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*A journal of
legal theory
and practice
“to the end
that human
rights shall
be more
sacred than
property
interests.”*

—Preamble, NLG
Constitution



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For generations, National Lawyers Guild members have fought against the glaringly racist use of the death penalty as a form of state-sanctioned murder. The Guild has long recognized that capital punishment is nothing more than a form of state sanctioned murder.

Yet, despite the myriad moral, constitutional, financial, and practical arguments against it, capital punishment persists. Proponents commonly argue that it should remain available to deter and express outrage against horrible crimes. Even if this argument were morally tenable (which it isn't), the reality is that capital punishment doesn't work this way in practice. In fact, those who commit the most heinous and tragic acts are often not sentenced to death—they plead to multiple life sentences, but are not condemned to die—and those who commit less shocking crimes often get a date with the executioner.

Take, for example, Colorado. There, the three men on death row are all black and went to the same high school. If that isn't disturbing enough, there are notable absences from Colorado's death row, such as James Holmes, the Aurora movie theater shooter; Robert Dear, the Planned Parenthood shooter; and Scott Ostrem, the Wal-Mart shooter. These men were not condemned to death, despite collectively killing four times as many people as their death row counterparts. Unsurprisingly, they are white. Thus, like other death penalty states, Colorado's death row reflects who juries are most comfortable putting to death: black men.

In this theme issue, our scholars provide new insights into different aspects of capital punishment, including philosophic arguments against the practice; insights into the Kafkaesque hurdles defendants face in postconviction

Continued inside the back cover

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**COUNTER-REVOLUTIONARY:
LIBERALISM, CAPITAL PUNISHMENT,
AND THE NEXT STEP FORWARD**

Capital punishment is predicated in part on the notion that collective, utilitarian justice, as embodied in the state, should supersede individual rights. The tension between the greater good and our instinctive understanding of the rights of the individual is a problem for the modern democratic state. Recall, for example, that the lynchings and race riots that accompanied the Ku Klux Klan's resurgence in the early twentieth century were generally justified by appeals to the greater good. Society depends on some individual subordination to the collective good, but when matters of life and death are involved, a liberal democracy should proceed cautiously.

Western liberal democracies have long been considered the crowning political achievement of the Enlightenment. American revolutionaries fought a bloody war that gave voice and content to such abstract Enlightenment ideals as liberty, tolerance, due process, and the value of the individual. Liberal democratic institutions have improved countless lives, yet for all the good that it has done, modern post-enlightenment liberalism remains glaringly imperfect. Capital punishment is one of its most notable eyesores, putting into bold relief the tension between our perceived (but sometimes erroneous) notions of the collective good and our resistance to sacrificing individual rights. Execution of the innocent, and administering a system that discriminates on racial and class grounds, offends notions of fairness and justice even as the state claims to act on behalf of us all.¹

Capital punishment is anathema to liberal notions of human rights and civil liberties. It is time to finally cast it aside as an anachronistic vestige of bygone times. The death penalty is fundamentally incompatible with a truly liberal state.

American history is replete with hypocrisies, contradictions, and imperfections. The United States was conceived in the genocide of Indigenous Nations² and weaned on slavery.³ The death penalty, like these other horrors,

is a vestige of our medieval past that the framers of our Constitution chose not to abolish.⁴ It is past time we remedied this error.

Philosophical Liberalism and the Death Penalty

I. History, Nature and Value in Liberal Enlightenment Philosophy

Liberalism is a political philosophy that emphasizes the protection of individual liberty as the chief concern of the state.⁵ Liberalism has evolved into multiple strands. It includes a broad intellectual school of thought with subspecies ranging from modern-day democratic socialism to market libertarianism with multiple threads on a continuum in between.⁶ At its core, liberalism stands for a few unshakable principles: the consent of the governed, individualism, egalitarianism, and human dignity. These basic principles (with grotesque exceptions, including slavery, genocide of native inhabitants, and subordination of women) were at the heart of the republic's revolutionary founding.

Liberalism is a product of the Age of Enlightenment, which itself was the product of the Scientific Revolution, which marked an emergence out of the thousand-year Christian Dark Ages.⁷ Feudalism only began to recede in the sixteenth century. Moreover, before the Peace of Westphalia in 1648, the dominant political authority throughout much of Western Europe was the Catholic Church. With a few notable exceptions, concepts like individual liberty and the consent of the governed remained a distant concern.

Modern liberalism can trace its most influential origins to the work of English philosopher John Locke who, in 1689, first wrote of legitimate political authority as stemming from the consent of the governed and of the legitimate function of government being the protection of natural rights.⁸ Although Locke owed much to earlier social contract theorists like Hugo Grotius and Thomas Hobbes, Locke's emphasis on the natural rights of the individual made a unique contribution. He argued that these natural rights, identified by Locke as life, liberty, and estate, emanated from outside the political sphere and were not derivative of the authority of the state.⁹ It was then revolutionary to think of the individual as having rights apart from the body politic.

Early Enlightenment political philosophers like Locke and his earlier contemporary, Thomas Hobbes, promoted the social contract theory—the idea that individuals consent to subordinate some of their natural rights to a central authority in exchange for peace and security. Hobbes famously wrote that without the protections of organized society, life would be “solitary,

poor, nasty, brutish and short,”¹⁰ and that when “all men have equal right unto all things,” life becomes “a mere war of all against all.”¹¹ This barbarity, Hobbes argued, was sufficient justification for the government to replace the natural rights of the individual, and to impose order through the “terror of some power.”¹² Locke, while conceding the necessity of government imposition of order, did not believe the social contract required bargaining away all of our natural rights to a kind of absolute state power, as Hobbes did. According to Locke, when the state denies natural rights to an inordinate and intolerable extent, it loses its legitimacy, and political revolution becomes a moral necessity.¹³ Thomas Jefferson and other members of the Continental Congress took this lesson to heart.

In 1762, the French philosopher Jean-Jacques Rousseau elaborated on social contract theory, arguing, “[L]et us agree that force doesn’t create right, and that legitimate powers are the only ones we are obliged to obey.”¹⁴ At the dawn of the U.S. revolution, the pamphleteer and rabble-rouser Thomas Paine described social contract theory this way: “It is a perversion of terms to say that a charter gives rights. It operates by a contrary effect—that of taking rights away. Rights are inherently in all the inhabitants; but charters, by annulling those rights, in the majority, leave the right, by exclusion, in the hands of a few . . . and consequently are instruments of injustice.”¹⁵ Whereas the abdication of some natural rights to government was a “necessary evil,”¹⁶ to Paine the creep of the tyranny of the majority was forever to be kept in check with skepticism and vigilance.

The idea of natural rights and the social contract that exists between the citizenry and a legitimate state that was conceived by Locke, elaborated upon by Rousseau, and fretted over by Paine, were the pulsing intellectual heart of the American Revolution. The Founding Fathers were convinced of the merits of these fundamental ideas. The Declaration of Independence, the Constitution, and our Constitution’s Bill of Rights are all pregnant with Enlightenment ideas about the relationship between liberty and the state. These ideals form the very essence of what many patriotic Americans like to think about themselves today, and they are the ideals that we continually hold up to the world and to ourselves—ideals that this article will demonstrate are fundamentally incongruous with capital punishment.

The death penalty is the ultimate illiberal triumph of the state over the individual. The social contract at the heart of liberalism requires us all to give up some of our natural-born liberties to live in society, but when the state demands a life, it demands too much. When the state claims the right to take a life, even of one who commits a heinous and unforgiveable crime, it forgets its place.

II. The Death Penalty in History

Since humans began to organize themselves into groups, these groups have always put to death those they deemed the worst transgressors of their norms. What constitutes a capital crime, however, has varied wildly, as have the categories of people against whom the death penalty could be applied and the procedures governing how the death penalty may be carried out.

Hammurabi, in seventeenth century BCE Babylonia, issued a code of civil and criminal law that warranted death as punishment for 25 distinct transgressions, including robbery, incest, abetting conspiracy, and leaving the city gates with a slave—murderers, however, received a lesser punishment.¹⁷ Hammurabi's Code was also scaled for different classes of people with different punishments for slaves and freemen, women and men, with the disfavored classes earning death for their transgressions while the privileged could escape with a fine.¹⁸

In sixth century Athens, the democratically elected legislator, Draco, replaced the oral laws and traditions of the city-state with a written code that prescribed execution for almost all crimes, including murder, cabbage thievery, sacrilege, and idleness.¹⁹ When asked why Draco had converted so many offenses into capital crimes, the Greek biographer and historian Plutarch reported that in Draco's opinion, "the lesser [crimes] deserved it, and for the greater ones no heavier penalty could be found."²⁰ A few centuries later, the philosopher Socrates was famously sentenced to death for impiety and corrupting the youth under a different Athenian regime.²¹ Similarly, the Hebrew Bible details many crimes for which death was required in ancient Israel, including murder, cursing a parent, blasphemy, adultery, homosexuality, bestiality, and working on the sabbath.²² Later, in medieval Europe, capital crimes included murder, rape, arson, treason, witchcraft, and intermarriage between Jew and gentile.²³ In just the two centuries of the Spanish Inquisition from the thirteenth through fifteenth centuries, thousands of people were put to death for crimes including heresy, witchcraft, blasphemy, and sodomy, among other transgressions.²⁴

Later, the eighteenth century British Parliament enacted England's Bloody Code, making 222 crimes punishable by death, including murder, treason, arson, cutting down a tree, the robbing of a rabbit warren, and the theft of goods worth more than twelve pence, which was about one-twentieth of the weekly wage for a skilled worker.²⁵ In the British American colonies in the seventeenth and eighteenth centuries, the capital laws of New England listed idolatry, witchcraft, blasphemy, buggery, adultery, and rebellion as among the many offenses that warranted the death penalty.²⁶ In New York, the Duke's Laws warranted the death penalty for denying the true god or traitorous denial of the King's rights.²⁷

III. Liberalism's First Efforts to Rein In the Death Penalty

One of the first checks on the state's power to inflict punishments arbitrarily came with John Lackland's defeat at Runnymede, culminating in the Magna Carta in 1215.²⁸ In the Magna Carta, the English king ceded some of his authority to a group of noblemen in exchange for their support. The Magna Carta's *Lex Terrae* clause stated that

“[n]o Freeman shall be taken or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any other wise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land.”²⁹

This was perhaps the first emergence of the rule of law as a check against the unrestrained authority of the state.

