

A Capital Waste of Time? Examining the Supreme Court's "Culture of Death"

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In a recent lecture at the University of Chicago, U.S. Supreme Court Justice Stephen Breyer stated that he has two basic jobs. The first job, he explained, is deciding what to decide, and the second job is then to decide what the Court has decided to decide.¹ As voluminous law reviews highlight, many law professors and other commentators devote careers to analyzing and criticizing exactly how Supreme Court Justices perform their second job of deciding the cases the Court has decided to decide. But far less attention has been devoted to analyzing and criticizing exactly how Supreme Court Justices perform their first job of deciding what to decide.

My interest in modern sentencing jurisprudence has led me to follow closely the Supreme Court's certiorari process and choices, and I now believe that more attention (and criticism) should be directed toward the Justices' performance in their first job of deciding what to decide. To put my particular concerns bluntly, I have concluded that, at least in the arena of criminal justice, the Supreme Court has recently done a poor job setting its own agenda and its failings have had a negative impact on state and federal legal systems. Specifically, the Supreme Court has become caught up in what I call a "culture of death:" the Court devotes extraordinarily too much of its scarce time and energy to reviewing death penalty cases and adjudicating the claims of death row defendants. As the title of this commentary suggests, I consider this phenomenon a "capital waste" of the Court's time, which results in various problems for the administration of both capital and non-capital sentencing systems.

Beyond criticizing the Supreme Court's troublesome affinity for obsessing over capital cases, I wish to explore agenda-creating and agenda-setting realities that can influence the Supreme Court and its work. My goal is to spotlight some under-examined dynamics that shape the Court's engagement with legal issues and its work-product, which in turn should facilitate broader reflection on the institution of the Supreme Court and the Justices' modern efforts in discharging both of their important decision-making jobs. In addition, as a final coda to this commentary suggests, a change in personnel on the Court may prove as consequential for how the Court sets its docket as for how the Court resolves cases.

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1. See Justice Stephen Breyer, 2006 University of Chicago Schwartz Lecture on "Judicial Activism: Power Without Responsibility?" (Feb. 7, 2006), podcast available at <http://webcast-law.uchicago.edu/2006/winter/schwartz-breyer.mp3>.

I. AN OVERVIEW OF THE SUPREME COURT'S DOCKET AND HOW IT GETS SET

Though the Supreme Court often seems like a stable institution, the nature and size of its docket has evolved significantly over the last century. With the near elimination of mandatory appeals, the Court's docket has come almost entirely within the Justices' control. Meanwhile, despite a dramatic increase in the number of litigants seeking Supreme Court review, there has been a dramatic decrease in the number of cases heard and adjudicated by the Court.

A. Modern Docket Basics

Through the Judiciary Act of 1925, Congress significantly reduced the number and type of cases that the Supreme Court had to hear as mandatory appeals.² Through the Judicial Improvements and Access to Justice Act of 1988, virtually all of the Court's remaining non-discretionary appellate jurisdiction was eliminated.³ Thus, since 1925, the Justices have had significant control over their plenary docket; for the last two decades, the Court has been almost entirely free to decide how many and which cases to consider on the merits.

The statistics that detail how many cases have been presented to and decided by the Supreme Court during the last century reveal notable and contrary trends. Since the 1920s, the number of cases presented to the Court has increased dramatically, but the number of cases the Court has resolved on the merits has decreased dramatically.⁴ In 1930, just over 1300 cases came before the Court, and the Justices resolved 235 cases on the merits.⁵ By 1970, nearly 3000 *more* petitions for review were submitted to the Court, but nearly one hundred *fewer* cases were resolved on the merits.⁶ By the year 2000, nearly 9000 cases were submitted for review, but the Court decided less than 90 total cases on the merits.⁷ In the last decade, the Justices have addressed

2. See Judiciary Act of 1925, Pub. L. No. 68-415, 43 Stat. 936 (1925); see also Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643 (2000) (reviewing the history and aftermath of the "Judges' Bill").

3. See Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662 (1988) (codified as amended at 28 U.S.C. §§ 1252, 1254, 1257, 1258 (2000)); see also Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 WASH. & LEE L. REV. 737, 751-58 (2001) (discussing the impact of the 1988 Act).

4. See Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1368 (2006) ("Based on these numbers [from the compendium of Supreme Court statistics], one thing is clear: the number of cases coming before the Supreme Court grew steadily since 1925, while the number of cases the Court decides has been in steady decline.").

5. See *id.* at 1369 (reporting these statistics compiled from various sources).

6. *Id.*

7. See *id.*

on the merits less than 1% of the cases submitted for review,⁸ and the 2006 October Term set a record low for full dispositions with only 68 merits opinions in cases that were fully briefed and argued before the Court.⁹

As some commentators have noted, the significant reduction in the size of the Supreme Court's docket has impacted not only how much work the Justices have to do, but also how the Justices do their work. Fewer cases to decide on the merits not only frees up additional time to write more and longer opinions, but it also shifts the nature and place of the Court's work in the nation's jurisprudence. Reflecting on the "shrunk docket," Professor Arthur Hellman has suggested that the Supreme Court "has now become Olympian" because the "Justices seldom engage in the process of developing the law through a succession of cases in the common-law tradition," but instead now render decisions "largely unconnected to other cases on the docket and even more detached from the work of lower courts."¹⁰ Writing in a similar vein, former Solicitor General Kenneth Starr has suggested that the Court "in its leisure [has] become a virtual sounding board for varying interpretive methodologies[.]" with the Court's work-product becoming "marked, not by growing consensus, but by an unhelpful, frustrating cacophony of jurisprudential voices."¹¹

B. Modern Case Selection Realities

With an extraordinary surge in the number of petitions for certiorari in recent decades, the task of deciding what the Supreme Court should decide has become a full-time job. But this job has also become one that the Justices have been increasingly disinclined to do themselves.

For nearly the first two centuries of the Court's existence, each Justice and his staff individually reviewed each petition submitted to the Court.¹² Driven by the rising volume of petitions, however, five Justices in 1972 created what has become known as the cert pool.¹³ The cert pool is an

8. See *id.*; see also David R. Stras, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 967 (2007) (noting that, "[s]ince October Term 1999, the Court has granted plenary review in less than 1% of the cases in which a petition for certiorari or jurisdictional statement has been filed").

9. See JEFFREY TOOBIN, *THE NINE* 329 (2007) (noting that the Supreme Court in its October Term 2006 rendered "only sixty-eight decisions, a record low for the Court in modern times").

10. Arthur D. Hellman, *The Shrunk Docket of the Rehnquist Court*, 1996 Sup. Ct. Rev. 403, 433 (1996).

11. See Starr, *supra* note 4, at 1375-76.

12. In the early years of the Supreme Court, the Justices did not have the benefit of much staff; the tradition of having law clerks to assist with the Justices' work did not develop until the late Nineteenth Century. See generally ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* 24-40 (2006); Stras, *supra* note 8, at 950-52.

