, the range of prison terms and other possible penalties is a broad continuum on the non-capital side, in contrast to the “on/off” switch of capital punishment. These two facts together suggest a much more ominous threat of floodgates opening on the non-capital side than on the capital side of proportionality litigation. Hence, one should expect to see exactly what has developed—that any developments in proportionality review on the capital side would be strictly confined and prevented from generating instability in the much larger and more amorphous arena of ordinary criminal punishment.

But why should a Court that is clearly unwilling to regulate non-capital sentences be so willing to intervene constitutionally on the capital side? The text and history of the Eighth Amendment certainly does not call for such a sharp divide (or any divide at all) between these forms of punishment. One could simply accept at face value the Court’s repeated observation that “death is different” from all other punishments in its severity and irrevocability. Yet one could also add the observation that “death is different” in a few additional important ways. First, the death penalty has enormous visibility and salience both within the United States as a symbol of crime policy and in the broader world as a symbol of American lack of respect for an

emerging world consensus on universal human rights. Second, the death penalty is a tiny part of American crime policy, even in the states that use it the most. Compare the current rate of about 50 executions per year nationwide to the national incarceration rate of about 2.3 million people. Any constitutional regulation of capital punishment thus will be both highly visible and relatively insignificant in its effect on national or state crime policy. Whether intentional or not, the Supreme Court's capital jurisprudence offers a means to legitimate American penal policy by ameliorating some of its harshest aspects and portraying the Court as a counter-majoritarian scrutinizer of state penal policy, while leaving the fundamental pillars of America's true penal exceptionalism intact. The United States's claim to the title of the world's leading incarcerator remains untouched by the constitutional regulation of capital punishment, yet such regulation gets a disproportionate degree of attention because of the power of the death penalty as a symbol in numerous different arenas.

As a result, constitutional regulation of capital punishment both obscures and normalizes the excesses of American penal policy. The problems of mass incarceration, racial disparities in punishment, and the failed drug war are obscured because they inevitably fall into the shadows when the spotlights of national and world attention are focused by the Supreme Court on highly dramatic issues regarding American death penalty practices. Moreover, extremely lengthy sentences are normalized by capital litigation: successful capital litigants, after all, are almost always "rewarded" with sentences of life without possibility of parole. Even the lengthiest sentences lose their horror when they are so avidly sought and so victoriously celebrated by the (rarely) successful capital litigant. In these ways, the success of capital litigants under the Eighth Amendment offers little comfort to and indeed likely limits the chances of successful challenges by non-capital litigants.

B. Constitutional Regulation of Defense Counsel

The regulation of the effectiveness of defense counsel under the Sixth Amendment presents some of the same potential dangers as Eighth Amendment proportionality regulation, but in a contrasting manner. While the Supreme Court developed two distinct lines of doctrine under the Eighth Amendment for capital and non-capital litigants, the Court has always insisted that there is but a single standard for attorney competence under the Sixth Amendment. In recent years, however, the Court has applied this unitary standard in a much more demanding manner to capital defense counsel during

sentencing proceedings. There is perhaps stronger reason in the Sixth Amendment context to think that this more demanding approach in capital cases may redound to the benefit of all criminal defendants, but the distinct possibility remains that the Court's disparate treatment of capital and non-capital cases will work to legitimate the patently inadequate criminal defense services that are all too often provided in ordinary criminal cases.

The very case in which the Supreme Court first announced its current constitutional standard for the regulation of defense counsel made clear that the Court was unlikely to forge two separate standards for capital and non-capital cases. *Strickland v. Washington*¹¹⁷ was a capital case in which the defendant had confessed and pleaded guilty (against the advice of counsel) to three capital murder charges. The Supreme Court case involved Washington's later challenge on federal habeas corpus review, with new counsel, to the minimal sentencing presentation by his trial counsel to the sentencing court. This challenge presented something of a mixed bag. On the one hand, Washington's defense counsel—perhaps from a sense of self-confessed “hopeless[ness]”¹¹⁸—failed to do much of anything to prepare for his client's capital sentencing hearing.¹¹⁹ On the other hand, the vigorous investigation later performed by habeas counsel suggested that there wasn't a great deal of helpful information that could have been unearthed on Washington's behalf.¹²⁰ The Court concluded that neither prong of its newly minted test for establishing ineffective assistance of counsel had been met: counsel's investigation and presentation had not been shown to be constitutionally “un-

117 466 U.S. 668 (1984).

118 *Id.* at 699.