The Habeas Corpus Act of 1679 followed nearly a century of litigation involving the power of the courts to use habeas corpus as a writ of freedom as well as earlier parliamentary efforts to expand the writ's ambit.³⁰ Proposed by the English Parliament and assented to by the King, it required judicial review of the crown's decisions to hold prisoners.³¹ A decade later, the dynastic and religious conflict between Protestant and Catholic branches of the house of Stuart brought about the Glorious Revolution, after which the winning faction, led by William of Orange and Mary II, assented to the English Bill of Rights of 1689.³² Among other things, the English Bill of Rights prohibited the imposition of cruel and unusual punishments.³³ The Habeas Corpus Act of 1679 and the English Bill of Rights of 1689 were major influences on the American revolutionaries when those revolutionaries were drafting their own social compact a century later.³⁴

Ratified in 1791, the Eighth Amendment to the U.S. Constitution prohibits cruel and unusual punishments and is the legal provision under which abolition of the death penalty is most likely to be won.³⁵ The Eighth Amendment owes its inclusion in the Bill of Rights to the great orator of liberty (and slaveholder) Patrick Henry. Fearing that the absence of an explicit prohibition against cruel and unusual punishments would allow for government overreach and oppression, he cautioned the Virginia ratifying convention that “they will tell you that there is such a necessity of strengthening the arm of government, that they must have a criminal equity, and extort confession by torture, in order to punish with still more relentless severity. We are then lost and undone.”³⁶ The Eighth Amendment is a direct product of such liberal skepticism.

The trouble with the Eighth Amendment, as with most provisions of the Bill of Rights, is its indefiniteness. What, exactly, is meant by “cruel and unusual punishment” was left purposefully vague by those who drafted and

ratified it. We know capital punishment was regularly employed throughout the several states and by the emerging federal government. Capital crimes in many of the states included arson, piracy, treason, murder, sodomy, burglary, robbery, rape, horse-stealing, slave rebellion, and counterfeiting.³⁷ In 1790, one of the first acts of the new national Congress was to enumerate federal crimes worthy of the death penalty, including treason, counterfeiting of federal records, murder, disfigurement, and robbery committed in federal jurisdictions or on the high seas.³⁸ The prescribed punishment was “hanging the person convicted by the neck until dead.”³⁹ Hangings were a public spectacle in the United States from the colonial era until the mid-nineteenth century, when reformers began to argue that the display was, if not cruel, then at least in poor taste. By 1850, the majority of states had switched to more modest, privately conducted executions.⁴⁰ Extra-judicial lynchings, of course, continued to plague the nation well into the twentieth century.

IV. Recent U.S. Supreme Court Cases on Capital Punishment

Trop v. Dulles is a 1958 Supreme Court case involving a soldier facing denationalization as punishment for wartime desertion.⁴¹ The Court recognized that the words “cruel and unusual punishment” were “not precise, and that their scope is not static[.]”⁴² concluding that the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”⁴³ The Court found for the first time, 167 years after the Eighth Amendment was ratified, that loss of citizenship was too cruel and unusual a punishment to withstand constitutional scrutiny. More importantly, the case established that the protections afforded to the individual in a social contract with the state can expand and grow as societal norms change. Unsurprisingly, the case invited a flurry of challenges to the death penalty.

Since 1958, there have been two distinct tracks for challenging the death penalty as being violative of the Eighth Amendment. One attacks the procedures involved in imposing death sentences.⁴⁴ This track includes both broad attacks on the constitutionality of the death penalty under all circumstances and narrower attacks on procedural aspects affecting trials and appeals in capital cases. The second track addresses the categories of people upon whom the death penalty can be imposed.⁴⁵ Advocates proceeding on both tracks have succeeded in reducing the application of the death penalty.

The most significant attack on the death penalty came in 1972, in *Furman v. Georgia*.⁴⁶ In *Furman*, the Court consolidated cases involving one inmate convicted of murder in Georgia and two convicted of rape—one in Georgia and the other in Texas. All of the inmates challenged the imposition of the

death penalty as cruel and unusual. In a one-paragraph per curiam opinion, the Court held that not only were the death penalty regimes in these two states unconstitutional, but that because every other capital jurisdiction in the U.S. had similar capital regimes, all were unconstitutional. This led to a four-year moratorium on the death penalty during which states passed new statutes they hoped would survive constitutional muster. During this time, 558 prisoners on death row had their sentences commuted to life in prison.⁴⁷ Two hundred forty-three were ultimately released from prison.⁴⁸

There were a number of concurring opinions in *Furman*. Three justices found the death penalty to be impermissibly arbitrary as applied, affecting not the worst offenders but a randomly selected handful.⁴⁹ Justice Potter Stewart famously wrote that “[t]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual” and concluded that “the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.”⁵⁰ Two Justices found the death penalty to be cruel and unusual in all circumstances. “Today death is a uniquely and unusually severe punishment. When examined by the principles applicable under the Cruel and Unusual Punishments Clause, death stands condemned as fatally offensive to human dignity.”⁵¹

Four years after *Furman*, after reconfiguring its capital punishment statute, Georgia was once again before the Supreme Court with a prisoner it hoped to execute. In *Gregg v. Georgia*⁵² the Supreme Court authorized the execution of a death row inmate who had been convicted and sentenced in a process ostensibly designed to eliminate the arbitrariness that had made the death penalty constitutionally repugnant in *Furman*. In allowing the state to proceed, the Supreme Court held that capital punishment did not violate the Eighth Amendment in all circumstances.⁵³ The Court approved a process that laid down some guardrails, narrowed the definition of capital crimes, and bifurcated the trial into separate guilt and penalty phases. These changes were supposed to supply objective criteria to guide a jury’s sentencing discretion⁵⁴ and provide opportunity for the jury to hear and consider mitigating and aggravating circumstances, thus winnowing the ultimate penalty down to those most deserving of death.⁵⁵ Finally, the Court required a meaningful appellate process.⁵⁶ With those protections in place to guard against the arbitrariness found in *Furman*, the Court once again gave its blessing to the state’s use of the death penalty.⁵⁷

After the Court held that capital punishment could proceed within certain procedural parameters, death penalty opponents tried to mitigate the damage. Opponents reasoned that if the death penalty was not *de facto* cruel and unusual, perhaps it was cruel and unusual when applied under certain circumstances and to certain groups.

In *Coker v. Georgia*⁵⁸ in 1977, a death row inmate challenged a death

sentence imposed for the rape of an adult woman. The Supreme Court held that the sentence was grossly disproportionate and excessive in relation to the crime.⁵⁹ Though the Court recognized that rape was “highly reprehensible” and “the ultimate violation of self[.]”⁶⁰ it reasoned that because the death penalty is “unique in its severity and irrevocability[.]” it should not be imposed for a crime that does not “involve the unjustified taking of human life.”⁶¹ In *Kennedy v. Louisiana* in 2008, the Court held that the death penalty could not be imposed for the rape of a child, limiting capital punishment exclusively to murder. “Difficulties in administering the penalty to ensure against its arbitrary and capricious application require adherence to a rule reserving its use, at this stage of evolving standards and in cases of crimes against individuals, for crimes that take the life of the victim.”⁶²

In *Enmund v. Florida*⁶³ in 1982, the Court considered the case of an inmate who had been sentenced to death for his peripheral role in a homicide.⁶⁴ The Court held that it violated the Eighth Amendment to impose on a murderer and his or her accomplice identical sentences when the accomplice did not intend to kill. “[P]unishment must be tailored to [] personal responsibility and moral guilt.”⁶⁵ Capital punishment in the absence of intentional wrongdoing is “unconstitutionally excessive.”⁶⁶ In *Tison v. Arizona*⁶⁷ in 1987, however, the Court allowed capital punishment in a case where an accomplice to murder demonstrated a reckless indifference to the value of human life which, the Court held, can be “every bit as shocking to the moral sense as an intent to kill.”⁶⁸

In *Thompson v. Oklahoma*⁶⁹ in 1988, an inmate who was sentenced to death for a crime committed when he was 15 years old challenged his sentence. The Court found it unlikely that a teenage offender could undertake “the kind of cost-benefit analysis that attaches any weight to the possibility of execution” and that “it is fanciful to believe that he would be deterred by the knowledge that a small number of persons his age have been executed during the 20th century.”⁷⁰ Because the death penalty could not be expected to make “any measurable contribution to the goals that capital punishment is intended to achieve[.]” the Court deemed it “nothing more than the purposeless and needless imposition of pain and suffering.”⁷¹

Then, in 1989, a challenge came from a death-sentenced prisoner who was 17 years old at the time he committed a murder.⁷² The Supreme Court refused to extend *Thompson*, finding neither “historical nor [] modern societal consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age.”⁷³ The Court overruled itself a mere 16 years later; in *Roper v. Simmons*,⁷⁴ a 5-4 Court found a national consensus in prohibiting capital punishment for juvenile offenders.⁷⁵ The standards of decency that mark the progress of a maturing society had apparently, but barely, evolved.

In a 2002 case out of Virginia, Daryl Adkins, an intellectually-disabled inmate, challenged the imposition of his death sentence.⁷⁶ There, the Court was “not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty” and found that Eighth Amendment “places a substantive restriction on the State’s power to take the life of a mentally retarded offender.”⁷⁷

The history of capital punishment has reflected a transformation of the institution from an unrestrained terror wielded against those who found themselves on the wrong side of power⁷⁸ to a scarcely used vestige that society finds more and more unpalatable.

In the four decades since the *Furman* moratorium and *Gregg* reinstatement, the judiciary has been “tinkering with the machinery of death”⁷⁹ and trying to fine-tune the contradictions. Courts have had to grapple with the seemingly irreconcilable interests of ensuring that parties who face the death penalty receive individualized consideration of their special circumstances and ensuring that certain defendants aren’t put to death based on morally impermissible considerations like race and class. As this tinkering has dragged on with still-imperfect results, it becomes more and more apparent that the this contradiction is inherent in the system and that the institution of the death penalty itself is fatally flawed.

As the Supreme Court has been confronted with different challenges to different aspects of the death penalty, it has faced the question whether capital punishment serves any legitimate penological function. It has considered historic and modern trends in penal theory,⁸⁰ the work product of state legislatures, trends in jury sentencing,⁸¹ the direction of legislative changes,⁸² international norms,⁸³ and the Justices’ own notions about the acceptability of the death penalty⁸⁴ to assess “the evolving standards of decency that mark the progress of a maturing society.” If some component of capital punishment does not meet one of the legitimate ends of criminal justice, then it should be discarded as cruel and unusual punishment.