13. See WARD & WEIDEN, *supra* note 12, at 118-25 (discussing development of the cert pool); see

arrangement in which participating Justices pool their law clerks to divide up, review and make recommendations about incoming certiorari petitions. Each petition for certiorari gets summarized and assessed by one of the pool clerks, and that clerk's memo will then be circulated among all the Justices participating in the pool.¹⁴

With an increasing number of petitions, the cert pool was initially viewed as a reasonable means to avoid the inevitable duplication of efforts when each of the Justices' chambers reviewed each petition for certiorari individually. But every new Justice to join the Court in the last 35 years, with the sole exception of Justice John Paul Stevens, has jumped into the pool. Consequently, Justice Stevens has been the only member of the Court who has his own clerks review incoming cases separately from the pool for the last twelve years.¹⁵

With certiorari now granted to less than one percent of all incoming petitions, the modern cert pool arrangement entails that virtually all of the cases brought to the Supreme Court are denied review with only one or two law clerks—and no Justices—reading the parties' submissions. Thus, how a single clerk chooses to summarize a certiorari petition is likely to have a significant impact on whether certiorari is granted.¹⁶ Moreover, as Kenneth Starr has recently suggested, cert pool dynamics might in part account for the Court's shrinking docket:

[C]lerks serve as mighty “barriers to entry” to the merits docket. The prevailing spirit among the twenty-five-year old legal savants, whose life experience is necessarily limited in scope, is to seek out and destroy undeserving petitions. The prevailing ethos is that no harm can flow from “just saying no.” Self-confident law clerks can rest assured that few, if any, recriminations will attend their providing guidance to the Court to deny certiorari. . . . As a practical matter, the

also Barbara Palmer, *The “Bermuda Triangle?” the Cert Pool and its Influence over the Supreme Court’s Agenda*, 18 CONST. COMMENT. 105, 107-08 (2001) (discussing the creation of the cert pool and uncertainty over exactly who created it).

14. See Palmer, *supra* note 13, at 107-08 (describing the operation of the pool); see also Peter B. Rutledge, *Clerks*, 74 U. CHI. L. REV. 369, 385-94 (2007) (exploring factors that may influence how the cert pool operates and impacts the work of the Justices).

15. See, e.g., WARD & WEIDEN, *supra* note 13, at 125; David M. O’Brien, *Join-3 Votes, the Rule of Four, the Cert. Pool, and the Supreme Court’s Shrinking Plenary Docket*, 13 J.L. & POL. 779, 799-800 (1997).

16. There is a robust debate in the academic literature concerning the influence of the cert pool on the size of the Supreme Court's docket. See, e.g., Starr, *supra* note 4, at 1366-77 (reviewing the debate); Stras, *supra* note 8, at 968-72 (reviewing literature and conducting additional analysis to conclude that “it is difficult to say exactly how much influence the pool recommendations have on the ultimate decision of whether to grant certiorari, it is safe to say . . . that the pool is not a factor in encouraging the Court to expand its plenary docket and may well be contributing to the decline”).

cert[] pool does promote judicial efficiency. However, that efficiency is achieved at the expense of informed judgment.¹⁷

The efficiency of the cert pool also may have an impact, like the shrinking merits docket, on the Supreme Court's ultimate work-product. Commentators have reasonably suggested, for example, that "most of the additional time modern clerks gained by the creation of the cert pool has been spent on opinion writing and is probably a contributing factor in the explosion in the number of separate concurring and dissenting opinions now issued by the Court."¹⁸

II. CRITICAL, CRIMINAL AND CAPITAL PERSPECTIVES ON THE SUPREME COURT'S DOCKET

In recent years, a number of academics have spotlighted and criticized how the Justices are managing their docket.¹⁹ The role of the cert pool and the fewer cases decided on the merits have come under particular scrutiny; commentators stress that the Justices' docket choices largely determine the Court's impact and influence in guiding lower courts, and in broader political and social debates.²⁰ Notably, before he joined the Supreme Court as its first new Chief Justice in two decades, John Roberts was among those critiquing how the Court managed its docket. In a 1997 talk at Georgetown University Law Center, Roberts called the cert pool "a little disquieting," because it makes the clerks "a bit too significant" in the certiorari process.²¹ And, during his 2005 confirmation hearings, Roberts suggested that the Supreme Court could and should be resolving more cases on their merits.²²

But while Supreme Court docket trends and case selection dynamics are being more widely discussed, there still has been relatively little analysis of

17. See Starr, *supra* note 4, at 1376-77; see also Stras, *supra* note 6, at 968-96 (exploring impact of the "stingy cert pool"). *But cf.* Palmer, *supra* note 11, at 120 (highlighting data from the early years of the cert pool that suggest little relationship between the cert pool and certiorari grant rates).

18. WARD & WEIDEN, *supra* note 12, at 142.

19. See, e.g., sources cited *supra* notes 3-16; see also Kevin M. Scott, *Shaping the Supreme Court's Federal Certiorari Docket*, 27 JUST. SYS. J. 191 (2006); Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging Versus Error Correction in the Supreme Court*, 63 WASH. & LEE L. REV. 271 (2006); Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389 (2004); H. W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* (1991); Arthur D. Hellman, *The Supreme Court, the National Law, and the Selection of Cases for the Plenary Docket*, 44 U. PITT. L. REV. 521, 522-23 (1983).

20. See, e.g., Cordray & Cordray, *supra* note 19, at 396-97; Hartnett, *supra* note 2, at 1736-38.

21. See Tony Mauro, *Will Roberts Jump Into the Supreme Court Cert Pool?*, LEGAL TIMES, Aug. 11, 2005 (quoting 1997 speech).

22. See 2005 Testimony of Nominee John Roberts before the Senate Judiciary Committee (Sept. 2005).

how these trends and dynamics intersect regarding particular subject areas. Commentators occasionally complain that the Court fails to take enough cases in a certain area of law or fails to resolve enough circuit splits,²³ but there has been little systematic examination of how particular types of cases come to the Court and the distinct caseload universe in which the Justices and their clerks operate.²⁴ Of particular interest and concern to me, as detailed in this Part, is how the Court's general docket trends and case selection dynamics may converge in the criminal justice arena, especially with respect to death penalty cases.

A. Considerable criminal case pressures

Extraordinary increases in criminal case filings over the last fifty years is one of the primary reasons for the docket pressures faced by the Supreme Court. In a 1976 monograph, Professors Gerhard Casper and Richard Posner documented the "explosive growth of the criminal docket" and detailed how much of the increase in the Supreme Court's total caseload from the mid 1950s to the mid 1970s could be attributed to petitions for certiorari in criminal cases.²⁵ Indeed, one may reasonably speculate that the very creation of the cert pool in the early 1970s can be linked, at least indirectly, to the spike in petitions coming from criminal defendants; these petitions frequently raised issues that were obviously not cert worthy, and the Justices likely found these petitions less than inspiring or exciting to warrant a close review.²⁶ Further, the increases in the number of criminal case certiorari petitions during this period might have been one ripple effect of the Supreme Court's previously active involvement in the operation of criminal justice systems through famed rulings such as *Gideon v. Wainwright*,²⁷ *Miranda v. Arizona*,²⁸

23. See Starr, *supra* note 4, at 13.82; Shapiro, *supra* note 19, at 287-337 (urging the Supreme Court to distinguish between those areas of law governed by rules and those governed by standards in deciding how often to take up certain types of cases).