119 Counsel spoke to the defendant's mother and wife on the phone, but never met with them in person, nor contacted any other possible character witnesses, nor sought any independent psychological or psychiatric evaluation of his client, nor requested that the state conduct a presentence investigation. Rather, counsel relied on Washington's acceptance of responsibility for his crimes, his apparent lack of a criminal history (which a presentence investigation would likely have rebutted), and his self-described state of “extreme mental or emotional disturbance” (one of Florida's statutory mitigating circumstances). *Id.* at 672–74.

120 There were more than a dozen friends, neighbors, and relatives who would have provided favorable character evidence. This good character evidence, however, was undercut by Washington's damning admissions to other criminal activity that had not been revealed during his initial sentencing proceeding, but would have been used to rebut the testimony of the character witnesses. Moreover, the psychological and psychiatric reports solicited by habeas counsel concluded that Washington was *not* under the influence of extreme emotional disturbance at the time of crimes, though he was “chronically frustrated and depressed because of his economic dilemma.” *Id.* at 675–77.

reasonable,” nor had Washington been shown to have been “prejudiced” by his counsel’s alleged failings in the sense that there was no reasonable probability that the outcome of the sentencing would have been different but for his attorney’s failures.¹²¹

Washington’s case clarified that capital sentencings and ordinary criminal trials alike are subject to the same overarching two-prong standard for assessing the constitutional adequacy of counsel. Moreover, the case signaled very clearly that the bar was being set intentionally high for the invalidation of criminal convictions (or capital sentences) on the ground of inadequate counsel. The Court was remarkably candid about its fear of opening the floodgates of litigation and the unfairness of evaluating attorney decision-making with the benefit of hindsight.¹²² Thus, the Court refused to create any “checklist” of specific minimum requirements for adequate representation and exhorted lower courts to accord a “strong presumption” of adequacy of representation and to give deference to attorney strategy.¹²³ Even the fairly general ABA Guidelines for the provision of defense services were not strongly endorsed by the Court; rather, they were to be treated as guides—“but . . . only guides”—for assessing the reasonableness of defense attorney choices in individual cases.¹²⁴

Thus, from the very beginning, *Strickland* appeared to be an equal-opportunity obstacle to constitutional claims of inadequate counsel. Neither capital defendants nor ordinary criminal defendants were able to meet the very high showing required by the new test. One early application of *Strickland* by the Supreme Court in a capital case demonstrated quite clearly how demanding the new standard was proving to be. In *Burger v. Kemp*,¹²⁵ the petitioner’s capital defense counsel presented no mitigating case whatsoever at his sentencing hearing, which resulted in a death sentence. Indeed, counsel performed virtually no investigation in preparation for the sentencing hearing. Counsel had met with Burger for a total of only about six hours in preparation for both the guilt and the sentencing phase of his trial, and relied on his client to suggest possible witnesses or mitigating evidence by asking whether Burger could produce evidence of “anything good about him.”¹²⁶ Unsurprisingly, this question did not

121 *Id.* at 698–700.

122 *Id.* at 689–90.

123 *Id.* at 688–89.

124 *Id.* at 688.

125 483 U.S. 776 (1987).

126 *Id.* at 813 (Blackmun, J., dissenting).

elicit the information later compiled by habeas counsel of a what the district court called the petitioner's "tragic childhood"¹²⁷—a childhood marked by family turmoil, physical abuse, neglect, and psychological problems. Although the Supreme Court concluded that trial counsel "could well have made a more thorough investigation than he did,"¹²⁸ the Court ultimately concluded that counsel's limited investigation could be viewed as a reasonable "strategic decision"¹²⁹ influenced by "the defendant's own statements or actions,"¹³⁰ which had failed to alert counsel to the value of pursuing further mitigating evidence. *Burger* sent an unmistakable signal to lower courts about the deference they were to accord the choices of trial counsel, even in capital cases, when life was on the line. As a result, *Strickland* claims, though ubiquitous and often reflecting egregiously poor lawyering, were virtually certain losers—a fact well recognized by lawyers and documented in reviews of both capital and non-capital litigation.¹³¹

Against this backdrop, it was startling when the Supreme Court invalidated on *Strickland* grounds three separate capital sentences from three different states over a period of slightly more than five years (from 2000 to 2005). Even more surprising was the fact that each of the three decisions reversed state court decisions despite the newly deferential standard of review imposed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").¹³² The three cases, read together, represent a sea change in the approach of the Supreme Court to the application of *Strickland*—at least in capital sentencing proceedings. Whether all criminal defendants should take heart from this new scrutiny is, of course, another question.