Penology and The Aims of Criminal Justice

Penology is the study of crime and punishment. It concerns itself with the philosophy and practice of crime suppression and the ramifications of crime-suppression practices for society.⁸⁵ It identifies four distinct operational theories that govern society’s efforts at crime suppression—rehabilitation, deterrence, incapacitation and retribution.⁸⁶ If the state demands that a life be given in service of one of the aims of criminal punishment, it must have some legitimate purpose. Otherwise, it violates the social contract. As will be shown below, the death penalty satisfies no legitimate penological goal.

I. Rehabilitation

Rehabilitation seeks to rehabilitate and reform an offender to allow him or her to reintegrate back into society.⁸⁷ Various schemes help to facilitate rehabilitation including community service, mental health counseling, substance abuse programs, job training, and victim-offender encounters.⁸⁸ The idea is to eliminate the negative influences on an offender's life while developing positive influences and strengthening the offender's ties to the community. Poetically, the practice of rehabilitation is the quest to relocate an offender's misplaced humanity.

The Court, for obvious reasons, considers rehabilitation to be an irrelevant penological consideration for death penalty cases. As Justice Stewart recognized in his concurrence in *Furman*,

The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.⁸⁹ Subsequent cases before the Court have consistently considered only deterrence and retribution as valid penological considerations in death penalty cases.⁹⁰

Because of the procedural protections that govern how death sentences are carried out, a capital inmate spends an average of 176 months, nearly fifteen years, on death row before execution.⁹¹ This penal purgatory provides an excellent opportunity for an offender to receive rehabilitative programming. In the event that death row inmates find themselves released from their capital sentences either because of actual innocence or for procedural reasons, it would benefit the offenders and their communities were they to emerge equipped with some level of training in the skills required in polite society. Nevertheless, the Court continues to refuse to acknowledge the value of rehabilitation for capital inmates.

The classic study of inmates released as a result of post-*Furman* commutations convincingly demonstrates that death row inmates can be rehabilitated.⁹² For example, *Evans v. Muncy*⁹³ involved a Virginia inmate convicted of murder and sentenced to death after a jury found that "if allowed to live Evans would pose a serious threat of future danger to society."⁹⁴ This was the sole aggravating factor warranting a death sentence instead of a sentence of life without parole. Three years later, Evans found himself in the midst of a prison riot with multiple hostages taken. Guards and nurses taken hostage later swore affidavits that Evans "took decisive steps to calm the riot, saving the lives of several hostages, and preventing the rape of one of the nurses."⁹⁵ Evans claimed that his uncontested heroic action was proof that

he posed no serious threat of future danger to society and that accordingly, he should not have been sentenced to death. The Supreme Court declined to entertain his petition for a stay, and he was executed.

Is it possible that Evans had been rehabilitated by his three year stay on death row? We will never know what was in his heart or whether his case speaks to the possibility of rehabilitation on death row. We do know that on average, death row inmates are no more violent than offenders in the general prison population and that they respond positively to programming opportunities and privileges.⁹⁶ We also know, as Justice Marshall noted in his concurrence in *Furman*, that “[d]eath, of course, makes rehabilitation impossible.”⁹⁷

II. Deterrence

Deterrence seeks to reduce criminal activity by using punishment as a warning or threat. Deterrence seeks to impose serious consequences, thus discouraging people from undertaking antisocial activities.⁹⁸ The death penalty serves as the state’s ultimate deterrent. Specific deterrence seeks to dissuade the individual malefactor from recidivism, while general deterrence seeks to deter others from crime.⁹⁹ Punishment serves a closely related educational function in the hope that when people know what the punishment is for criminal activity, they will be dissuaded. The death penalty serves no function as a specific deterrent. Once executed, a person can no longer be deterred; he or she is only incapacitated, which will be discussed below. The only relevant question, therefore, is whether execution serves a general deterrent function.

Statistics demonstrate that the murder rate in states that do not have capital punishment is notably lower than states that embrace capital punishment enthusiastically.¹⁰⁰ Those statistics fail to account for glaring discrepancies in poverty and education rates. A study done in 2008 indicates that the consensus of criminologists, north of 88% of those surveyed, say the death penalty “does not add any significant deterrent effect above that of long-term imprisonment.”¹⁰¹ A 1995 survey asked police chiefs, “What, in your opinion, works in the battle against crime?” The expanded use of the death penalty was the choice of only 1% of respondents, ranking well behind social programs addressing drug abuse, improved economic opportunity, improved education, and more police officers on the streets.¹⁰² However, other studies can be found to validate the practice.¹⁰³ In its 2012 meta-analysis, the National Research Council concluded that “research to date is not informative about whether capital punishment decreases, increases, or has no effect on homicide rates[;] [t]herefore, these studies should not

be used to inform deliberations requiring judgments about the effect of the death penalty on homicide.”¹⁰⁴

It cannot be demonstrated that the death penalty has any value as an effective deterrent. Thus, this argument for capital punishment ought to be abandoned. The connection between capital punishment and general deterrence is too tenuous and too ephemeral to be considered a legitimate reason to continue the practice. As Justice Stevens put it, “[t]he legitimacy of deterrence as an acceptable justification for the death penalty is also questionable, at best. Despite 30 years of empirical research in the area, there remains no reliable statistical evidence that capital punishment, in fact deters potential offenders. In the absence of such evidence, deterrence cannot serve as a sufficient penological justification for this uniquely severe and irrevocable punishment.”¹⁰⁵

Assuming, *in arguendo*, that it could be conclusively demonstrated that capital punishment does have some value as a general deterrent to criminality, the practice would still be unacceptable. A liberal state has a moral responsibility to persuade with reason, not to cow with fear. While the “terror of some power” may have been acceptable for early modern pessimists like Thomas Hobbes, John Locke and his ideological progeny won the great debate over how a legitimate government should behave. The threat of death as a social deterrent harkens back to a medieval mindset when the “ritualized and regulated application of violence on the state’s behalf” was used to “shock spectators and to reaffirm divine and temporal authority” in a “theater of horror.”¹⁰⁶ As a society, we ought to have moved away from that kind of barbarity. It is time our penological methods reflect that.

III. Incapacitation

Incapacitation as a penological goal seeks to remove a specific offender from society.¹⁰⁷ The death penalty makes that removal permanent. Incapacitation is a close cousin to specific deterrence in that it seeks to proactively prevent future offending by a specific offender. While deterrence aims to reduce the probability of future offending through the imposition of undesirable consequences, incapacitation seeks to remove an offender from society. In that regard, the penological philosophy of incapacitation abandons the notion of appealing to the better angels of an offender’s nature. There is no lesson to learn, no element of rehabilitation or reeducation, no attempts to salvage some humanity from the offender; there is merely an effort to limit an offender’s ability to cause future harm through the crudest means available.

While incapacitation may have a straightforward appeal and be tempt-

ingly practical, divorced from lofty notions about humanity and restorative justice, utilizing the death penalty for incapacitation is excessive. If the aim of incapacitation is solely to remove an offender from society to prevent the offender from being able to offend again, a term of natural life in prison would serve that end.

In the four decades since the reinstatement of the death penalty, a recurring concern for the Court has been proportionality and excessiveness. When a punishment is excessive, it becomes cruel and unusual.¹⁰⁸ The Court has created a two-part test for excessiveness: “[f]irst, the punishment must not involve the unnecessary and wanton infliction of pain . . . [and s]econd, the punishment must not be grossly out of proportion to the severity of the crime.”¹⁰⁹ Under the penological purpose of incapacitation, the death penalty fails that test. While murder is a severe offense and the punishment for murder should also be severe, the penological aim of incapacitation is not about meting out justice or serving up revenge. Incapacitation is pragmatic and utilitarian, concerned solely with removing an offender from society. The death penalty is not being used to incapacitate criminal masterminds or notorious escape artists; it is applied to an unlucky cross-section of murderers no more difficult to incapacitate through a life sentence than any other offender.¹¹⁰ Modern prisons are more than capable of dealing with even the most hardened offenders.¹¹¹ Extreme isolation in ‘SuperMax’ prisons presents ethical issues of its own, however.¹¹²

In 1764, the Italian jurist, Enlightenment philosopher, and pioneering penologist Cesare Beccaria derided the death penalty as “a war of a whole nation against a citizen whose destruction they consider as necessary or useful to the general good.”¹¹³ Utilizing the death penalty as a means of incapacitation is as disproportionate and excessive as the asymmetrical warfare of a nation against a citizen. Accordingly, the death penalty does not meet the purposes of incapacitation. If the death penalty is to be justified, it will have to be through some other penological purpose.

IV. Retribution

Retribution as a penological goal seeks to impose just desert punishment on an offender for wrongdoing.¹¹⁴ Of the four penological models of crime suppression, retribution is the only one that is backward-looking, seeking to deliver punishment proportional to the offense. As public policy, retribution seems to scratch the innate itch for justice to see the guilty righteously punished for their transgressions. In that way, retribution is penology being the most honest with itself. It may be argued that the societal need for retributive justice is hardwired into our primate brains. The philosophical

debate between Locke and Hobbes about the nature of man and government is paralleled in biology. In the late eighteenth century, post-*Origin of Species*,¹¹⁵ the English evolutionary biologist and “Darwin’s Bulldog,” Thomas Huxley, found himself defending evolutionary competition not only against the religious and political conventions of the day but also against a small minority who were unwilling to discount the evolutionary power of cooperation and mutual aid. Huxley believed “violence in the evolutionary past to have been frequent and adaptive[.]” leaving modern humans with a legacy of “dominance hierarchies and relatively frequent deaths from aggression.”¹¹⁶ In contrast, Pyotr Kropotkin, the Russian naturalist and anarchist philosopher, believed humans to be “a naturally benign and unaggressive species, comparable to primates that have a consistently low frequency of conflict” and that violence was largely a product of “recent cultural novelties.”¹¹⁷ Recent literature suggests that they were both right.¹¹⁸ A distinction exists between “reactive violence,” violence that erupts from a swell of anger, frustration, or fear, and “proactive violence[.]” which is planned and calculated. Human brains, it seems, are hardwired with a lower propensity for reactive aggression compared to our closest primate cousins and a higher propensity for proactive aggression.¹¹⁹ Biologically, human nature has no requirement for blind, reactive violence. However, regardless of whether humans are hard wired to violence and vengeance, or to cooperative behavior, retributive philosophy seeks to circumvent individual violence by placing the power to punish with the state. Thus retribution, whatever its origins, seeks to regularize the imposition of state violence. As such, it must be subservient to larger criminological aims. And here it founders. The one thing that any retributive philosophy is aimed at avoiding is the consequentialism of utilitarian theories that allow for the execution of the innocent. We know that we execute the innocent. Moreover, so long as humans are prone to error, that risk cannot be eliminated. Therefore, retribution as a basis for the death penalty has an Achilles heel.¹²⁰

The Supreme Court seems to acknowledge the tension inherent in validating reactive, itch-scratching violence as state policy. In *Furman*, the Court had a colloquy amongst its members about the validity of retribution as a penological goal. Justice Stewart insisted that “[t]he instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law.”¹²¹ Justice Marshall, however, was unwilling to give retribution the Court’s imprimatur. “Retaliation, vengeance, and retribution have been roundly condemned as intolerable aspirations for a government in a free society . . . the Eighth Amendment itself was adopted to prevent punishment from becoming synonymous with vengeance . . . [t]o preserve the integrity of the Eighth Amendment, the Court has consistently

denigrated retribution as a permissible goal of punishment.”¹²² Ultimately the Court was unable to reach a consensus on the validity of retribution as a penological aim. The Court only agreed that the death penalty is valid as predicated on one of the penological goals, though never saying which.¹²³

Retribution as a social policy is as old as the code of Hammurabi, the *lex talionis*, an eye for an eye, a tooth for a tooth; yet, as a matter of practice, we no longer take eyes for eyes or teeth for teeth. The death penalty is the only remaining instance of the punishment imposed literally matching the crime. Every other transgression against person or community can be reduced into a term of imprisonment, community service, or fine, and yet we continue to insist that a certain few deaths every year be met with corresponding death. The practice is an anachronism.

