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### ***RESPONSE***

#### GET IN THE GAME OR GET OUT OF THE WAY: FIXING THE POLITICS OF DEATH

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**I**N his insightful new paper, *The Supreme Court and the Politics of Death*, Professor Stephen Smith analyzes how the Supreme Court has floundered for more than three decades in a failed effort to eliminate the arbitrariness of the death penalty. As Professor Smith explains, the Court has politicized the death penalty and in doing so inadvertently stymied reform efforts. The general public believes capital punishment is reserved for the most heinous offenders while, in reality, the system is skewed in favor of death for those who have had the toughest lives and the worst lawyers.<sup>1</sup> It is enough to leave an observer of the Court utterly despondent.

Yet Professor Smith sees cause for optimism in the Court's renewed focus on substantive proportionality guarantees—namely the bans on executing the mentally retarded and juveniles—and the imposition of more rigorous standards for effective assistance of counsel. While I am in full agreement with his diagnosis of the problem, I part company with Professor Smith's view that the Court's latest approach might succeed where previous efforts have failed. To overplay a metaphor, the Court's latest jurisprudence

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<sup>1</sup> See Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 Va. L. Rev. 283, 334–35 (2008).

amounts to the Court dipping its foot in the water and making some waves. Those waves might be bigger than the ripples in years past, but they are nevertheless small and inconsequential. Moreover, the Court's decisions keep the public focused on the actions of the judiciary and allow legislators to skate by without taking responsibility for the systemic flaws that pervade capital punishment. If the Court desires to eliminate the arbitrariness of the death penalty, it needs to either take a major step forward or get out of the way so that the political actors can take responsibility. The Court's categorical exclusions and renewed focus on effective assistance of counsel follow neither of these approaches and thus stand little chance of eliminating the politics of death.

Let's take the categorical exclusion cases first. As Professor Smith explains, the Supreme Court in recent years has determined that it is disproportionate to execute those who are mentally retarded or were juveniles when they committed their crimes. These seemingly sweeping decisions could easily convey the impression that the Court has taken great strides to remedy the arbitrariness of the death penalty by taking unpalatable defendants off the table. Yet we must first recognize that these groups amount to only a fraction of the death-penalty cases filed each year. Of roughly 110 to 350 death sentences per year,<sup>2</sup> only a handful have involved juveniles in recent years.<sup>3</sup> And while there have been more colorable cases of mentally retarded defendants, the greatest estimate puts the number at only 20 percent.<sup>4</sup> Moreover, because the Court has refused to adopt a bright-line approach for defining mental retardation, that categorical exclusion will not forbid the execution of all who might be defined by some criteria as mentally retarded.

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<sup>2</sup>See Robert Tanner, U.S. Death Sentences Drop to 30-Year Low, *washingtonpost.com*, Jan. 5, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/04/AR2007010401192.html>.

<sup>3</sup>See Scott E. Sundby, *The Death Penalty's Future: Charting the Crosscurrents of Declining Death Sentences and the McVeigh Factor*, 84 *Tex. L. Rev.* 1929, 1952–53 (2006).

<sup>4</sup>See Timothy S. Hall, *Legal Fictions and Moral Reasoning: Capital Punishment and the Mentally Retarded Defendant After *Penry v. Johnson**, 35 *Akron L. Rev.* 327, 327 (2002) (“Estimates of the incidence of mental retardation in American’s [sic] death row population range from 4% to as high as 20%.”) (footnotes omitted).

Perhaps more importantly, while the categorical exclusions might appear to clean up problems with the death penalty, we cannot really be sure that those excluded are not truly deserving of death. Some juveniles and mentally retarded individuals are in fact highly culpable, such as the sixteen-year-old who plotted to kill his father, his father's girlfriend, and her two young children and then engaged in an elaborate cover-up of his involvement in their deaths.<sup>5</sup> Such highly culpable offenders now have a free pass from facing the death penalty, much to the chagrin of death-penalty proponents. Thus, it is hard to see how the Court's categorical exclusions take any steps toward eliminating the politics of death. To the contrary, they seem to reinforce it.

Turning to the Court's renewed focus on effective representation for capital defendants, Professor Smith is surely correct that this is cause for optimism. But how much? During the last decade, the Court has issued three strongly worded rebukes of death sentences where the defendants' lawyers were inadequate. And, as Professor Smith indicates, this seems to suggest that the Court is now demanding a higher level of representation for capital defendants. Yet the Court has not altered the main elements of an ineffective assistance of counsel claim—the defendant must still demonstrate both deficient performance by his lawyer and resulting prejudice. The Court has therefore done nothing to eliminate a core problem in such cases: that it is very difficult to demonstrate prejudice because a cold paper record of a lawyer's trial performance often does not indicate what the lawyer should have done but failed to do.

Thus, while the Supreme Court might be more incensed in a handful of cases, that does not mean lower courts will grant ineffective assistance claims with any more frequency than in the past.<sup>6</sup> Indeed, at this point there is little evidence to suggest that

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<sup>5</sup> See Adam M. Gershowitz, *Imposing a Cap on Capital Punishment*, 72 *Mo. L. Rev.* 73, 101–02 (2007).