The first of the three cases, *Williams v. Taylor*,¹³³ was the first Supreme Court case to interpret the new standard of review under AEDPA. Despite the Court's conclusion that Congress did indeed require greater deference to the legal analysis of state courts, the

127 *Id.* at 794 (quoting *Burger v. Kemp*, 753 F.2d 930, 937–38 n.7 (11th Cir. 1985)).

128 *Id.*

129 *Id.* at 795.

130 *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 691 (1984)).

131 See, e.g., Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1857–66 (1994) (illustrating how inadequate capital defense services were tolerated under *Strickland*); William S. Geimer, *A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS.J. 91, 97–161 (1995) (illustrating *Strickland's* failings in the wider run of criminal cases).

132 Pub. L. No. 104-132, 110 Stat. 1214, 1217–26 (codified in scattered sections of 28 U.S.C.). See *infra* text accompanying notes 149–66 for a more detailed discussion of AEDPA.

133 529 U.S. 362 (2000).

Court nonetheless rejected the conclusion of the Virginia Supreme Court that Williams had received effective assistance of counsel at his capital sentencing proceeding. The scope of the decision in *Williams* was limited in that it dealt only with the “prejudice” prong of the *Strickland* test. The state habeas trial court had found that Williams’ counsel had been ineffective at his sentencing hearing, and the Virginia Supreme Court assumed, without deciding, that trial counsel’s performance had indeed been deficient. The only question before the U.S. Supreme Court was whether to affirm the Virginia Supreme Court’s conclusion that Williams had not been *prejudiced* by his lawyer’s incompetence. Thus, *Williams* was the exceedingly rare case in which the state and federal courts agreed that *Strickland*’s strong presumption of competent lawyering had been overcome. This agreement had a sound foundation: Williams’ trial lawyer failed to uncover dramatic evidence of his client’s extreme mistreatment, abuse, and neglect as a child, testimony that his client was borderline mentally retarded and might have organic mental impairments, and powerful testimony from the state’s own experts that Williams might not pose a danger in the future if incarcerated rather than executed.¹³⁴ As for the sentencing presentation, the Supreme Court acerbically noted that the bulk of defense counsel’s closing “was devoted to explaining that it was difficult to find a reason why the jury should spare Williams’ life.”¹³⁵

The Supreme Court rejected the Virginia Supreme Court’s analysis of the “prejudice” prong on three grounds, one of which was peculiar to the case, two of which were generalizable to other capital defendants, but none of which had much relevance to the application of *Strickland* to ordinary criminal defendants. The ground peculiar to the case was the Virginia Supreme Court’s strange characterization of the *Strickland* prejudice prong as somehow based on more than “mere” outcome determination—an analysis that led the Supreme Court to the highly unusual conclusion that, even under AEDPA deference, the state court’s conclusion could not be upheld because it had simply applied the wrong legal standard.¹³⁶ The two more generalizable grounds were first, that the state court had failed to consider the *totality* of the mitigating evidence in the case (from both the trial and the later habeas proceeding), and second, that the state court had failed to give appropriate *weight* to the mitigating evidence un-

134 *Id.* at 370.

135 *Id.* at 369.

136 *Id.* at 397.

covered by habeas counsel by stressing the issue of future dangerousness to the exclusion of moral culpability.¹³⁷

The first of these two more generalizable grounds might offer some modest assistance to non-capital defendants in that it suggests that various pieces of evidence that a trial lawyer erroneously fails to investigate and present must be considered in their totality. But it is rarer outside the context of capital sentencing that a lawyer's investigative failures will be concentrated around a single issue (such as mitigation). Thus, the aggregation principle for which *Williams* might plausibly stand offers substantially less assistance outside of the special context of investigation of mitigation. Moreover, and much more powerfully, only in the capital context are defendants routinely appointed lawyers in state and federal habeas proceedings. Because the inadequacy of trial counsel's investigation can be demonstrated only by a more complete investigation by habeas counsel (consider the presentations in *Strickland*, *Burger*, and *Williams*), the Court's willingness to carefully consider the impact of such later investigations necessarily privileges the capital litigant over the non-capital litigant.