24. A relatively recent article by Margaret Meriwether Cordray and Richard Cordray includes some break-down of cases by subject areas, but this analysis tends to be only in service to a general effort to identify and assess broader trends in the Supreme Court's overall work. See Cordray & Cordray, *supra* note 3, at 758-63.

25. See GERHARD CASPER & RICHARD POSNER, THE WORKLOAD OF THE SUPREME COURT 35-46 (1976). In their detailed analysis, Professors Casper and Posner effectively highlighted that a "major factor in the growth of the Court's criminal docket ... has been the enormous increase in the number of *federal* cases on the docket." *Id.* at 38.

26. Notably, in their 1976 monograph, Professors Casper and Posner lauded the creation of the cert pool as a means to manage the Supreme Court's growing caseload and they suggested the usefulness of "greater pooling of law clerks for screening applications for review." See *id.* at 108, 117.

27. 372 U.S. 335 (1963) (guaranteeing certain defendants the right to a lawyer).

28. 384 U.S. 436 (1966) (establishing certain rules for police interrogation).

and *Terry v. Ohio*.²⁹ Some commentators have suggested that the Court's expansion of the means through which criminal defendants could challenge their convictions in part accounts for the total number of cert petitions jumping from just over 1,000 in 1940 to more than 5,000 in 1980.³⁰

Notably, while more recent Supreme Court substantive rulings have restricted the reach of certain criminal procedure doctrines, the overall size of state and federal criminal justice systems has grown dramatically. Between 1970 and 2005, state and federal authorities increased prison populations by 628%.³¹ Just prior to the start of the modern era of "get tough" reforms, there were only about 300,000 persons serving time in prison or jail nationwide.³² By 2005, more than 1.5 million persons were incarcerated in U.S. prisons on any given day, and an additional 750,000 were incarcerated in local jails.³³ Consequently, given historical links between increases in criminal convictions and increases in certiorari petitions from criminal defendants,³⁴ it is not surprising that contemporary data show that criminal cases continue to account for continuing increases in certiorari petitions in recent decades.³⁵ Put simply, the enduring docket pressures felt by the Supreme Court can and should be significantly attributed the impact of criminal case filings; in turn, the Justices' enduring affinity for labor-saving devices like the cert pool also probably can and should be attributed the impact of criminal case filings.³⁶

29. 392 U.S. 1 (1968) (defining constitutional regulations for police authority to stop and frisk suspects).

30. See Arthur D. Hellman, *Case Selection in the Burger Court: A Preliminary Inquiry*, 60 NOTRE DAME L. REV. 947 (1985) (discussing the increase in filings and the greater emphasis on criminal procedure issue in the work of the Warren and Burger Courts). *But cf.* CASPER & POSNER, *supra* note 25, at 46 (suggesting that the increase in certiorari petitions in criminal cases could mostly be attributed to "a shift in the composition of federal criminal prosecutions toward crimes committed by more affluent defendants and the provisions of the Criminal Justice Act of 1964 providing for compensation for appellate counsel of indigent defendants").

31. DON STEMAN, VERA INST. JUST., RECONSIDERING INCARCERATION: NEW DIRECTIONS FOR REDUCING CRIME 1 (2007), available at http://www.vera.org/publication_pdf/379_727.pdf.

32. *Id.*

33. See STEMAN, *supra* note 31, at 1; see also PEW CTR. ON STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008 5 (2008) ("Between 1987 and 2007, the national prison population has nearly tripled.") available at http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf.

34. See CASPER & POSNER, *supra* note 25, at 35-46.

35. See Cordray & Cordray, *supra* note 3, at 760 (noting the tripling of federal criminal certiorari petitions between 1986 and 1994 and indicating that state criminal petitions also likely increased significantly during this period).

36. Notably, most of the full-throated defenses of the cert pool tend to emphasize the value of efficiently screening the large number of pauper petitions coming from criminal defendants. See CASPER & POSNER, *supra* note 25.

B. Considerable capital cases attention

Intriguingly, the Supreme Court never directly addressed the operation of the death penalty during the 1950s and 1960s even when the Court, under the direction of Chief Justice Earl Warren, was rigorously scrutinizing criminal justice systems throughout the nation.³⁷ Influenced in part by certain Supreme Court Justices' separate discussion of death penalty issues, lower courts began actively to examine, and came indirectly to halt the application of capital punishment in the late 1960s.³⁸ Beginning in the 1970s, the Supreme Court's work regularly started to include a significant number of major (and minor) rulings addressing the constitutionality of the death penalty. As one informed commentator has recently detailed, "[b]etween 1937 and 1967, the Court issued only two decisions addressing the constitutionality of a death sentence or execution. [But b]etween 1972 and 2006, the Court issued at least 209 opinions in capital cases in which capital-specific issues were raised."³⁹ After having virtually no capital cases on its merits docket for most of its history, the Supreme Court has over the last three decades adjudicated, on average, six capital cases each and every term.

The Supreme Court's intense modern engagement with capital punishment has necessarily entailed a significant investment of energy and effort by the Justices. Tellingly, the Court's first blockbuster ruling in the capital arena, *Furman v. Georgia*,⁴⁰ which struck down wholly discretionary capital punishment schemes, prompted the Justices to issue nine separate opinions that together comprise the longest written decision in the Court's history. Thereafter, through an extraordinary and seemingly never-ending series of decisions, the Supreme Court has essentially designed and monitored the basic legal structure and many procedural particulars for the operation of modern capital punishment systems throughout the nation.⁴¹ The Supreme Court's modern constitutional regulation of the death penalty has evolved over three decades with little consensus and lots of words; precious few of the

37. See generally ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 242 (2d ed. 1962) (noting that the Supreme Court repeatedly passed on opportunities to address the death penalty during the early years of the Warren Court).

38. See James S. Liebman, *Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963–2006*, 107 COLUM. L. REV. 1, 16–23 (2007).

39. *Id.* at 14 n.42.

40. 408 U.S. 238 (1972).

41. A remarkable amount of scholarship has been devoted to the Supreme Court's remarkable modern efforts to regulate capital punishment. Some particularly effective scholarly coverage of the Court's work include Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355 (1995), Scott W. Howe, *The Failed Case for Eighth Amendment Regulation of the Capital Sentencing Trial*, 146 U. PA. L. REV. 795 (1998), Corinna Barrett Lain, *Deciding Death*, 57 DUKE L.J. 1 (2007), and Liebman, *supra* note 38.

Supreme Court's significant capital punishment rulings have been unanimous, and even fewer could be read fully during the average subway ride.