The families of victims of capital crimes may call for the murderers of their loved ones to be torn apart fistful by bloody, screaming fistful; this instinct is understandable and appropriate, but we recognize that there is no place in modern society for that kind of horror. The social contract requires citizens to yield their personal interests in vengeance to the state. While it may be tempting to heed the cry of the victims of capital crimes, to pay due deference to the family left behind calling for vengeance, a liberal state must resist that impulse. The state acts in the place of the injured party to seek justice, though when it does so, it must consider factors separate from the righteous blood-lust of the injured parties. Questions of humanity, restraint, decency, and national aspiration are beyond the scope of the individual wronged party, but these ideals must always be considered by the liberal state. As Justice Marshall articulated in *Furman*, “the Eighth Amendment is our insulation from our baser selves.”¹²⁴ Because the urge for retribution is not a necessary component of human nature, because retribution is outmoded, and because we can live without it, we should live without it.

In his concurrence in *Furman*, Justice White said that when divorced from the social ends it was deemed to serve, the death penalty becomes “the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the state would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment.”¹²⁵ Here, it has been demonstrated that the death penalty no longer serves any discernible social or public purpose. The death penalty is not effective as a form of rehabilitation; it is dubious as a deterrent; it is excessive as a means of incapacitation; and it is both unseemly and unnecessary as a form of retribution. Accordingly, it should be abandoned.

Sentencing capital offenders to significant terms of confinement in prison with rehabilitative programing and the possibility of eventual release satisfies

all of the penological aims of crime suppression while remaining within the aspirational confines of the liberal state. A significant term of confinement is severe enough to deter members of the community from considering criminality while efficiently incapacitating the offender and neutralizing his or her ability to cause future harm. A significant term of confinement satisfies the desire for retribution without debasing the convicted party and discrediting the state in the process. Finally, a significant term of confinement with an eventual release date, even decades into the future, acknowledges the basic humanity of the offender, the offender's ability to change, and the possibility of rehabilitation. Respecting life and honoring the indelible humanity of the citizenry are fundamental first principles upon which the liberal state was founded.

The Death Penalty is Inconstant with Liberal Values

As demonstrated above, the death penalty serves no legitimate penological purpose that cannot be met through a term of significant incarceration and rehabilitation. It must then be asked, what societal function does the death penalty serve? While there is an argument to be made that the death penalty exists because it enjoys marginal popularity, meager popular support cannot suffice to justify a public policy as consequential as capital punishment.

Capital punishment currently holds a slim popular majority nationwide. In a 2016 Pew Research poll, only 49% of respondents favor the death penalty for people convicted of murder, while 42% oppose the death penalty.¹²⁶ This figure represents a 40-year low in the death penalty's popularity, down from a high of 78% approval in the mid-1990s.¹²⁷ Among the reasons for the decline in support for the death penalty since the 1990s is an increasing awareness of actual innocence; 71% of Americans surveyed say that there is some risk that an innocent person will be put to death, and only 26% believe the institution has sufficient safeguards against the execution of innocents.¹²⁸ In 2018, the percentage of capital punishment supporters rose to 54% with 39% in opposition.¹²⁹

Capital punishment continues to enjoy a degree of popularity. Voters seem to approve of it and politicians run on it because it feels good to scratch the itch of retribution, but democratic approval alone does not make the practice inherently valid. The Court considers a number of factors, including public sentiment, when evaluating the "evolving standards of decency" that inform cruel and unusual punishment,¹³⁰ but a thin majority of public opinion is a flimsy consideration in matters of life and death. Democracy is important, but it is not the *raison d'être* of the liberal state. The will of the majority must always be tempered by respect for the rights of the minority. Our inalienable natural rights ought not be decided by the ebb and flow of popular opinion.

The death penalty is a favorite implement of some of the world's most repressive and repugnant regimes. The countries with the highest instances of capital punishment are, in descending order, China, Iran, Saudi Arabia, Iraq, Pakistan, Egypt, Somalia, and the United States.¹³¹ To be fair, the lion's share of the world's annual executions occur in the top five countries, with the United States executing 23 people in 2017 compared to Saudi Arabia's 146 and China's 1,000-plus.¹³² However, in the past decade, the U.S. has held a position among the top-five executing nations on several occasions.¹³³ The inclusion of the U.S. on such an ugly and ignominious list ought to be cause for public concern.

Repressive regimes use the death penalty as a means of social control, not only for the removal of citizens the state considers inconvenient but more broadly to cultivate a sense of fear in the population at large. When a population knows that its government can lay claim to citizens' lives, the relationship between citizen and state changes. In that way, the death penalty serves as an omnipresent reminder of the state's awesome and horrible power. In her essay, *The Liberalism of Fear*, the political theorist Judith Shklar asserted that "systematic fear is the condition that makes freedom impossible and it is aroused by the expectation of institutional cruelty and by nothing else."¹³⁴ Where the threat of institutional cruelty and systemic fear exist, true freedom cannot. Because freedom and fear seem to be mutually exclusive, the United States ought to finally rid itself of the institution of capital punishment.

Conclusion

On October 11, 2018, in a unanimous *en banc* decision, the Supreme Court of Washington State ruled that the state's death penalty scheme was unconstitutional as applied.¹³⁵ The Court held that the "arbitrary and racially biased manner" in which the death penalty had been imposed was violative of state constitutional protections against the infliction of cruel punishments.¹³⁶ Washington now joins 19 other states and the District of Columbia in rejecting the death penalty either through popular referendum or judicial edict.¹³⁷ This development is welcome and happy news for libertarian skeptics, constitutional purists and, most especially, the death row inmates of Washington State whose capital sentences have been converted to life imprisonment. It remains unsatisfying, however, that the decision addressed only the flaws in Washington's capital punishment scheme as applied, and not the system itself. While laudable in its result, the Washington Supreme Court's opinion continues ignores the greater point that the death penalty is always incompatible with our professed values.

By birth or naturalization, Americans have entered into a social contract with the state. This contract guarantees people's natural rights, which exist outside of the political realm: life and liberty. When a person has transgressed with sufficient severity against the state, his or her liberty may be curtailed to serve the greater good, but it is not justifiable to take the transgressor's life. Capital punishment is demonstrably devoid of any legitimate penological purpose that cannot be achieved through a term of imprisonment and rehabilitative programming. In that way, the death penalty is gratuitous and excessive and inches ever closer to constitutional rebuke with every passing day. History has been on a slow march toward eliminating the death penalty for the last five decades. It is time now to finally and totally acknowledge that the death penalty is so fundamentally flawed that no amount of tinkering with the machinery can save it. As an institution, the death penalty is morally disquieting, contrary to our American aspirations, and grotesquely illiberal. It is time now to consign the practice to the dustbin of history.

NOTES

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***DAVILA V. DAVIS, BRADY, AND THE
FUTURE OF PROCEDURAL DEFAULT
DOCTRINE IN FEDERAL HABEAS CORPUS***

Introduction

The writ of habeas corpus—the so-called “great writ”¹—has been described as the “the best and only sufficient defense of personal freedom.”² Rooted in English common law, the writ allows a detainee or prisoner to petition a court to test the validity of his or her detention and order his or her release if there is no legal basis for continued detention.³ The writ’s role as a “vital instrument for the protection of individual liberty”⁴ was known to the Framers of the Constitution, who explicitly protected the writ by forbidding its suspension except “when in Cases of Rebellion or Invasion the public Safety may require it.”⁵ It is not an exaggeration to characterize the writ of habeas corpus as America’s oldest and most fundamental civil rights remedy.⁶

Under a series of Congressional statutory enactments⁷ and court decisions,⁸ the federal writ of habeas corpus has become a means of ensuring that state criminal proceedings comply with the Constitution. Federal habeas corpus review thus became an important tool to protect individual rights from oft-hostile state governments, from the lynching era⁹ to the civil rights era¹⁰ to the modern era of capital punishment and mass incarceration.¹¹ At its high-water mark in the Warren Court era, habeas corpus was a mechanism that allowed for federal oversight of nearly all aspects of state criminal proceedings.¹²

However, decades of conservative courts and tough-on-crime legislatures have rendered federal habeas a shell of what it once was.¹³ In 1996, Congress sharply limited the scope of federal habeas by passing the Antiterrorism and Effective Death Penalty Act (AEDPA),¹⁴ which, among other provisions, required federal courts to defer to factual findings and legal conclusions of state courts in all but the most egregious cases of error.¹⁵ The Supreme

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Court has also limited access to federal habeas review in dozens of ways.¹⁶ For instance, the Supreme Court has precluded habeas petitioners from receiving the retroactive benefit of newly announced rules of criminal procedure in most circumstances,¹⁷ and insulated most Fourth Amendment claims against federal review.¹⁸ The effective result is that state prisoners, and the attorneys defending them, have lost an important tool to vindicate their rights.