The second of the two generalizable grounds is simply inapposite to non-capital litigation. The Supreme Court's insistence that the state court consider the relevance of mitigating evidence to the jury's assessment of the defendant's moral culpability (and not merely his future dangerousness) reflects the distinctive nature of the decision at issue in capital sentencing—the appropriateness of death as punishment. In ordinary criminal trials, evidence that trial counsel fails to uncover and present on behalf of a client is assessed only against the government's case for conviction, along the unitary dimension of “guilty” versus “not guilty.” Capital cases have a more qualitative and inescapably moral dimension—even assuming that the defendant is guilty and eligible for capital punishment, is the defendant someone who ought to be put to death? The considerations that inform this decision are different from the factual determinations that trial juries are called upon to make in ordinary criminal trials, and the Supreme Court's admonition in *Williams* offers nothing that will impact determinations of “prejudice” in ordinary criminal cases.

In the second of the three startling reversals, *Wiggins v. Smith*,¹³⁸ the Court went much further than it had in *Williams* by addressing directly *Strickland*'s first prong, in particular, the requirements for reasonable investigation. As in all of the previous capital sentencing

137 *Id.* at 397–98.

138 539 U.S. 510 (2003).

challenges under *Strickland*, Wiggins's habeas counsel uncovered evidence of a "bleak" life history—including "evidence of severe physical and sexual abuse petitioner suffered at the hands of his mother and while in the care of a series of foster parents."¹³⁹ In contrast to *Williams* (and also *Strickland* and *Burger*), however, Wiggins was represented at trial by two experienced and apparently able public defenders, who devoted substantial time and thought to his defense, eventually committing themselves to a strategy of "residual doubt" at sentencing—arguing that even if Wiggins participated in some way in felony murder of the elderly victim, he was not the actual killer. Although trial counsel uncovered some evidence of Wiggins's limited intellectual capacities and difficult life, they failed to uncover the dramatic evidence eventually compiled in the "social history" commissioned by habeas counsel. The Supreme Court concluded that this failure constituted deficient lawyering under the Sixth Amendment and that the Maryland courts' conclusion to the contrary was not merely wrong, but unreasonably so.

Some of the bases for the Court's conclusions in *Wiggins* have more potential (not yet realized) to be broadly generalizable than the Court's analysis in *Williams*. First, in stark contrast to *Burger*, the Court rejected the state's (and the dissent's) attempt to portray counsel's failure to present evidence of Wiggins's life history as "strategy." Rather, the Court concluded that "counsel chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible."¹⁴⁰ This holding breaks no new doctrinal ground, as *Strickland* itself insisted that a reviewing court must consider the reasonableness of the investigation that underlies any strategic decision.¹⁴¹ But *Wiggins* reflects a new willingness on the part of the Court to apply this requirement with some vigor. Whether this vigor will extend outside of the capital context has yet to be tested in the Supreme Court. Second, the Court noted that it was "standard practice" in Maryland to prepare a social history of the defendant in capital cases, a practice also endorsed by the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases.¹⁴² Once again, the Court took pains to note that it was merely applying *Strickland* rather than revising it, but the shift from *Strickland's* reference to ABA standards as "*only* guides" to *Wig-*

139 *Id.* at 516.

140 *Id.* at 527–28.

141 *See id.* (citing *Strickland v. Washington*, 466 U.S. 668, 690–91 (1984)).

142 *Id.* at 524.

gins's repeated reference to and quotation from the ABA's death penalty Guidelines represents another unexpected shift in emphasis. This shift toward incorporation of ABA standards as the foundation of constitutional reasonableness—if extended outside of the capital context—could redound to the benefit of all criminal defendants, as the ABA has been considerably more “checklist” oriented in its consideration of counsel's duties than have the vast majority of courts applying *Strickland*.¹⁴³

On the other hand, the *Wiggins* Court's consideration of the “prejudice” prong of the *Strickland* test, like the analysis of the *Williams* Court, relied on a distinctive feature of capital sentencing. While the *Williams* analysis relied on the distinctively moral nature of the substantive decision that capital juries are called upon to make, the *Wiggins* Court relied on a distinctive procedural feature of Maryland's capital sentencing process—the fact that a single vote for life would not “hang” a jury, but rather would require the imposition of a life sentence. The Supreme Court explained, “Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that *at least one juror* would have struck a different balance.”¹⁴⁴ It is hard to see how this analysis offers any applicability to determinations of prejudice from inadequate trial presentations.