It is perhaps understandable that, during the 1970s and 1980s when the Supreme Court first became actively involved in regulating the operation of the death penalty, a sizeable portion of the Court's docket and the Justices' energies were invested in reviewing capital cases and adjudicating the claims of death row defendants. A full three decades after the Court first actively took up death penalty issues, however, the Justices continue to devote an extraordinary amount of time and attention to capital cases. As noted before, the overall size of the Court's merits docket has been shrinking significantly, and yet the number of capital cases adjudicated by the Court has remained quite large. In recent terms, the Justices have sometimes decided as many as a dozen or more cases directly or indirectly raising distinctive capital punishment issues.⁴² With the Justices recently averaging only around 70 merits opinions each year, this means that a sizeable percentage of the entire Supreme Court docket is now being consumed by death penalty cases.

Professor Liebman, in a recent article questioning the peculiar set of substantive choices that the Supreme Court has made in regulating the death penalty, laments that the Justices for 35 years have been "*Slow Dancing with Death*."⁴³ Substantive rulings aside, my distinct concern here is the Justices' continuing affinity for returning again and again to the death penalty dance floor. As suggested in my title, I fear that the Court is caught up in a "culture of death," which leads the Justices to "waste" an extraordinary amount of its scarce time and energy to reviewing capital cases and adjudicating the claims of death row defendants. As explained in the next Part, a number of institutional and doctrinal forces contribute to this deadly culture and help explain why the Court is drawn again and again to considering capital cases on the merits. But as Part IV argues, sober reflection on the Supreme Court's engagement with the death penalty suggests that the Justices' addiction to capital cases may be doing more harm than good for the administration of both capital and non-capital justice systems.

III. EXAMINING REASONS FOR THE SUPREME COURT'S CULTURE OF DEATH

Before critiquing of the Supreme Court's capital case obsession, this Part explores agenda-creating and agenda-setting realities that help explain why death penalty cases have become such a large component of the Supreme Court's work. Though this story has many dimensions, one might usefully

42. See generally Death Penalty Information Center, News From the Supreme Court, available at <http://www.deathpenaltyinfo.org/article.php?did=248&scid=38> (last visited May 1, 2008) (listing capital cases adjudicated by the Supreme Court in recent Terms).

43. See Liebman, *supra* note 38.

(though somewhat artificially) divide and describe the unique forces at work in terms of five dynamics: emotional realities, societal interest, legal doctrines, regional/policy disputes, and practical problems.

A. The unique emotional realities of the death penalty

John Stuart Mill in his renown “Speech in Favor of Capital Punishment” highlighted that the death penalty makes a unique “impression on the imagination.”⁴⁴ All humans are, in Mill’s words, “so much shocked by death.”⁴⁵ Though Mill stressed death’s “impression” to argue that capital punishment could best deter potential murderers, his basic insight helps explain why this punishment uniquely impacts the behavior and attitudes of all persons who operate or assess criminal justice institutions. Indeed, Supreme Court decisions regularly emphasize—both expressly and implicitly—that “death is different.”⁴⁶ This raw human reality makes it perhaps inevitable that Supreme Court Justices and their clerks will always be emotionally inclined to give particularly careful, cautious and conscientious attention to any and every death penalty case brought their way.

B. The unique societal interest in the death penalty

Capital punishment is a minuscule part of the nation’s massive criminal justice system,⁴⁷ but this is hard to tell from reading the papers. The death penalty not only makes a unique “impression on the imagination,” it also has a huge impact on the media and on the general public. The amount and extent of reporting on potential and actual capital cases, in both the traditional and non-traditional media, is extraordinary by any measure.⁴⁸ In the political arena, candidates for state and national offices are frequently asked about the

44. John Stuart Mill, *Speech in Favor of Capital Punishment 1868*, in PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT 271-75 (Gertude Ezorsky ed. 1972).

45. *See id.*

46. *See Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (Stewart, J.) (asserting that “the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.”); Note, *The Rhetoric of Difference and the Legitimacy of Capital Punishment*, 114 HARV. L. REV. 1599, 1599-1602 (2001) (reviewing the Supreme Court’s emphasis on the concept that “death is different” and highlighting that this concept “has become an axiom of American law.”).

47. *See infra* Part IV.A and notes 69-70.

48. *See* Susan Bandes, *Fear Factor: The Role of Media in Covering and Shaping the Death Penalty*, 1 OHIO ST. J. CRIM. L. 585 (2004); *see also* J. Richard Broughton, *Every Day More Wicked: Reflections on Culture, Politics, and Punishment by Death*, 22 J.L. & POL. 113 (2006) (lamenting the distorted image of capital punishment presented by the media and in popular culture); Sara Sun Beale, *The News Media’s Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397 (2006) (exploring the impact of the media on public views on crime and punishment).

death penalty even in jurisdictions that have had few or no executions in recent years.⁴⁹ The disproportionate media and political attention given to the death penalty, in turn, necessarily influences the interests and engagements of lawyers and courts. Prosecutors, defense attorneys, public policy groups and courts are often praised—or at least garner media attention and the public’s respect—for devoting extra time and attention to death penalty issues.⁵⁰ Society’s intense and persistent interest in the death penalty makes it unsurprising that Supreme Court Justices and their clerks, prodded by lawyers, public policy groups and the media, will always be inclined to give particularly careful, cautious and conscientious attention to any and every death penalty case brought their way.

C. *The unique legal doctrines surrounding the death penalty*

Well before the Supreme Court started regulating capital punishment, state legislatures enacted and revised distinctive legal structures for the administration of the death penalty.⁵¹ Since the Supreme Court’s landmark rulings in *Furman*,⁵² and then *Gregg v. Georgia*,⁵³ the Justices have spent more than three decades developing and refining intricate legal requirements for any jurisdiction seeking to utilize death as its ultimate punishment. Though the “success” of the Supreme Court’s regulatory jurisprudence over the past 30 years is the subject of robust debate,⁵⁴ it is undebatable that

49. See Samuel R. Gross, *Still Unfair, Still Arbitrary—But Do We Care?*, 26 OHIO N. U. L. REV. 517, 523 (2000) (noting that, for more than two decades, “the death penalty [has been] a central part of the national politics of crime”); see also Peter Loge, *How to Talk Crimey and Influence People: Language and the Politics of Criminal Justice Policy*, 53 DRAKE L. REV. 693, 697-702 (2005) (detailing how the terms of political debate concerning the death penalty has shifted in recent years).

50. See generally Christopher M. Johnson, *Foreword: The Perpetual Controversy*, 6 PIERCE L. REV. 365, 365-66 (2008) (highlighting that “an exceptionally talented and dedicated specialist capital defense bar continually mounts new challenges to the institution of the death penalty[,]” which in turn inspires “an equally committed corps of death penalty supporters seek[ing] to break the legal resistance to capital punishment”).

51. Douglas A. Berman, *Addressing Capital Punishment Through Statutory Reform*, 63 OHIO ST. L.J. 1, 1-2 (2002) (“[L]egislatures principally have been responsible for the acceptance and evolution (and even sometimes the abandonment) of capital punishment in the American criminal justice system from the colonial and founding eras, through the nineteenth and twentieth centuries, and now into the twenty-first century.”).