Another significant way that the Supreme Court has cut back on the federal habeas remedy is through expansion of the procedural default doctrine. The doctrine of procedural default in federal habeas corpus review prevents a federal court from granting habeas relief to a petitioner who has “fail[ed] to raise a claim at the time or in the manner required by state procedures” during state appellate or post-conviction review.¹⁹ The procedural default doctrine has a particularly pronounced impact because of its intersection with other Supreme Court precedent that limits access to post-conviction counsel.²⁰ Since criminal defendants are not entitled to counsel in post-conviction proceedings,²¹ and courts do not review the effectiveness of post-conviction counsel in instances where defendants are able to secure assistance,²² criminal defendants frequently procedurally default viable claims due to error by their attorneys or error that they themselves make while proceeding *pro se*.²³ Procedural default therefore becomes the “‘principal escape route’ from federal habeas.”²⁴ As a result, many criminal defendants are often unable to secure federal review of a host of important constitutional claims, such as ineffective assistance of trial counsel.²⁵

Procedural default serves as a “particularly nefarious”²⁶ barrier to federal review of state criminal convictions. Yet the news is not all bad. In recent years, the Supreme Court has taken tentative steps in the direction of easing strict procedural default rules and expanding the set of circumstances in which state procedural defaults may be excused, although the exact contours of the Court’s new doctrinal direction remain unclear. In *Martinez v. Ryan*²⁷ and *Trevino v. Thaler*,²⁸ the Supreme Court created a limited exception to the generally applicable procedural default rule, by which a subset of procedural defaults may be excused. This exception applies to a situation in which error during a petitioner’s first state collateral review proceeding results in the default of a substantial ineffective assistance of trial counsel claim, and the state collateral review proceeding had occurred in a state post-conviction review scheme that *de jure* or *de facto* requires claims of ineffective assistance of trial counsel to be brought in state collateral review proceedings. However, in its recent decision in *Davila v. Davis*,²⁹ the Court cabined the *Martinez/Trevino* exception, holding it did not apply when error during a petitioner’s initial state post-conviction review proceeding results in the default of a claim of ineffective assistance of appellate counsel.

After *Davila*, the scope of the nascent *Martinez/Trevino* doctrine—most notably, its applicability to other constitutional claims—remains unsettled, yet potentially fertile, terrain for criminal defense and civil rights attorneys looking to vindicate the rights of their clients in a federal forum. This Article provides an overview of the lay of the land. Part I summarizes the state of procedural default doctrine before *Davila*. Part II reviews and analyzes the Court’s opinion in *Davila*. Part III argues that *Martinez*, *Trevino*, and *Davila* collectively outline core principles that dictate when state procedural defaults may be excused and when they may not, and that those principles suggest that the *Martinez/Trevino* exception should be applied to at least one category of constitutional claims beyond ineffective assistance of trial counsel: namely claims arising under *Brady v. Maryland* that allege prosecutorial failure to produce material, exculpatory evidence.³⁰

Procedural Default Doctrine Before *Davila*

The Supreme Court first addressed procedural default in *Fay v. Noia*.³¹ In *Noia*, the Court adopted a narrow rule of procedural default, “hold[ing] that the jurisdiction of the federal courts on habeas corpus is not affected by procedural defaults incurred by the applicant during the state court proceedings,”³² except when the federal habeas petitioner “understandingly and knowingly . . . deliberate[ly] by-pass[ed] . . . state procedures.”³³ However, in the years following *Noia*, the Court expressed concern that *Noia*’s limited definition of procedural default did not give sufficient respect to “considerations of comity and concerns for the orderly administration of criminal justice.”³⁴ In *Wainwright v. Sykes*,³⁵ the Supreme Court replaced *Noia*’s “deliberate bypass standard” with a “cause and prejudice”³⁶ standard, by which a federal habeas petitioner’s failure to raise a claim in state post-conviction proceedings in accordance with state procedural requirements would render the claim procedurally defaulted upon federal habeas review “absent a showing of cause for the noncompliance and some showing of actual prejudice resulting from the alleged constitutional violation.”³⁷

The Supreme Court has repeatedly reaffirmed the *Sykes* “cause and prejudice” standard as the basic framework for procedural default,³⁸ but *Sykes* itself left open several questions regarding the application of the standard.³⁹ Among them was the question of whether attorney “error or negligence” in state proceedings, as opposed to the intentional circumvention of state proceedings contemplated in *Noia*, could qualify as the requisite cause for excusing a default.⁴⁰ In *Coleman v. Thompson*,⁴¹ the Court ultimately ruled that attorney error, at least in post-conviction proceedings, could not constitute cause and prejudice. The Court relied on two lines of precedent

in reaching its holding in *Coleman*. In *Murray v. Carrier*,⁴² the Court concluded that attorney error at trial or on direct appeal only constituted “cause” under *Sykes* if the attorney error amounted to Constitutionally ineffective assistance of counsel.⁴³ In *Pennsylvania v. Finley*⁴⁴ and its progeny,⁴⁵ the Court held that there is no right to counsel in post-conviction proceedings. In *Coleman*, the Court merged these two lines of cases to hold that, since there is no constitutional right to counsel in post-conviction proceedings, post-conviction counsel cannot be unconstitutionally ineffective, and ineffective assistance of counsel on state collateral review can therefore never serve as cause for a procedural default.⁴⁶

The strict rule of procedural default arising from *Sykes* and *Coleman*—under which a procedural default resulting from no counsel or ineffective assistance of counsel on state collateral review, would always preclude consideration of the defaulted claim on federal habeas review—prevailed until 2012, when the Supreme Court decided *Martinez v. Ryan*.⁴⁷ In *Martinez*, the Court relied on equitable considerations such as the importance of effective assistance of trial counsel⁴⁸ and the limited burden on state resources⁴⁹ to establish what it defined as a “narrow”⁵⁰ exception to the strict *Sykes/Coleman* regime: after *Martinez*, “[i]nadequate assistance of counsel at initial-review [state] collateral proceedings may establish cause for a prisoner’s procedural default of a claim of ineffective assistance at trial”⁵¹ when, under state law, the state post-conviction proceeding is “the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial,”⁵² and the claim of ineffectiveness is “substantial.”⁵³ Subsequently, in *Trevino v. Thaler*,⁵⁴ the Court expanded the newly announced *Martinez* doctrine to cases in which state law allows claims of ineffective assistance of trial counsel to be raised on direct appeal, but where the “structure and design of the [state] system in actual operation . . . make it ‘virtually impossible’ for an ineffective assistance claim to be presented on direct review.”⁵⁵ Under the *Martinez/Trevino* doctrine, then, the following rule applies: generally, ineffective counsel or no counsel during state collateral review cannot excuse a state procedural default, except when the underlying claim is a “substantial” claim of ineffective assistance of trial counsel, the default occurred during a prisoner’s first state collateral review proceeding, and state law requires, either *de jure* or *de facto*, that claims of ineffective assistance of trial counsel be raised on post-conviction review.

In *Martinez*, the Supreme Court left open the question of whether its newly announced equitable rule applied outside of the context of claims of ineffective assistance of trial counsel, declaring that “[o]ur holding here addresses only the constitutional claims [ineffective assistance of trial counsel] presented in this case,”⁵⁶ and the Court did not use *Trevino* to clarify whether the newly announced doctrine applied outside of the ineffective assistance

of trial counsel context.⁵⁷ *Martinez* and *Trevino* thus begged the question of whether the newly announced doctrine would apply to other constitutional claims commonly asserted in state post-conviction proceedings, such as claims of improper withholding of material exculpatory evidence in violation of *Brady v. Maryland* (“Brady claims”)⁵⁸ or claims of ineffective assistance of appellate counsel.⁵⁹

In dissent in *Martinez*, Justice Scalia expressed concern “that the newly announced ‘equitable’ rule will [not] remain limited to ineffective-assistance-of-trial-counsel cases” because “[t]here is not a dime’s worth of difference in principle between those cases and many other cases in which initial state habeas will be the first opportunity for a particular claim to be raised,” citing *Brady* claims and claims of ineffective assistance of appellate counsel as examples of constitutional claims that could fall into *Martinez*’s newly announced exception.⁶⁰ Perhaps inspired by Justice Scalia’s dissent, several commentators subsequently noted that the underlying logic of the *Martinez* doctrine suggests that it should be applied to a number of other constitutional claims beyond ineffective assistance of trial counsel: some suggested application to *Brady* claims,⁶¹ others suggested application to constitutional claims “impact[ing] fundamental fairness or the accuracy of the guilt/innocence determination,”⁶² and still others suggested application to all constitutional claims requiring introduction of extra-record evidence.⁶³

In the wake of *Martinez* and *Trevino*, circuit courts also split on the application of the doctrine to constitutional claims beyond ineffective assistance of trial counsel. Several circuits addressed the applicability of *Martinez* and *Trevino* in the context of ineffective assistance of appellate counsel claims, with the Ninth Circuit concluding that the doctrine applied to claims of ineffective assistance of appellate counsel,⁶⁴ while the other circuits that addressed the question concluded that it did not.⁶⁵ The Ninth Circuit also rejected expansions of the *Martinez* doctrine to procedurally defaulted judicial bias claims⁶⁶ and, over a dissent, procedurally defaulted *Brady* claims.⁶⁷

Davila v. Davis

In *Davila v. Davis*,⁶⁸ the Supreme Court resolved some of the uncertainty regarding the application of the *Martinez/Trevino* doctrine outside of the ineffective assistance of trial counsel context. The petitioner, Erick Davila, was accused of shooting a woman and her granddaughter in Fort Worth, Texas in 2008.⁶⁹ Davila was arrested shortly after the shooting and confessed, stating that “he ‘wasn’t aiming at the kids or the woman,’ but that he was trying to kill [the victim’s son] and the other ‘guys on the porch.’”⁷⁰

Davila was charged with capital murder.⁷¹ At trial, the trial court sought to instruct the jury that it could convict Davila of capital murder on a theory of transferred intent: namely, it could convict Davila of capital murder in the deaths of the two victims, whom he did not intend to kill, based on his intent to kill the “guys on the porch.”⁷² Davila’s trial counsel objected to the proposed instruction, but the trial court overruled the objection and submitted the transferred instruction to the jury, and Davila was convicted of capital murder and sentenced to death.⁷³

Davila subsequently appealed his conviction, but his appellate counsel did not challenge the trial court’s transferred intent instruction,⁷⁴ and the Texas Court of Criminal Appeals affirmed his conviction.⁷⁵ After the failure of his direct appeal, Davila sought post-conviction relief in Texas state court, but his counsel neither challenged the transferred intent instruction directly nor contended that his appellate counsel’s failure to challenge the transferred intent instruction on direct appeal constituted ineffective assistance of appellate counsel under *Strickland v. Washington*⁷⁶ and its progeny.⁷⁷ The state trial court denied Davila’s petition for post-conviction relief, and the Texas Court of Criminal Appeals affirmed.⁷⁸

Davila then sought federal habeas relief, asserting among other claims that his counsel on direct appeal was unconstitutionally ineffective because of her failure to challenge the use of a transferred intent instruction at trial.⁷⁹ Davila contended that, while his failure to raise an ineffective assistance of appellate counsel claim during state post-conviction proceedings would typically constitute a procedural default precluding consideration of the claim during federal habeas corpus proceedings under the regime set out in *Sykes* and *Coleman*, the *Martinez/Trevino* exception encompassed his ineffective assistance of appellate counsel claim, thus excusing his procedural default.⁸⁰ The federal district court rejected Davila’s assertion that his claim of ineffective assistance of appellate counsel fell into the *Martinez/Trevino* exception and denied habeas relief on the ineffective assistance of appellate counsel claim on the basis that it was procedurally defaulted.⁸¹ The 5th Circuit affirmed the district court’s denial of federal habeas relief,⁸² and the Supreme Court subsequently granted certiorari.⁸³

In a 5-4 decision, the Supreme Court affirmed the 5th Circuit, declining to expand the *Martinez/Trevino* doctrine to encompass ineffective assistance of appellate counsel claims.⁸⁴ Writing for the court, Justice Thomas defined the *Martinez/Trevino* doctrine as a “narrow . . . highly circumscribed, equitable exception”⁸⁵ to the *Sykes/Coleman* regime and identified several reasons why claims of ineffective assistance of appellate counsel do not qualify for the *Martinez/Trevino* equitable exception.