The Court's third capital sentencing reversal, *Rompilla v. Beard*,¹⁴⁵ was the most fact-specific and the least generalizable to any other context, capital or non-capital. *Rompilla's* lawyers had, like all of the others, failed to uncover a substantial amount of mitigating evidence—in this case, evidence of a neglected childhood, serious alcoholism within the family and on the part of *Rompilla* himself, and indications of *Rompilla's* serious mental illness and cognitive impairment. *Rompilla's* lawyers, like those of *Wiggins*, were experienced, dedicated counsel who did a fair amount of investigation on his behalf, none of which had turned up this mitigating evidence. The Court held that *Rompilla's* lawyers made one quite specific error—they failed to look at a file, available as a public court record, on which the prosecution had given notice that it intended to rely at sentencing to prove a prior offense, similar to the one for which *Rom-*

143 The Court cited the ABA standards not only in *Wiggins*, but also in *Williams*, 529 U.S. 362, 396 (2000), and *Rompilla v. Beard*, 545 U.S. 374, 387 & nn.6–7 (2005), a trifecta for the new relevance of ABA guidance—at least in death cases.

144 *Wiggins*, 539 U.S. at 537 (emphasis added).

145 545 U.S. 374 (2005).

pilla faced capital sentencing. It turned out that this file contained prison files with leads to all of the mitigating evidence that Rompilla's lawyers had missed.

The very specific nature of the error described by the Court—the importance of the prior conviction to the government's sentencing presentation, the amount of notice that defense counsel was given of the prosecution's intent to rely upon the court file, the ease with which defense counsel could have accessed the file, and the trove of relevant information that the file turned out to possess—renders it very difficult to identify any doctrinal proposition advanced by the case. Moreover, the case was decided by a 5-4 margin, with Justice O'Connor as the decisive vote in the majority. Justice O'Connor retired only a few months later, and her seat on the Court was taken by Justice Alito, who had authored the Third Circuit opinion reversed by the Court in *Rompilla*. This switch in personnel makes it even harder to say what *Rompilla* stands for—if anything.

The combined effect of *Williams*, *Wiggins*, and *Rompilla* has been to hearten advocates of greater constitutional regulation of defense counsel by the courts.¹⁴⁶ As the above discussion suggests, it is possible that these cases reflect (or may engender) a greater commitment to applying the *Strickland* test in a more demanding manner not only in capital sentencing proceedings, but also in ordinary criminal cases. More skeptical scrutiny by courts of lawyers' post-hoc claims of "strategy" (which are ubiquitous) and more consultation of expert assessments of counsel's basic duties (such as those provided by the ABA) would clearly improve, albeit modestly, the capacity of courts to regulate defense counsel under the Constitution. But it is at least equally possible that the three cases reflect a special inflection of *Strickland* relevant only to the distinctive (and very small) context of capital sentencing. The simple fact that the Court chose to review only cases involving challenges to representation in capital sentencing proceedings, as well as the emphasis in the Court's analyses on special substantive and procedural aspects of such proceedings, suggests that the Court may be signaling (or may be interpreted by lower courts as

¹⁴⁶ See, e.g., John H. Blume & Stacey D. Neumann, "It's Like *Deja Vu* All Over Again": *Williams v. Taylor*, *Wiggins v. Smith*, *Rompilla v. Beard* and a (Partial) Return to the Guidelines Approach to the Effective Assistance of Counsel, 34 AM. J. CRIM. L. 127, 129 (2007) (stating that these three cases "have provided some reason for optimism"); David Cole, Gideon v. Wainwright and *Strickland v. Washington*: Broken Promises, in CRIMINAL PROCEDURE STORIES 101, 125 (Carol S. Steiker ed., 2006) (stating that these three cases constitute "rays of hope").

signaling) a greater willingness to scrutinize defense representation only in this limited context.

Should this more limited view of the *Williams*, *Wiggins*, and *Rompilla* trilogy trouble or dishearten the non-capital criminal defense bar? On the one hand, one could take the “camel’s nose” view and posit that capital defendants represent the “thin edge of the wedge” that will eventually shift the intensity of the scrutiny (from less to more) that courts accord the adequacy of defense counsel services in all cases. On the other hand, as this Article argues more generally, there is a risk that special treatment of capital cases is *premised* on its inapplicability to the much larger and much more potentially destabilizing mass of ordinary criminal defendants. Moreover, there is the further, more troubling possibility that the special attention paid to the representation of capital litigants will obscure or even work to legitimate the general system of indigent defense representation. As noted above, the failures of capital trial lawyers are generally brought to light only when new counsel are appointed during state or federal post-conviction proceedings, and these new counsel perform the investigation that trial counsel failed to do. Two features of the world of ordinary criminal cases work against the possibility of real scrutiny of defense counsel preparation and investigation. First, as noted above, only capital defendants are routinely appointed counsel in post-conviction proceedings. Thus, despite the very real possibility that ordinary criminal defense counsel will fail to investigate adequately, there is little chance that any inadequacy will be brought to light for the vast majority of criminal defendants who cannot afford to privately fund post-conviction counsel. Greater *doctrinal* insistence on scrutiny of defense counsel services will do little in the absence of some mechanism to bring inadequate representation to the attention of courts.