52. 408 U.S. 238 (1972).

53. *Gregg v. Georgia*, 428 U.S. 153 (1976).

54. Compare Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 403 (1995) (describing the Supreme Court’s capital jurisprudence as “a stunning failure on the Court’s own terms.”), with David McCord, *Judging the Effectiveness of the Supreme Court’s Death Penalty Jurisprudence According to the Court’s Own Goals: Mild Success or Major Disaster?*, 24 FLA. ST. U. L. REV. 545 (1997) (suggesting that the Supreme Court’s regulatory efforts have been at least partially successful).

legislatures and courts have together created an elaborate and complicated legal regime for the administration of the death penalty. The extraordinary growth and scope of modern capital punishment law and procedure—which presents distinct legal issues relating to (a) jury selection, (b) the admission of evidence, (c) an additional penalty phase of the trial, (d) the advocates’ arguments, (e) jury instructions, (f) direct appeals, and (g) collateral appeals—ensures that there are always new and complex legal disputes over capital cases coming before the Supreme Court.⁵⁵

Further, though well over 90% of all non-capital criminal cases are resolved through plea deals, nearly every capital case involves an extended multi-phase trial.⁵⁶ And though the vast majority of non-capital defendants never appeal their conviction or sentence in any court, nearly every capital defendant brings multiple appeals in both state and federal courts and will often press their claims all the way to the U.S. Supreme Court.⁵⁷ Of course, it is no surprise that defendants charged with a capital offense will raise every possible trial issue to avoid a death sentence, or that defendants sent to death row will raise every possible appellate issue to try to avoid being executed. But these collective legal realities—i.e., the extraordinary array of complicated legal doctrines surrounding the death penalty together with the extraordinary willingness of capital defendants to litigate their claims in every available forum—ensures that the Supreme Court will receive a disproportionate number of certiorari petitions in capital cases. And these collective legal realities also ensure that Supreme Court Justices and their clerks are ever mindful of the multiplicity of doctrinal issues in capital cases that advocates sincerely believe merit the Court’s attention.

55. See generally Johnson, *supra* note 50, at 366 (noting that “capital punishment raises genuinely hard issues of law”).

56. On rare occasions, a capital defendant will plead guilty to a capital charge and only seek a trial proceeding on the issue of punishment. But most capital cases that end in a death sentence involve two jury trials: a guilt phase and a separate punishment phase. See generally Jeffrey Abramson, *Death-is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117 (2004) (examining the distinctive role of the jury in capital cases).

57. See Tom Gibbons, *Victims Again: Survivors Suffer Through Capital Appeals*, A.B.A.J., Sept. 1988, at 64, 66 (noting that “all convicted murderers have the right to initiate judicial review at 11 different levels”); see also Judge Arthur L. Alarcón, *Remedies for California’s Death Row Deadlock*, 80 S. CAL. L. REV. 697, 697-98 (2007) (reviewing the various means California death row defendants utilize to appeal their convictions and sentences); Marilyn Peterson Armour & Mark S. Umbreit, *The Ultimate Penal Sanction and “Closure” for Survivors of Homicide Victims*, 91 MARQ. L. REV. 381, 407-09 (2005) (discussing the “emotional roller coaster” for survivors of homicide victims resulting from death row defendants’ many appellate avenues).

D. The unique regional/policy disputes over the death penalty

As Professors Carol Steiker and Jordan Steiker have recently noted, the “United States is not monolithic in its death penalty practices.”⁵⁸ As they put it, the nation is home to “three sorts of jurisdictions: states without the death penalty by law[,] . . . states with the death penalty but insignificant numbers of executions[,] . . . and states with both the death penalty in law and in practice—states actively carrying out executions.”⁵⁹ This diversity of state approaches to capital punishment might be viewed as a regional expression of a diversity of public policy positions regarding the death penalty: some Americans are categorically opposed to the death penalty, some are principally troubled by flaws in the administration of the ultimate punishment, and some are principally troubled that abolitionists and reformers seem eager to impede state efforts to carry out more executions.

Of course, regional and public policy diversity is evident in many areas of American law. In the context of the death penalty, however, this diversity is often manifested in significant legal disputes over capital punishment law and procedure. Lawyers and courts in some regions—particularly in the north—often appear remarkably receptive to challenges to the death penalty while lawyers and courts in other regions—particularly in the south—often appear remarkably dismissive of challenges to the death penalty.⁶⁰ The Supreme Court often gets caught in the crossfire of this national civil war over state use of the ultimate sanction: state prosecutors appeal from lower courts whenever they believe a seemingly sound death sentence has been reversed, and state defendants appeal from lower courts whenever they believe a seemingly suspect death sentence has been affirmed. If effective counsel can spotlight lower court confusion, uncertainty, or conflict resulting from the Supreme Court’s own capital jurisprudence, the Justices may feel uniquely obligated to mediate what may be essentially regional and/or policy disputes concerning the practical and legal application of the death penalty. Indeed, as Carol Steiker noted, the Supreme Court has recently seemed especially inclined to take up capital cases in order to “temper [some courts’] enthusiasm and [other courts’] reluctance to allow executions to go forward.”⁶¹ Though

58. Carol S. Steiker & Jordan M. Steiker, *A Tale of Two Nations: Implementation of the Death Penalty in “Executing” Versus “Symbolic” States in the United States*, 84 TEX. L. REV. 1869, 1870 (2006).

59. *Id.*

60. See James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839 (2000); see also Steiker & Steiker, *supra* note 58, at 1875-1904 (examining at length the distinct appellate realities in the review of death sentences in California and Texas).

61. Carol S. Steiker, Panetti v. Quarterman: *Is there a “Rational Understanding” of the Supreme Court’s Eighth Amendment Jurisprudence?*, 5 OHIO ST. J. CRIM. L. 285, 286 (2007).

such judicial moderation may have substantive virtues, it essentially demands the Court's continual and intrusive involvement with capital cases:

This “mend it, don't end it” approach led to the creation of the complex body of law that the Court now oversees in the Fifth, Ninth, and other federal circuits, as well as in state supreme courts, [and Justice Kennedy] seems determined to keep the Court on the same middle path in its role as overseer of the centrist legacy[.]⁶²

E. The unique practical problems with the death penalty

Despite the Supreme Court's earnest efforts, many believe that the Justices' capital punishment jurisprudence “has accomplished very little of value, after investing vast judicial resources.”⁶³ Whether documented by the American Bar Association's recent findings of “serious problems . . . in every state death penalty system” it studied,⁶⁴ or by other empirical and anecdotal evidence that the administration of the death penalty is not significantly more reliable, accurate, or fair today than 40 years ago,⁶⁵ it is widely believed that the “capital punishment system in the United States is broken.”⁶⁶

62. *Id.*

63. Scott W. Howe, *The Failed Case for Eighth Amendment Regulation of the Capital Sentencing Trial*, 146 U. PA. L. REV. 795, 862 (1998); *see also* *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari) (concluding that, despite Supreme Court's continual efforts, “no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies”); James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2048-57 (2000) (describing the death penalty system which has developed from Supreme Court regulation as “perverse, . . . immensely expensive, . . . penologically risky, [and] . . . egregiously prone to substantive error”); Louis D. Bilionis, *Legitimizing Death*, 91 MICH. L. REV. 1643, 1647-48 & nn. 20-22 (1993) (citing many sources while noting that “[c]ritics have been giving the Court's death penalty jurisprudence a bad name for years Dozens of articles each year take the Court to task for the wide array of outrages and blunders . . . with few, if any, kind words to be said for the path the Court has taken”).