The Court's primary basis for rejecting an expansion of the *Martinez/Trevino* doctrine to the ineffective assistance of appellate counsel context was its conclusion that "the Court in *Martinez* was principally concerned about *trial errors*—in particular, claims of ineffective assistance of *trial* counsel."⁸⁶ The Court asserted that "[t]he criminal trial enjoys pride of place in our criminal justice system in a way that an appeal from that trial does not."⁸⁷ The Court went on to note several reasons for this "pride of place", including that the Constitution guarantees the right to criminal trial but not appeal,⁸⁸ the Court's own extensive history of distinguishing the rights guaranteed at trial to the rights guaranteed post-conviction,⁸⁹ and the fact that the "stakes for the defendant are highest"⁹⁰ at trial because trial is where "a presumptively innocent defendant is judged guilty"⁹¹ and is "where the trial judge or jury makes factual findings that nearly always receive deference on appeal and collateral review."⁹² Ultimately, the Court relied on these aforementioned differences between trial rights and appellate rights to conclude that there is "unique importance [in] protecting a defendant's trial rights"⁹³ that is not present in the appellate context.

The Court also rejected the argument that expanding the *Martinez/Trevino* doctrine to ineffective assistance of appellate counsel claims is necessary to protect the aforementioned "unique[ly] import[ant]" trial rights. The court reasoned that, unlike ineffective assistance of trial counsel claims, an exception to the *Sykes/Coleman* procedural default rule for claims of ineffective assistance of trial counsel is "not required to ensure that meritorious claims of trial error receive review by at least one . . . court—the chief concern identified by this Court in *Martinez*."⁹⁴ The Court noted that trial courts cannot address issues of alleged ineffective assistance of trial counsel "[b]ecause it is difficult to assess a trial attorney's performance until the trial has ended,"⁹⁵ and that in a regime in which appellants are *de jure* or *de facto* precluded from raising ineffective assistance of trial counsel claims on direct appeal, a procedural default of an ineffective assistance of trial counsel claim means that the underlying claim will never be reviewed by any court.⁹⁶ By contrast, ineffective assistance of appellate counsel claims are fundamentally premised on errors that initially occurred in the trial court—in every instance in which a petitioner contends ineffective assistance of appellate counsel, the petitioner is doing so because appellate counsel failed to properly appeal an alleged error that occurred in the trial court.⁹⁷ Thus, one of three circumstances is always true when a petitioner claims ineffective assistance of appellate counsel. Either appellate counsel failed to properly appeal an alleged trial error that was preserved at trial, in which case the trial court was able to contemporaneously rule on the alleged error by means of trial counsel's objection;⁹⁸ or appellate counsel failed to appeal an unpreserved error, which is "not deficient performance

unless that claim was plainly stronger than those actually presented to the appellate court;⁹⁹ or, in the rare case in which the “unpreserved trial error was so obvious that appellate counsel was constitutionally required to raise it on appeal . . . trial counsel likely provided ineffective assistance by failing to object to it in the first instance,”¹⁰⁰ thus qualifying the petitioner for the *Martinez/Trevino* exception based on ineffective assistance of trial counsel.¹⁰¹ Therefore, the court concluded, the concerns about unreviewability underlying *Martinez/Trevino* are not present in the ineffective assistance of appellate counsel context, implying that a further expansion is not warranted in this new context.

In its equitable analysis, the Court also relied on a line of reasoning, stemming from *Martinez*, regarding the equitable consequences of the state’s institutional design choices. In *Martinez*, the court reasoned that, when the state structured its post-conviction review system in a manner that forced ineffective assistance of trial counsel claims into post-conviction review, it “significantly diminishe[d] prisoners’ ability to file such claims” by moving them into a phase of review where counsel is not constitutionally guaranteed.¹⁰² Thus, it would be “inequitable to refuse to hear a defaulted claim of ineffective assistance of trial counsel when the State had channeled that claim to a forum where the prisoner might lack the assistance of counsel in raising it.”¹⁰³ In *Trevino*, the Court expanded this equitable conclusion to state post-conviction regimes “pursuant to which collateral review was, “as a practical matter, the onl[y] method for raising an ineffective-assistance-of-trial-counsel claim.”¹⁰⁴ By contrast, the Court reasoned, in the ineffective assistance of appellate counsel context, state post-conviction review is inherently the first opportunity to review the claim, because review cannot take place until appeal is complete.¹⁰⁵ Therefore, it is not inequitable to charge petitioners with the consequences of a default in this context, because the state is not responsible for structuring its scheme in a manner that makes a default likely.

Finally, the Court weighed the systemic costs and benefits of expanding the *Martinez/Trevino* exception to claims of ineffective assistance of appellate counsel, and concluded that the systemic costs outweighed the benefits.¹⁰⁶ The Court reasoned that the systemic costs of expansion would be far more substantial than in *Martinez* for two reasons. The Court first noted that, while *Martinez/Trevino* only apply to states that *de jure* or *de facto* channel ineffective assistance of trial counsel claims to state post-conviction review, expanding *Martinez/Trevino* to ineffective assistance of appellate counsel claims would subject every state to the rule, because ineffective assistance of appellate counsel claims by their nature may not be raised before state post-conviction review.¹⁰⁷ The Court also noted that expanding *Martinez/Trevino* to the ineffective assistance of appellate counsel context

would “produce a domino effect”¹⁰⁸ by which petitioners could “use those newly reviewable appellate ineffectiveness claims as cause to excuse the default of their underlying claims of trial error”¹⁰⁹ and thus “knock down the procedural barriers to federal habeas review of nearly any defaulted claim of trial error.”¹¹⁰ The Court concluded that expansion would therefore “not only impose significant costs on the federal courts,”¹¹¹ but also aggravate the “intru[sion] on state sovereignty”¹¹² caused by federal habeas review, “frustrate[] both the States’ sovereign power to punish offenders and their good-faith attempts to honor constitutional rights,”¹¹³ and “undermine the doctrine of procedural default and the values it serves.”¹¹⁴ By contrast, the Court concluded, “the benefit [of expansion] would—as a systemic matter—be small”¹¹⁵ because the “number of meritorious [ineffective assistance of appellate counsel] cases is ‘infinitesimally small.’”¹¹⁶ Therefore, the Court reasoned that expansion of the *Martinez/Trevino* exception to claims of ineffective assistance of appellate counsel would do little to protect genuine violations of constitutional rights while simultaneously imposing a significant burden on the federal courts and infringing on state sovereignty, suggesting that the equitable analysis in *Martinez/Trevino* weighed against expansion to this context.

On behalf of four justices, Justice Breyer dissented. As an initial matter, the dissenters highlighted the potentially arbitrary outcomes that could result from a regime that allows an exception to procedural default for claims of ineffective assistance of trial counsel but not claims of ineffective assistance of appellate counsel, noting that certain underlying constitutional claims such as improper jury instructions or prosecutorial misconduct are amenable to being framed on federal habeas review as either ineffective assistance of appellate counsel (because appellate counsel failed to raise the errors on direct appeal) or ineffective assistance of trial counsel (because trial counsel failed to raise them at trial), but that only the trial claim would be reviewable post-*Davila* if defaulted on state post-conviction review.¹¹⁷ The dissenters went on to critique the Court’s assertion regarding the “unique importance”¹¹⁸ of trial rights, noting that the Constitution guarantees both effective assistance of trial counsel¹¹⁹ and, should a state authorize appellate review, effective assistance of appellate counsel.¹²⁰ The dissenters also contended that “the Court . . . misses the point”¹²¹ when it asserts that claims of ineffective assistance of appellate counsel, unlike claims of ineffective assistance of trial counsel, are distinguishable because they always involve underlying claims that have been reviewed by the initial trial court: the dissenters argued that the very purpose of appellate counsel is to ensure review of potentially erroneous trial court decisions, meaning that trial court review *ex ante* is no substitute for effective appellate assistance.¹²² The dissent then disputes the Court’s assertions regarding the systemic costs and benefits

of an expansion of the *Martinez/Trevino* doctrine to claims of ineffective assistance of appellate counsel. The dissent notes that empirical evidence post-*Martinez* indicates that federal courts have not been overwhelmed by new habeas petitions alleging previously defaulted claims of ineffective assistance of trial counsel,¹²³ and that the Court's concerns about ineffective assistance of appellate counsel serving as a gateway to a broader range of underlying claims than ineffective assistance of trial counsel are misplaced, since both claims "could serve as the gateway to federal review of a host of trial errors."¹²⁴ Finally, the dissenters reiterate that the Court's distinction between appeal and trial in *Davila* is arbitrary, and violates "the basic legal principle . . . that requires courts to treat like cases alike" that "should determine the outcome of this case."¹²⁵

The Implications of *Davila* for *Brady* Claims

In rejecting an extension of the *Martinez/Trevino* doctrine to claims of ineffective assistance of appellate counsel, the Court clarified the scope of the doctrine and attempted to ensure that the doctrine would remain a "narrow exception."¹²⁶ Perhaps counterintuitively, however, *Davila* nonetheless strengthens the argument that the *Martinez/Trevino* doctrine should apply to other classes of constitutional claims beyond ineffective assistance of trial counsel. In clarifying the basis for the *Martinez/Trevino* doctrine, the Supreme Court identified the characteristics by which courts can determine whether a category of claim qualifies for the *Martinez/Trevino* treatment. These characteristics include claims that implicate the fundamental fairness or accuracy of the trial, are likely to evade review without access to the federal forum via the *Martinez/Trevino* doctrine, were not addressed earlier in the adjudicative process because of the state's own policy decisions, are regularly successful, and impose minimal systemic costs. In outlining this list of characteristics, the Court (perhaps unintentionally) suggested that *Brady* claims¹²⁷ should be eligible for the *Martinez/Trevino* exception.