Second, unlike most capital defendants, the vast majority of ordinary criminal defendants plead guilty, often on the basis of advice offered after inadequate preparation and investigation by their lawyers. Exactly how often, however, is anyone’s guess because the adequacy of the preparation, investigation, and advice offered to defendants who plead guilty routinely escapes judicial review. This is not because *Strickland* doesn’t apply in the guilty plea context. Rather, defendants who plead guilty and later seek to overturn their convictions on the grounds of inadequate representation must demonstrate “prejudice” in the form of a reasonable probability that they would not have pled

guilty but rather would have insisted on going to trial.¹⁴⁷ Merely showing that adequate preparation or investigation would have allowed defense counsel to strike a better deal is insufficient. Given the often vast differential between the sanctions that defendants risk if they go to trial and the plea bargains that they are offered,¹⁴⁸ it will be extraordinarily difficult to demonstrate in any particular case that a defendant would not have pled guilty *at all*.

These structural impediments to any substantial judicial review of the adequacy of defense counsel preparation and investigation in the vast majority of ordinary criminal cases mean that doctrinal shifts in the intensity of scrutiny under the *Strickland* standard will be largely meaningless, even if they extend more broadly outside of the capital context. But the appearance of tough scrutiny, especially by the Supreme Court, may well create the false impression, especially to the uninitiated, that our criminal justice system is far more intensively regulated than it really is. This real possibility of legitimization can increase the resistance to the necessary legislative action that will always lie at the heart of any real reform of the way that indigent defense services are delivered.

C. Federal Habeas Corpus Review

The constitutional doctrines regarding proportional punishment and effective assistance of counsel both privilege capital litigants over non-capital litigants—the first formally through the creation of two separate lines of doctrine, and the second informally through differential application of the same doctrinal framework. In the preceding two sections, we explored the possibility that the “differentness” of death cases might necessarily exclude greater doctrinal scrutiny in non-capital cases, and indeed might even work to obscure or legitimate troubling practices in ordinary criminal cases. We concede that our concerns have yet to be confirmed empirically; moreover, our suspicions are by their nature difficult to verify or measure, even if completely accurate. In contrast to the necessarily speculative and slippery possibilities that we chart above, the recent revolution in the structure of federal habeas corpus review presents a different set of issues regarding the way that capital cases may affect the administration of the broader criminal justice system.

¹⁴⁷ See *Hill v. Lockhart*, 474 U.S. 52, 60 (1985) (White, J., concurring in judgment).

¹⁴⁸ See generally John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3 (1978) (criticizing vast sentencing differentials between trials and plea bargains).

In the habeas context, rather than receiving especially solicitous constitutional treatment to the exclusion of ordinary criminal cases, capital cases became the archetype that ushered in new procedural barriers to constitutional relief for all criminal defendants. Moreover, in this context, there is no need to speculate about the effect that capital cases have had on criminal law and procedure; rather, the results are plainly written in the provisions of AEDPA.¹⁴⁹ The AEDPA experience draws our attention to the darker shadows that inevitably accompany the bright light that capital cases shine on the criminal justice system. Just as wrongful convictions and inadequate counsel seem that much more compelling in the capital context and can draw media attention and law reform efforts that ordinary criminal cases cannot, the pathologies of capital litigation—especially the extraordinary lengths of time that often elapse between conviction and execution—draw more than their share of attention as well. The reform of federal habeas review is an example of how the window-opening potential of capital litigation can lead to the building of insurmountable walls in the form of formidable procedural impediments to constitutional relief.

The scope and availability of federal habeas corpus review of state criminal convictions became a persistent issue, both for the federal judiciary and for Congress, in the second half of the twentieth century in the wake of the Supreme Court's incorporation through the Fourteenth Amendment of almost all of the criminal provisions of the Bill of Rights. With new and often imprecisely defined constitutional rights in state criminal proceedings, state prisoners flooded the federal courts with petitions for habeas relief from unconstitutional confinement. For decades, Congress considered (and sometimes passed) legislation refining the scope and availability of the writ,¹⁵⁰ and the Supreme Court continually reconsidered its approach to key questions regarding the effect of state procedural defaults,¹⁵¹ the retroactivity of federal habeas judgments,¹⁵² and the preconditions for

149 Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1217–26 (codified in scattered sections of 28 U.S.C.).