64. A.B.A., DEATH PENALTY MORATORIUM IMPLEMENTATION PROJECT, STATE DEATH PENALTY ASSESSMENTS: KEY FINDINGS (Sept. 2007), available at <http://www.abanet.org/moratorium/assessmentproject/keyfindings.doc>.

65. *See, e.g.*, Sara Darehshori, Jeffrey L. Kirchmeier, Colleen Quinn Brady & Evan Mandery *Empire State Injustice: Based upon a Decade of New Information, a Preliminary Evaluation of How New York's Death Penalty System Fails to Meet Standards for Accuracy and Fairness*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 85 (2006); 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 (2001) (reviewing the evidence, and growing awareness of the numerous problems infecting the administration of capital punishment in the United States).

66. James S. Liebman, *Opting for Real Death Penalty Reform*, 63 OHIO ST. L.J. 315 (2002). Professor Liebman first used the term “broken” to describe the modern death penalty system in his examination of reversal rates in death penalty cases. *See* Liebman et al., *A Broken System: Error Rates in Capital Cases, 1973-1995* (2000) [hereinafter *A Broken System*], available at <http://www2.law.columbia.edu/instructionalservices/liebman/liebman2.pdf>.

A number of Justices, through speeches and separate opinion, have expressly acknowledged that the modern administration of capital punishment remains flawed in various ways despite the Court's considerable regulatory efforts.⁶⁷ Even those Justices who may be less troubled by the complaints of death penalty critics cannot entirely ignore the evidence of wrongful convictions that spotlight how the punishment of death can be badly misapplied in some cases. And well-documented and persistent practical problems with the administration of the death penalty include not only the wrongful conviction of innocent persons, but also racial disparities and other inequities in who is sentenced to death, and underfunded and poor quality of representation received by many capital defendants. Problems such as these make it inevitable that Supreme Court Justices and their clerks will be institutionally inclined to give particularly careful, cautious, and conscientious attention to every claim of death penalty error raised by capital defendants.

F. Summary: The Strong Pull Toward Error Correction in Capital Cases

This Part has described an array of capital case realities that collectively appear to have a profound and significant impact on how the Supreme Court sets its docket—put simply, it seems that the Supreme Court frequently takes on an error-correction role when considering capital cases. In a thoughtful 1991 examination of the Supreme Court's case selection process, H.W. Perry noted the “close attention given to all capital cases”⁶⁸ and spotlighted that the Justices seemed to have concluded that “no case can be considered frivolous . . . if the punishment is death.”⁶⁹ The Supreme Court expressly embraced this view in its 1995 decision in *Kyles v. Whitely*⁷⁰ when asserting that its “duty to

67. See, e.g., *Baze v. Rees*, 128 S. Ct. 1520, 1551 (Steven, J., concurring) (“I have relied on my own experience in reaching the conclusion that the imposition of the death penalty represents the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes.”); *Kansas v. Marsh*, 548 U.S. 163, 208, 211 (2006) (Souter, J., dissenting) (noting the recent evidence of “repeated exonerations of convicts under death sentences” and the “evidence of the hazards of capital prosecution”); John Paul Stevens, Justice, Supreme Court of the United States Address to the American Bar Association at the Thurgood Marshall Awards Dinner Honoring Abner Mikva (Aug. 6, 2005) (lamenting quality of counsel provided to capital defendants and concerns about wrongful capital convictions), available at www.supremecourtus.gov/publicinfo/speeches/sp_08-06-05.html; Ruth Bader Ginsburg, Justice, Supreme Court of the United States, Joseph L. Rauh Lecture at the University of the District of Columbia School of Law: In Pursuit of the Public Good: Lawyers Who Care (April 9, 2001), available at www.supremecourtus.gov/publicinfo/speeches/sp_04-09-01a.html. See generally Erwin Chemerinsky, *The Rehnquist Court and the Death Penalty*, 94 GEO. L.J. 1367, 1374 (2006) (“The death penalty as administered in the United States is terribly flawed, and the Justices recognize this.”).

68. See H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 92-96 (1991).

69. *Id.*

70. *Kyles v. Whitely*, 514 U.S. 419 (1995).

search for constitutional error with painstaking care is never more exacting than it is in a capital case.”⁷¹ More than a decade later, even as the Court’s merits docket has continued to shrink, these essential case-selection dynamics do not appear to have changed. Death penalty cases continue to assume a large part of the Supreme Court’s docket because, in the capital context and only in the capital context, the Justices and their clerks seem eager to correct any and every error they perceive in each and every capital case.

IV. EXAMINING COSTS AND CONSEQUENCES FLOWING FROM THE SUPREME COURT’S CULTURE OF DEATH

The Supreme Court’s tendency to assume an error-correction role in capital cases might be seen as heroic or at least venerable; indeed it may seem hard-hearted to assail the Justices and their clerks for being uniquely concerned about reaching the right outcome in every capital case brought their way. But, as detailed in this Part, there are some significant costs and consequences that result from the Supreme Court’s error-correction obsession in capital cases.

A. Case Mix Costs and Consequences

As detailed in Part I of this commentary, the Supreme Court’s time and energy have become an increasingly scarce resources in recent years as the Court’s merits docket has shrunk. The Court’s decision to give plenary review to so many capital cases necessarily leaves the Justices with less time to consider other types of cases—both criminal and civil—that compete in a crowded cert pool for the Justices’ attention.⁷² The Court’s capital case obsession seems especially questionable given the overall composition of state criminal convictions throughout the United States: state courts convicted an estimated 1,079,000 adults of a felony in 2004, with an estimated 8,400 persons convicted of murder or non-negligent manslaughter and only 115 defendants receiving a sentence of death.⁷³ In other words, roughly 1 in every

71. *Id.* at 422 (quoting *Burger v. Kemp*, 483 U.S. 776, 785 (1987); see also *Kyles*, 514 U.S. at 455 (Stevens, J., concurring) (asserting that the “duty to administer justice occasionally requires busy judges to engage in a detailed review of the particular facts of a case,” and that this obligation may be “especially important” in light of the “current popularity of capital punishment”). But see *Kyles*, 514 U.S. at 456-59 (Scalia, J., dissenting) (assailing the Court for taking up a capital case that lacked broad significance and stressing that “responsibility for factual accuracy, in capital cases as in other cases, rests elsewhere—with trial judges and juries, state appellate courts, and the lower federal courts”).

72. PERRY, *supra* note 68, at 97 (“The Court has chosen to pay special attention to cases involving capital punishment, and in so doing, it gives less time to something else.”).