<sup>6</sup> See Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 *Tul. L. Rev.* 443, 497–99 (2007). Since the Court's most recent reversal of a death sentence on ineffectiveness grounds in *Rompilla v. Beard*, 545 U.S. 374 (2005), there have been ninety-five executions. See Death Penalty Information Center, *Executions by Year*, <http://www.deathpenaltyinfo.org/article.php?scid=8&did=146> (last visited Apr. 4, 2008). Are we to believe that all or even most of those who went to their deaths

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successful ineffectiveness claims will be more common in the wake of the Court's trilogy of cases. While the Supreme Court hears a disproportionate number of capital cases each year,<sup>7</sup> it simply cannot be in the business of completely reviewing each one on the merits. Thus, once again, the Court may have conveyed the impression that its heavy regulation of the death penalty protects against miscarriages of justice, when in fact it is able to do so in only a fraction of cases.

Moreover, even if a larger number of ineffectiveness challenges were sustained by lower courts, that still would not ensure that states or counties will do anything about the underlying problem of under-funded indigent defense. Professor Smith argues that reversals for ineffective assistance of counsel will lead legislators to attack the cause of the reversals: the appointment of lousy or under-funded defense lawyers. Yet reversing a death sentence—whether it be on ineffectiveness grounds or for some other reason—often leads states or counties in the exact opposite direction: pouring more resources into years of additional litigation and retrials. And indeed, to date, the response to the Court's trilogy of ineffectiveness cases has not been a rash of additional funding spent on indigent defense. State and county officials preoccupied with budget shortfalls have hardly noticed that the Court is upset about the quality of representation in capital cases.

This is not surprising when we consider that the Court's three reversals for ineffective assistance of counsel happened in cases from Pennsylvania, Maryland, and Virginia.<sup>8</sup> The former two states rarely carry out the death penalty in the first place, so even if they take the Court's cue and bulk up their indigent defense funding, it will have little effect on capital punishment nationwide. And while Virginia carries out a fair share of the nation's death sentences, the reality is that almost half of the nation's executions occur in Texas

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received the quality representation the Court now seems to be demanding? I am doubtful.

<sup>7</sup>As Professor Doug Berman has repeatedly explained, the Court hears a disproportionate number of death-penalty cases that have very little effect beyond the cases themselves. See Robert Barnes, High Court Hears 3 Death Penalty Cases: Capital Punishment Accounts for Larger Share of Justices' Smaller Workload, Wash. Post, Jan. 18, 2007, at A3 (quoting Professor Berman).

<sup>8</sup>See *Rompilla v. Beard*, 545 U.S. 374 (Pennsylvania); *Wiggins v. Smith*, 539 U.S. 510 (2003) (Maryland); *Williams v. Taylor*, 529 U.S. 362 (2000) (Virginia).

and most of the remaining executions occur in the Deep South. If the Supreme Court has yet to reverse a single death sentence on ineffectiveness grounds from the states carrying out the vast majority of executions, why would those states rush to spend millions of dollars to provide better indigent defense representation?

With the lack of legislative response in mind, the question for the Supreme Court then becomes the same one that Sean Connery's character Jim Malone (who had just been shot and was on the verge of death) asked Elliot Ness in the 1987 film *The Untouchables*: "What are you prepared to do?"<sup>9</sup> If all the Court is prepared to do is sporadically overturn a handful of convictions on ineffective assistance of counsel grounds, then the prospects of eliminating the politics of death are slim.

There are big steps the Court could take to get in the game. The Court could raise the standard of proof in death-penalty cases<sup>10</sup> or it could impose caps on the number of capital prosecutions states or counties can file in a given year.<sup>11</sup> The likelihood of this happening is extremely slim. Indeed, the Court already tried to "go big" in *Furman v. Georgia* when it ruled all of the nation's death-penalty statutes unconstitutional.<sup>12</sup> As Professor Smith explains, we have been dealing with the backlash and negative effects ever since.

And so, in the absence of the Court really getting in the game, shouldn't it get out of the way? As Professor Smith cogently argues, the Court's three decades of involvement have only managed to make matters worse. The Court hyper-regulates, the public thinks things are under control, but death sentences are still arbitrary. If the Court ceased to nibble around the edges—including the larger recent bites that Professor Smith identifies in his article—wouldn't the pressure then come to bear on political actors to step up to the plate? For instance, the public might pay

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<sup>9</sup> *The Untouchables* (Paramount Pictures 1987).

<sup>10</sup> See Craig M. Bradley, A (Genuinely) Modest Proposal Concerning the Death Penalty, 72 Ind. L.J. 25, 27 (1996) (arguing for jury instruction forbidding a death sentence unless jury had "no doubt" as to defendant's guilt).

<sup>11</sup> See Gershowitz, *supra* note 5, at 78 (proposing caps on death-penalty prosecutions).

<sup>12</sup> 408 U.S. 238 (1972) (*per curiam*).

attention to legislatures' failure to fund indigent defense and governors' decisions to deny almost all clemency petitions. After more than three decades of failed judicial regulation, isn't that worth a try?