150 *See* *Wright v. West*, 505 U.S. 277, 305 (1992) (O'Connor, J., concurring) (chronicling several decades of proposed legislation to amend the federal habeas statute).

151 *Compare* *Fay v. Noia*, 372 U.S. 391 (1963) (holding that state procedural defaults foreclose federal habeas review only if the defendant deliberately bypassed state procedures), *with* *Wainwright v. Sykes*, 433 U.S. 72 (1977) (holding that state procedural defaults foreclose federal habeas review unless the defendant can show cause and prejudice).

152 *Compare* *Linkletter v. Walker*, 381 U.S. 618 (1965) (holding that the retroactive application of new constitutional rules in federal habeas cases depends on a consideration of various factors on a case-by-case basis), *with* *Teague v. Lane*, 489 U.S. 288, 311 (1989)

holding federal evidentiary hearings.¹⁵³ Finally, in response to the Oklahoma City bombings and concerns that those responsible would not be executed in a timely fashion, Congress acted to alter the structure of federal habeas so as to ensure an “effective death penalty”—the “EDP” in the AEDPA statute. AEDPA represents the most recent and radical rewriting of the federal habeas statute—a reworking that has substantially inhibited the ability of the federal courts to enforce the federal constitutional rights of both capital and non-capital petitioners.

AEDPA’s most radical departure is, of course, the new standard of review, codified in 28 U.S.C. § 2254(d), forbidding the granting of the writ unless the state court proceedings resulted in a decision that was “contrary to, or involved an unreasonable application of, clearly established Federal law.”¹⁵⁴ By a narrow margin, the Supreme Court concluded in *Williams v. Taylor*¹⁵⁵ that the statutory language did indeed require a profound change from the previously accepted de novo standard of review. Two recent death cases reveal just how powerful the deference required by AEDPA can be. In *Brown v. Payton*,¹⁵⁶ Justice Breyer cast the crucial fifth vote for reversing the Ninth Circuit’s grant of habeas relief to Payton on his capital sentencing claim. Justice Breyer wrote separately to explain that he would have voted the other way on the Eighth Amendment merits, but that his resolution of the case was altered by AEDPA-required deference: “In my view, this is a case in which Congress’ instruction to defer to the reasonable conclusions of state court judges makes a critical difference.”¹⁵⁷

In a truly outrageous case of just a few months ago, *Buntion v. Quarterman*,¹⁵⁸ a Texas trial court judge admitted to stating in open court that he believed he was “doing God’s work to see that the de-

(holding that new constitutional rules apply retroactively in federal habeas cases only when they prohibit certain primary conduct or adopt procedures “implicit in the concept of ordered liberty”).

153 Compare *Townsend v. Sain*, 372 U.S. 293 (1963) (listing six circumstances in which a federal evidentiary hearing is mandatory), with *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992) (authorizing a federal evidentiary hearing only when a defendant can show cause and prejudice or a “fundamental miscarriage of justice” would result if the hearing were disallowed).

154 28 U.S.C. § 2254(d) (2006).

155 529 U.S. 362, 403–05 (2000).

156 544 U.S. 133 (2005).

157 *Id.* at 148 (Breyer, J., concurring) (citing 28 U.S.C. § 2254(d)(1)).

158 524 F.3d 664 (5th Cir. 2008).

fendant Buntion gets executed,”¹⁵⁹ among numerous other indications of his lack of impartiality in the high-profile capital case before him. The federal district court judge who heard Buntion’s petition for a writ of habeas corpus granted him relief on his claim of judicial bias, but the Fifth Circuit reversed. Describing the AEDPA standard of review as “highly deferential,”¹⁶⁰ the Fifth Circuit explained that while the judge’s statements were “very troubling and hardly reflective of the high standards that judges should strive to maintain,”¹⁶¹ so much so that they resulted in a public reprimand from the Texas State Commission on Judicial Conduct,¹⁶² there was still no room under AEDPA for upholding a grant of federal habeas relief.