73. See Matthew R. Durose & Patrick A. Langan *Felony Sentences in State Courts, 2004*, U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, July 2007, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fssc04.pdf>.

10,000 state felony sentences is a death sentence, and only 1 in 75 sentences for intentional homicide is a death sentence. Yet the Supreme Court devotes far more time and energy to reviewing state death sentences than all other types of state sentences combined.

Because only a very small number of states actively utilize the death penalty, the Justices' affinity for capital cases also results in a troublesome regional skew in the Court's overall docket. Consider this recent data from a report by the Death Penalty Information Center:

Forty out of the 50 states in the U.S. had no executions [in 2007], making the death penalty arguably "unusual" and largely irrelevant in a country with 15,000 murders. Almost all (86%) of the executions this year were in the south, and 62% of the country's executions took place in one state—Texas. Together, the northeast and the west were responsible for 1 execution.⁷⁴

Many lawyers and court-watchers likely would find it curious and would be troubled if the Supreme Court regularly decided to devote a significant portion of its docket every year to adjudicating the constitutionality of a certain novel type of civil claim that arose only in a few cases in a few states each year. And yet, this is essentially what the Justices are doing in the criminal justice arena by taking up such a large number of capital cases every Term. Indeed, it is fair to suggest that the Supreme Court, when it is actively involved in the review of capital cases, essentially transforms itself from the highest court in the land into the highest court for serious murder cases in Texas and a few other states.

B. Regulatory Costs and Consequences

In an influential article written more than a decade ago, Professors Carol Steiker and Jordan Steiker concluded that the Supreme Court's death penalty jurisprudence produced "the worst of all possible worlds" because its "detailed attention to death penalty law has generated negligible improvements over the pre-*Furman* era, but has helped people to accept without second thoughts . . . our profoundly failed system of capital punishment."⁷⁵ Significantly, numerous death row exonerations have recently led politicians and the public to have serious and sustained "second thoughts" about the death penalty. Still, the Steikers' broader insight about the institutional limitations of the Supreme Court remains sound and very important: when the Supreme Court takes so many capital cases, it tends to "occupy the field" and

74. DEATH PENALTY INFORMATION CENTER, THE DEATH PENALTY IN 2007: YEAR END REPORT 2 (Dec. 2007), available at <http://www.deathpenaltyinfo.org/2007YearEnd.pdf>.

75. See Steiker & Steiker, *supra* note 41 at 438.

divert energy and attention from efforts in other branches to regulate and improve the administration of capital systems.

As the ultimate interpreter and expounder of constitutional limitations, the Supreme Court is necessarily concerned only with what may qualify as a minimally acceptable death penalty scheme. As Justice Scalia often stresses in his opinions, the Court is not charged with assessing or exploring what would serve as the most effective and just approach to capital punishment.⁷⁶ That is, the Supreme Court only determines constitutional floors; the Court establishes minimum procedures that states must utilize. The Court is not required to, nor is it likely to, address policy alternatives that might reveal preferable capital procedures that states could utilize. Moreover, because of the Justices' attentiveness to issues of federalism and the separation of powers, the Supreme Court is understandably (and many would say appropriately) institutionally inclined to set constitutional floors as low as possible.⁷⁷

Because of these institutional realities, it is not too surprising that, despite a seemingly endless stream of death penalty rulings over the past three decades, the Supreme Court's capital jurisprudence actually places "relatively minimal demands on states seeking to administer the death penalty."⁷⁸ Yet, by virtue of the Court's continuous involvement in the regulation of capital punishment, the Justices' work in this arena can create the highly inaccurate impression that courts are systematically working on system-wide remedies to the various problems that continue to burden the administration of capital punishment in the United States.

Tellingly, once death row exonerations began to showcase dramatically that the Supreme Court had not and could not effectively address the most extreme kind of death penalty errors, other branches of government quickly

76. See, e.g., *Herrera v. Collins*, 506 U.S. 390, 427–29 n.* (1993) (Scalia, J., concurring) (lamenting other Justices' unwillingness to acknowledge the "unhappy truth that not every problem was meant to be solved by the United States Constitution, nor can be"); *Baze v. Resse*, 128 S. Ct. 1520, 1555–56 (Scalia, J., concurring) ("I take no position on the desirability of the death penalty, except to say that its value is eminently debatable and the subject of deeply, indeed passionately, held views—which means, to me, that it is preeminently not a matter to be resolved here.").

77. See, e.g., *Medina v. California*, 505 U.S. 437, 442–44 (1992) (asserting that interpretations of the Due Process Clause in criminal cases must show deference to "considered legislative judgments"); *Harmelin v. Michigan*, 501 U.S. 957, 996–1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment) (stressing principles of federalism and separation of powers to justify a very limited role for the Supreme Court in judging the proportionality of sentences); *Gregg v. Georgia*, 428 U.S. 153, 199 n.50 (1976) (upholding Georgia's capital sentencing scheme while asserting that "unrealistic conditions" which might "indirectly outlaw[] capital punishment" cannot be placed on the death penalty); see also *Billionis*, *supra* note 63, at 1669–81 (discussing the impact of "the institutional and structural considerations that argue for judicial restraint" on the Supreme Court's capital jurisprudence).

78. See *Steiker & Steiker*, *supra* note 41 at 371.

started to explore and seek to remedy the problem of wrongful convictions.⁷⁹ The societal and political impact of the so-called “innocence revolution” highlight that once the Supreme Court’s inefficacy as death penalty reformer is evident, energy and attention will be directed toward legislative and executive branch reform efforts that may have a much greater potential to address systemic problems with capital punishment administration.⁸⁰ Thus, there is reason to hope and even expect that, if the Supreme Court were to play a far less active role in the regulation and examination of capital punishment, other political actors and institutions might more readily recognize and fulfill their independent obligation to ensure that the ultimate punishment is administered fairly and effectively.

C. Jurisprudential Costs and Consequences

As suggested above, there is an unavoidable “zero-sum” quality to the Supreme Court’s involvement in the regulation of criminal justice systems. More Supreme Court attention and constitutional scrutiny given to capital cases necessarily means less attention and constitutional scrutiny given to non-capital cases. In this context, consider how long it took the Supreme Court to identify and remedy a fundamental constitutional flaw in the non-capital federal sentencing system: the Court’s 2005 landmark ruling in *United States v. Booker*⁸¹ was handed down only after the Justices had allowed the federal guideline sentencing system to operate unconstitutionally for nearly two decades.⁸² It is remarkable, and perhaps remarkably telling, that many thousand of *federal* defendants were subject to an unconstitutional sentencing process for so many years while the Supreme Court was deeply invested in ensuring that a few dozen *state* capital defendants had their convictions and sentences carefully examined.