The *Davila* court's rejection of the petitioner's claims is primarily premised on its interpretation of *Martinez* and *Trevino* as announcing a limited doctrine rooted in the "unique importance of protecting a defendant's trial rights."¹²⁸ *Martinez*, in turn, discusses the systemic purpose of the Constitutionally guaranteed trial rights in the context of explaining the importance of effective assistance of trial counsel: according to *Martinez*, "[d]efense counsel tests the prosecution's case to ensure that the proceedings serve the function of adjudicating guilt or innocence, while protecting the rights of the person charged."¹²⁹ The purpose of the *Martinez/Trevino* doctrine, then, is not to protect core trial rights for the sake of protecting core trial

rights. The purpose of the doctrine is to defend the systemic benefits that core trial rights, such as the right to effective assistance of counsel, are designed to protect: ensuring accurate adjudicative outcomes and promoting fundamental fairness.

The *Brady* right is similar to the right to effective assistance of trial counsel in that it serves the systemic accuracy-promoting and fairness-promoting goals identified by the Court in *Martinez* and affirmed in *Davila*. In announcing the *Brady* rule, the *Brady* court (somewhat desultorily) identified systemic fairness as the rule's fundamental purpose, contending that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."¹³⁰ In subsequent cases, the Supreme Court emphasized the role of the *Brady* rule as an accuracy-promoting rule, noting that "[i]ts purpose is . . . to ensure that a miscarriage of justice does not occur"¹³¹ and construed the materiality element of the *Brady* rule announced in *Brady* itself to emphasize accuracy, limiting *Brady* to cases where "the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict."¹³²

The dual accuracy and fairness roles of the *Brady* rule—with a heavy focus, through a materiality requirement, on accuracy—mirrors the rules governing ineffective assistance of trial counsel. In *Strickland v. Washington*,¹³³ the Supreme Court, just as it did in *Brady*, reasoned from conceptions of fundamental fairness reasoning to identify a trial right.¹³⁴ However, just as it did in *Brady*, the Court used a materiality element to narrow the rule to cases where the accuracy of the trial outcome was called into question by the Constitutional violation.¹³⁵ The similarities between the purpose and operation of the *Brady* doctrine—where the Court has not yet recognized a procedural default exception—and purpose and operation of the ineffective assistance of trial counsel doctrine—where the Court recognized an exception to general procedural default rules in *Martinez* and *Trevino*—thus weigh strongly in favor of expanding the *Martinez/Trevino* doctrine to *Brady* claims. The Court has identified both rules as core trial rights, with significant implications for fairness and accuracy. The Court has relied on similar reasoning to apply them narrowly to cases where trial outcome accuracy is called into question. It would be arbitrary to grant a procedural default exception to one of these very similar rules, but not the other.

In dismissing an expansion of the *Martinez/Trevino* doctrine to ineffective assistance of appellate counsel, the Court also relies heavily on assertions regarding the availability of an alternate forum to hear underlying claims. Under the Court's reasoning, an expansion to ineffective assistance of appellate counsel is unnecessary because an appeal (whether effective or ineffective) always involves underlying conduct that occurred in the

trial court, and any eventual habeas petitioner could have been heard on this allegedly objectionable underlying conduct in the trial court itself by objecting at trial.¹³⁶ While the dissenters ably point out the flaws in that reasoning, noting that it misses the very point of appeal,¹³⁷ the Court's dubious arguments regarding an alternative forum are even less convincing in the context of *Brady* claims than they are in the context of ineffective assistance of appellate counsel claims. By their very nature, *Brady* claims involve evidence that is unavailable to the trial court.¹³⁸ *Brady* claims inherently involve evidence that is withheld from the trial court: the prosecution has no incentive to submit material exculpatory evidence at trial, and the defense has no access to it because the prosecution withheld it in violation of its *Brady* obligations. There is thus no opportunity for the trial court to rule in the first instance on either the *Brady* claim or other constitutional issues (such as, for instance, other forms of prosecutorial misconduct) that may become apparent as a result of the *Brady* evidence. The possibility of *ex ante* trial court review—which the *Davila* court relies on so heavily in demonstrating that the concerns about unreviewability animating the *Martinez/Trevino* courts are not present in the ineffective assistance of appellate counsel context¹³⁹—is not available in the *Brady* context. It is either post-conviction review or nothing, since no state has a regime by which *Brady* evidence may be reviewed outside of the post-conviction review system, except in very rare circumstances that are unlikely to occur in practice.¹⁴⁰ If the Court is concerned about procedural default resulting in unreviewability in the *Brady* context, then an expansion of *Martinez/Trevino* to cover *Brady* is necessary.

In *Davila*, the Court also distinguished ineffective assistance of appellate counsel claims from ineffective assistance of trial counsel claims by highlighting equitable concerns arising from a state's institutional design choice to channel ineffective assistance of trial counsel claims into post-conviction proceedings, either *de jure*¹⁴¹ or *de facto*¹⁴², where there is no right to assistance of counsel, thereby increasing the risk that a petitioner, operating without the assistance of counsel, procedurally defaults such a claim on post-conviction review.¹⁴³ *Brady* claims are similarly forced into state post-conviction review by virtue of a confluence of state institutional design choices and the behavior of state actors, and it would be similarly inequitable to charge a petitioner with the consequences of procedurally defaulting those claims on post-conviction review.

Brady claims inherently involve material, exculpatory evidence that, by its very nature, likely would have been introduced at trial but for the intentional or inadvertent¹⁴⁴ acts of state officials, chargeable against the state,¹⁴⁵ that kept *Brady* evidence from the defense. As a result of state action,¹⁴⁶ then, evidence that otherwise would have been introduced at trial is excluded

from the trial record. Many states have adopted procedural regimes in which evidence not found in the trial record—including *Brady* material—cannot be introduced on direct review.¹⁴⁷ Others states have adopted procedural regimes that only allow a defendant to supplement the trial record—regardless of whether the supplemental evidence is *Brady* evidence—in very limited circumstances, such as by filing a motion for a new trial under filing deadlines ranging from five to thirty days post-verdict.¹⁴⁸ Therefore, the confluence of misconduct by state actors and state institutional design choices shunt *Brady* claims to state post-conviction review, where the risk of procedural default is high because of the lack of guaranteed counsel.¹⁴⁹ As a result, the same equitable concerns—the risk that a petitioner may procedurally default and bear the consequences of the default as a result of the state’s choices—that animated the Court’s equitable reasoning in *Martinez* and *Trevino* arise when *Brady* claims are at issue.

The *Davila* court, noting the equitable nature of the *Martinez/Trevino* doctrine, weighed the systemic costs and benefits of the proposed expansion, concluded that the systemic costs would be high and the benefits small, and ultimately used the cost-benefit analysis as a basis for rejecting an expansion to cover ineffective assistance of appellate counsel claims. However, the Court’s cost-benefit reasoning in *Davila* is inherently context-specific, and in the *Brady* context, the cost-benefit calculus is different and weighs in favor of an expansion.

In analyzing the systemic costs and benefits of the proposed expansion, the Court came to the conclusion that the benefits of the proposed expansion were minimal because meritorious ineffective assistance of appellate counsel claims are, in the Court’s view, extremely rare.¹⁵⁰ By contrast, meritorious *Brady* claims are ubiquitous and highly consequential. One study identified potential *Brady* violations in 29 of the first 250 DNA exonerations,¹⁵¹ and other studies have identified even higher rates of wrongful conviction involving *Brady* violations.¹⁵² *Brady* violations are common not only in “run of the mill” criminal cases, but also in cases in which heightened reliability is expected, such as capital cases¹⁵³ and politically charged high profile cases.¹⁵⁴ The federal courts have also repeatedly recognized the problem of *Brady* noncompliance.¹⁵⁵ Given the overwhelming evidence of outcome-determinative *Brady* noncompliance throughout the country, the systemic benefit—which benefits both individuals who are convicted as a result of *Brady* violations, and the system as a whole due to the accuracy-promoting function of *Brady*—of ensuring that *Brady* claims can be heard during federal habeas review, even in the face of a state procedural default, is far more significant than the rarely meritorious ineffective assistance of appellate counsel claims at issue in *Davila*.

However, the *Davila* court was concerned not only with the systemic benefit of an expansion of the *Martinez/Trevino* doctrine, but also with the systemic costs of an expansion, particularly with respect to the potential burden on federal court dockets¹⁵⁶ and the potential harm to federal-state comity that could result from a significant expansion of federal habeas jurisdiction.¹⁵⁷ The significant systemic benefit of expansion in the *Brady* context may seem to imply significant systemic costs, as well: if there are significant numbers of meritorious *Brady* claims, and the Court adopts a rule that expands the jurisdiction of federal courts to hear them by limiting the circumstances in which they can be procedurally defaulted, then the resulting systemic costs are also likely to be significant, in the form of burdened federal habeas dockets and increased federal court involvement in state criminal cases.

Yet there is reason to believe that the significant systemic costs predicted by this syllogism will not materialize, as the number of cases in which a *Brady* claim is procedurally defaulted in state post-conviction proceedings, but revived in federal habeas proceedings, is likely to be small. For one, the number of habeas petitioners who allege *Brady* violations in the first instance is simply smaller than the number of habeas petitioners who allege ineffective assistance of trial or appellate counsel. An analysis of a random sample of federal habeas petitions found that non-capital federal habeas petitioners are almost four times more likely to allege ineffective assistance of counsel than “false, lost, or undisclosed evidence” (a category broader than *Brady* claims), and capital federal habeas petitioners are twice as likely to allege ineffective assistance of counsel than “false, lost, or undisclosed evidence.”¹⁵⁸ There are several reasons why this is likely to be the case.