Obviously, the new deferential standard will pose similar hurdles for non-capital and capital defendants alike. But some of the other provisions of AEDPA will prove to be even more onerous for non-capital petitioners—rather ironically, since Congress’s stated intent was to ensure a more “effective death penalty.” In particular, AEDPA’s one-year statute of limitations, its absolute ban on same-claim second petitions, its higher bar for filing new-claim second petitions, its onerous exhaustion provisions, and its restrictions on federal evidentiary hearings pose hurdles that are much more difficult to clear for petitioners without appointed counsel. Because there is no constitutional right to appointed counsel in habeas proceedings, and because only capital defendants are routinely provided counsel in state and federal post-conviction proceedings, it is the ordinary criminal defendant (the vast majority of whom are indigent) who is most impeded by AEDPA’s tighter requirements.

One might counter this argument (that non-capital defendants have been harmed, perhaps disproportionately, by the restructuring of federal habeas motivated by the perceived excesses of capital litigation) by noting that non-capital defendants did not have much to lose, habeas-wise, in the first place. This was Stephen Bright’s point during the live symposium that spawned this paper: he observed that the typical non-capital defendant seeking habeas relief has no effective access to the courts without the help of appointed counsel, rendering the right to habeas review essentially meaningless. “I might as well fly a Boeing 747 by myself,” he quipped. This is a fair point, finding some support in a pre-AEDPA reported rate of federal habeas re-

159 *Id.* at 667 (quotation marks omitted).

160 *Id.* at 675.

161 *Id.* at 676.

162 *Id.*

lief of only 1 in every 100 non-capital cases. However, a recent study of the effects of AEDPA found that post-AEDPA, the rate dropped from 1 in 100 to 1 out of every 341 cases filed.¹⁶³ One could say that either one of these rates is vanishingly small (Bright's point). But another crucial fact to note is the absolute number of non-capital habeas petitions filed on a yearly basis—a number greater than 18,000.¹⁶⁴ Even a very low rate of success still represents a substantial number of cases, and undoubtedly some rather egregious ones (if the reported facts of the *Buntion* case are any indication). So there is still some modest regulation of state court excesses going on in federal habeas review, and AEDPA's more than three-fold reduction should count as a real loss.

III. CONCLUSION

Having challenged the comforting “window opening” story that death penalty advocacy and litigation promotes the interests of all criminal defendants, and having explored the darker story of the “wall building” potential of particular capital punishment strategies and doctrines, what is to be done? Our purpose here is not to propose a solution to the conflicts that we chart. We do not necessarily think that an “innocence” strategy or LWOP laws are always wrong-headed, no matter what the context. Nor do we mean to suggest that the Supreme Court's “death is different” doctrinal edifice should be dismantled. After all, it is entirely reasonable to believe that death *is*, in fact, different. Rather, we seek to draw attention to the unrecognized limitations and tensions that death penalty strategies and doctrines generate for the much larger population of ordinary criminal defendants. To recognize that “death is different” is also to assert that incarceration (as opposed to death) is different, too—less severe, less final, less problematic, and less worthy of attention. In light of our current crisis of mass incarceration, we need to be wary of any such implication.

To be wary, however, requires being aware. Once the potential conflicts between the interests of capital and non-capital defendants are recognized, it then becomes possible to try to gauge their severity and to structure advocacy and litigation strategies so as to avoid or

¹⁶³ See NANCY J. KING ET AL., NAT'L CTR. FOR STATE COURTS, HABEAS LITIGATION IN U.S. DISTRICT COURTS: AN EMPIRICAL STUDY OF HABEAS CORPUS CASES FILED BY STATE PRISONERS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996, at 52, 58 (2007), http://www.ncsconline.org/D_Research/publications.html#F.

¹⁶⁴ *Id.* at 9–10.

minimize such conflicts. Sometimes, a conflict might be so severe as to suggest that a death penalty reform (say, the passage of an LWOP bill) might, under the circumstances, be so likely to have such large negative effects on non-capital defendants as not to be “worth it.” In such circumstances, even genuinely useful reforms may be worth forgoing or actively opposing (even unsuccessfully). Whether to reject (and work to defeat) potentially harmful or legitimating reforms or whether to work around them depends on the relative weights of harm, legitimization, and reform, as we have suggested elsewhere.¹⁶⁵ Such weighing needs to be done, but it can be only if the community of capital and criminal defense lawyers—small and beleaguered as it already is—honestly confronts the issues that could potentially divide them. We are thus doubly inspired to offer the above reflections—as scholars in pursuit of “truth,” of course, but also as reformers in pursuit of the best possible improvements to our criminal justice system as a whole.

¹⁶⁵ See Carol S. Steiker & Jordan M. Steiker, *Should Abolitionists Support Legislative “Reform” of the Death Penalty?*, 63 OHIO ST. L.J. 417, 424 (2002).