The jurisprudential costs and consequences of the Supreme Court’s tendency to engage in capital case error correction runs deeper than the Justices failure to give sufficient attention to non-capital criminal justice issues. The Court’s tendency to emphasize the “death is different” rationale when engaging in capital case error correction has had a profound impact on

79. See generally Joseph L. Hoffmann, *Protecting the Innocent: The Massachusetts Governor’s Council Report*, 95 J. CRIM. L. & CRIMINOLOGY 561 (2005) (highlighting how innocence issues have transformed the politics and reform dynamics surrounding the death penalty).

80. See generally Lawrence C. Marshall, *The Innocence Revolution and the Death Penalty*, 1 OHIO ST. J. CRIM. L. 573 (2004); Mark A. Godsey & Thomas Pulley, *The Innocence Revolution and Our “Evolving Standards of Decency” in Death Penalty Jurisprudence*, 29 U. DAYTON L. REV. 265 (2004).

81. 543 U.S. 220 (2005).

82. See generally Douglas A. Berman, *Beyond Blakely and Booker: Pondering Modern Sentencing Process*, 95 J. CRIM. L. & CRIMINOLOGY 653, 654 (2005) (exploring some reasons why *Booker* was so long in coming); Douglas A. Berman, *Reconceptualizing Sentencing*, 2005 U. CHI. L. FORUM 1.

both the tone and the substance of its non-capital rulings. In a potent recent article, Professor Eva Nilsen has effectively spotlighted the problematic interplay between the Justices' work in capital and non-capital cases,⁸³ and her important insights merit quoting at length here:

The "death is different" doctrine has become a convenient barrier to the review of prison terms, leading to routine life terms for crimes that under a just desert theory warrant only a few years in jail. Sentences for terms of years do not get adequate scrutiny under current Eighth Amendment law; and the Court's excessive deference to legislatures leaves no room for conscience or moral compunction in its decisions.

... Supreme Court cases in the 1970s interpreted the Eighth Amendment to forbid death sentences issued without extra layers of process, including appellate proportionality review, and an individualized consideration of the defendant's character and the circumstances of the crime. . . .

Death sentences may well demand "super due process," but other sentences surely demand much more than the virtual blank check issued by the Supreme Court to the legislatures. Imprisonments may be just as cruel and painful as an execution, and, in fact, may contain most of the burdens of a death sentence. The high rate of suicide is evidence that some prisoners would rather die than spend another day in prison. Lost years are irremediable.

Despite the death is different doctrine's implication that all non-death sentences are the same, they are not: minimum security is far different from segregation in a supermax facility, and imprisonment for a term of years is not the same as imprisonment for life without the possibility of parole. Each sentence contains particular hardships, pain, and loss, thus each should be subject to meaningful Eighth Amendment scrutiny considering both circumstances of the offender and the crime.

... [T]he Court's toothless disproportionality doctrine in non-death penalty cases amounts to a "hands off" doctrine giving an extreme deference to legislators and sentencing judges. The "heavy burden . . . on those who would attack the judgment of the representatives of the people" in promulgating punishments has become an impossible one. This is surely not what the Framers envisioned when

83. Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. DAVIS L. REV. 111 (2007).

they placed constitutional limits on punishment and established independent courts to police those limits.⁸⁴

D. Symbolic Costs and Consequences

Though the above sub-sections document an array of pragmatic and jurisprudential costs and consequences that can be linked to the Supreme Court's obsession with capital cases, I ultimately believe that the heaviest costs and consequences are symbolic. Professor Alexander Bickel famously wrote that "the courts . . . are also a great and highly effective educational institution."⁸⁵ As he put it:

The Justices . . . "are inevitably teachers in a vital national seminar." No other branch of the American government is nearly so well equipped to conduct one. And such a seminar can do a great deal to keep our society from becoming so riven that no court will be able to save it.⁸⁶

In the context of the death penalty, I fear that the Supreme Court has been a grandiose and highly dysfunctional educational institution: it has symbolically taught the nation that capital cases—and only capital cases—merit its sustained attention. Moreover, the national seminar on the death penalty that the Court conducts again and again through its cert grants in capital cases appears to have led our society to become *more* riven concerning the death penalty. Consequently, I come to the conclusion that I started with—namely that the Court devotes extraordinarily too much of its scarce time and energy to reviewing death penalty cases and adjudicating the claims of death row defendants, and this phenomenon is a "capital waste" of the Court's limited time resulting in serious problems for the administration of both capital and non-capital sentencing systems.

V. CONCLUSION AND CODA

As I completed this (long-in-gestation) commentary during the closing days of the Supreme Court's 2007 October Term, I could not help but notice some encouraging signs in the composition of the Court's docket. Though during this Term the Court considered two high-profile capital issues concerning the constitutionality of lethal injection protocols and of making child rape a capital offense, they took up few other capital cases. And, perhaps as a direct consequence of its reduced capital docket, the Court saw

84. *Id.* at 116, 151-53.

85. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 26 (2d ed. 1986)

86. *Id.*

fit during the 2007 October Term to consider a relatively large number of non-capital federal sentencing issues and a large number of non-sentencing federal criminal law issues.

Though the 2007 Term may prove to be a statistical anomaly, I cannot help but speculate and hope that the Court's recent change in personnel—with Chief Justice John Roberts taking over from the late Chief Justice William Rehnquist and with Associate Justice Samuel Alito taking the seat of former Justice Sandra Day O'Connor—has started to alter the Court's certiorari perspectives. Notably, Chief Justice Roberts has indicated his interest in achieving greater consensus among his colleagues and to reduce the number of divided and acrimonious opinions.⁸⁷ A reduction in the number of capital cases considered on the merits might be an especially effective way to achieve these goals.⁸⁸ In addition, Justice Samuel Alito came to the bench after having significant experience in the federal criminal justice system, and he may be uniquely attuned to the need for federal prosecutors and federal defendants to have more clarity and certainty concerning an array of important (lower-profile) federal criminal laws and issues. Based on early trends, there is a basis for hoping that some of the Justices are coming to see that regular and repeated review of capital cases on the merits may do significantly more harm than good.

Only time and statistics will tell if the Supreme Court is really moving away from its troublesome affinity for obsessing over capital cases. But whatever is revealed by future docket trends, I will conclude by urging more Court watchers and academics to explore and reflect critically upon the various legal and social dynamics that shape the Court's engagement with legal issues and its work-product. In addition, as this final coda is meant to suggest, Court watchers and academics should consider the possibility that an evolution in the Court's docket (prodded perhaps by a change in its personnel) may sometimes be as important and as consequential as any evolution in the Court's doctrines.

87. See Jeffrey Rosen, *Roberts's Rules*, ATLANTIC MONTHLY, Jan. 1, 2007, at 104.

88. Notably and tellingly, the most closely watched and consequential capital case of the October 2007 Term, the *Baze v. Rees* case concerning the constitutionality of Kentucky's lethal injection protocol, produced one of the most divided and acrimonious rulings from the Court in recent years. 128 S. Ct. 1520 (2008). Similarly, the most controversial capital case of the October 2007 Term, the *Kennedy v. Louisiana* case concerning the constitutionality of making child rape a death-eligible offense, also resulted in a divided and acrimonious ruling from the Court. 128 S. Ct. 2611 (2008).