Unlike potential cases of ineffectiveness, which are readily apparent to potential habeas petitioners,¹⁵⁹ *Brady* violations are difficult to identify post-conviction and the number of defendants who are able to identify them represent a small fraction of all defendants.¹⁶⁰ While prosecutors are under a continuing obligation to comply with *Brady*, and that obligation continues post-conviction,¹⁶¹ in practice, the incentive structure confronted by prosecutors dissuades them from revisiting *Brady* issues *sua sponte* post-conviction.¹⁶² Discovery of *Brady* violations is then limited to the rare cases in which a defendant is able to identify *Brady* evidence using tools such as the Freedom of Information Act, an unrelated evidentiary hearing, or the discovery of previously unknown witnesses.¹⁶³ In some cases, the discovery of *Brady* violations will be effectively miraculous: for instance, *Brady* violations have been discovered as a result of freak events such as inadvertent mailing of exculpatory recordings to defense counsel¹⁶⁴ or the theft and release of exculpatory evidence from a prosecutor’s office by an individual in a romantic relationship with a staff member.¹⁶⁵ The discovery of *Brady* violations will be “serendipitous,”¹⁶⁶ rather than systemic.

The task of identifying a *Brady* violation post-conviction—difficult even with the aid of counsel—is made Herculean for the vast majority of defendants, who have no right to counsel in post-conviction proceedings.¹⁶⁷ The class of defendants able to enlist counsel and identify *Brady* claims post-conviction is likely to disproportionately consist of capital defendants,¹⁶⁸ a context in which the Supreme Court has created exceptions to general procedural requirements due to a Constitutional requirement of heightened reliability,¹⁶⁹ and non-capital defendants with especially meritorious claims, such as those who are able to demonstrate a colorable case of actual innocence and secure the aid of counsel from an Innocence Project. The difficulty of identifying *Brady* violations post-conviction, especially without counsel, is therefore likely to serve as a significant check on the flood of defaulted *Brady* claims into federal habeas proceedings, and those that remain are likely to be especially meritorious or occur in circumstances meriting heightened reliability, because cases exhibiting those circumstances are likely to be the ones in which the defendant is able to enlist counsel and identify a *Brady* violation.

The class of petitioners who cannot secure post-conviction relief on a *Brady* claim now, but would be able to do so if the *Martinez/Trevino* doctrine were expanded to cover *Brady* claims, make up an even smaller subset of habeas petitioners than the number of potential petitioners who can identify *Brady* violations post-conviction in the first instance. If a petitioner is able to identify a *Brady* violation prior to filing for state post-conviction review (or, depending on their state's post-conviction review scheme, potentially after a ruling on an initial state post-conviction review petition), that petitioner could simply bring a *Brady* claim in state court: state post-conviction courts have proven willing to enforce *Brady*'s requirements in meritorious cases.¹⁷⁰ In other cases of defaulted *Brady* claims—such as when the defendant fails to bring a *Brady* claim during state post-conviction review because the evidence remains withheld by the state and the state represents that it has made a complete disclosure—no expansion of the *Martinez/Trevino* doctrine is necessary: the Supreme Court held in *Strickler v. Greene* that, in certain cases, such as when the state claimed to have turned over all evidence under an “open file” policy but continued to suppress certain *Brady* evidence, an ongoing *Brady* violation can serve as the requisite cause and prejudice excusing procedural default in its own right.¹⁷¹

In the small subset of cases that would rely on an expansion of *Martinez/Trevino* to cover *Brady*, the task of the reviewing federal habeas courts would also be relatively limited, at least relative to the burden associated with reviewing claims of ineffective assistance of counsel. *Brady* claims are discrete. A petitioner raising a *Brady* claim must identify a piece of *Brady* evidence, demonstrate that the government withheld the evidence, and dem-

onstrate prejudice.¹⁷² In reviewing a *Brady* claim, the reviewing court need only address those three issues with respect to discrete pieces of evidence. By contrast, review of the ineffective assistance of counsel claims at issue in *Martinez*, *Trevino*, and *Davila* is far more extensive. The Supreme Court has set out only “general” standards for effective assistance of counsel,¹⁷³ holding that a court reviewing a claim of ineffective assistance of counsel “must judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed as of the time of counsel’s conduct . . . in light of all the circumstances”¹⁷⁴ Many aspects of counsel’s performance, at all stages of the adjudicative process, are potentially subject to federal review under *Martinez/Trevino*.¹⁷⁵ This sort of sweeping, context-specific, holistic review required by the Supreme Court’s ineffectiveness precedents is likely to burden a reviewing court in a manner that review of discrete *Brady* claims does not. The narrower scope of *Brady* review as compared to ineffectiveness review thus provides further indication that the systemic costs that concerned the Supreme Court in *Davila* are less likely to materialize if the *Martinez/Trevino* doctrine is extended to *Brady* claims.

Finally, the *Martinez/Trevino* doctrine’s requirement that a claim be “substantial”¹⁷⁶ in order to excuse a procedural default creates yet another limit on the scope of an expansion of the doctrine to cover *Brady* claims. Under *Martinez*, the standard for determining whether a habeas petitioner has made a sufficiently “substantial” claim tracks the standard for the issuance of a certificate of appealability of a federal habeas petition under the federal habeas statute¹⁷⁷ and the Supreme Court’s interpretation of that statute in *Miller-El v. Cockrell*.¹⁷⁸ This standard requires a petitioner to show that “reasonable jurists could debate whether . . . the petition should have been resolved in a different manner.”¹⁷⁹ This standard is not particularly burdensome: while it requires a petitioner to “prove ‘something more than the absence of frivolity,’”¹⁸⁰ it does not require a petitioner to show that he or she is likely to prevail on the merits.¹⁸¹ Nevertheless, the requirement that a claim that relies on the *Martinez/Trevino* doctrine to excuse a default must be “substantial” gives district courts another way to screen claims and prevents burdensome review on the merits when it is unwarranted, further reducing the risk that high systemic costs will result from the new rule.

Given the availability of *Brady* relief in state court and the availability of the *Strickler* rule as a means of excusing procedural default of a *Brady* claim when the state’s conduct is particularly egregious or deceptive, an expansion of *Martinez/Trevino* only reaches a small subset of the small number of *Brady* claims that are identified post-conviction. The expansion would reach only those cases that are substantial, but defaulted as a result of nonexistent or ineffective post-conviction counsel. The actual federal review of those cases would also be narrow in scope: unlike claims of inef-

fective assistance of counsel, which inherently involve sweeping review of counsel's performance, review of alleged *Brady* claims is limited to discrete incidents. An expansion covering such a small subset of cases, and involving such limited review, is unlikely to implicate the federalism, comity, and docket-burdening concerns identified by the Court in *Davila*. Rather, an expansion to cover these cases is more properly understood as the sort of "guard against extreme malfunctions in the state criminal justice systems"¹⁸² that federal habeas corpus review is intended to provide.

Conclusion

An extension of *Martinez* and *Trevino* to cover *Brady* claims procedurally defaulted due to attorney error has potentially significant implications: both for the small, but likely tangible, number of prisoners with defaulted and otherwise unreviewable *Brady* claims who could get relief as a result of an extension, and for the coherent development of this convoluted area of law.

Attorneys who serve clients seeking post-conviction relief should scrutinize how the reasoning of *Davila* may actually serve to expand access to federal habeas review, even if it creates only a narrow opening for procedurally defaulted *Brady* claims. They should carefully raise these claims on behalf of their clients, and courts should take the opportunity to extend *Martinez* and *Trevino* to serve these worthy purposes. With hindsight, what appears now to be a narrow procedural development may actually mark the revival of the once-great Great Writ.

NOTES

- 1 See, e.g., Louis H. Pollak, *Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ*, 66 YALE L.J. 50 (1956).
- 2 *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 95 (1868).
- 3 *Boumediene v. Bush*, 553 U.S. 723, 740-42 (2008) (discussing the history of habeas corpus in English law). See also Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Context, and American Implications*, 94 VA. L. REV. 575 (2008).
- 4 *Boumediene*, 553 U.S. at 743.
- 5 U.S. Const. art. I, § 9, cl. 2. While the Suspension Clause does not explicitly state *who* is authorized to suspend the writ of habeas corpus, courts have interpreted the Clause as vesting the power to suspend habeas corpus in Congress, as opposed to the president. See *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487) (Taney, J.).
- 6 See, e.g., Erwin Chemerinsky, *Thinking About Habeas Corpus*, 37 CASE W. L. REV. 748, 749 (1987) ("[Habeas] truly is one of the most, if not the single most, important part of the Constitution which protects individual rights."); Noam Biale, *Beyond a Reasonable Disagreement: Judging Habeas Corpus*, 83 U. CIN. L. REV. 1337, 1344 (2016) (describing habeas "as a check on both state and federal sovereign power").

- 7 See, e.g., Act of February 5, 1867 (“Habeas Corpus Act of 1867”), Chap. 28, 39th Cong., 14 Stat. 385, 385-86 (1867) (authorizing federal courts to grant a writ of habeas corpus to anyone “restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States”).
- 8 See, e.g., *Brown v. Allen*, 344 U.S. 443 (1953).
- 9 See, e.g., *United States v. Shipp*, 214 U.S. 386, 403-04 (1909) (discussing the use of federal habeas to protect an African-American man’s Constitutional rights from a “legal lynching” in the early 20th century South).
- 10 See, e.g., Robert J. Glennon, *The Jurisdictional Legacy of the Civil Rights Movement*, 61 TENN. L. REV. 869, 905-918 (1994) (reviewing how the Warren Court expanded the scope of federal habeas review in part to protect defendants prosecuted for civil rights demonstrations in the Jim Crow South from invasions of their federal rights).
- 11 See, e.g., Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 HARV. C.R.-C.L. L. REV. 339 (2006).
- 12 See, e.g., John H. Blume et al, *In Defense of Noncapital Habeas: A Response to Hoffmann and King*, 96 CORNELL L. REV. 435, 440 (2011) (describing the breadth of Warren Court-era habeas doctrine).
- 13 See, e.g., Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court’s Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 U. MICH. L. REV. 1219 (2015); Stephen B. Bright, *The Richard J. Childress Memorial Lecture 2016 Keynote: The Continuing Denial of Counsel and Assembly-Line Processing of Poor People Accused of Crimes*, 61 ST. LOUIS U. L.J. 605, 608 (2016) (“A person convicted of a crime in the state courts can go to the federal court and file what used to be called the Great Writ of Habeas Corpus. It is now the shabby, barely existent writ of habeas corpus.”).
- 14 Pub. L. No. 104-132, 110 Stat. 1214.
- 15 Blume, *supra* note 12, at 441-42 (discussing the effects of AEDPA).
- 16 Blume, *supra* note 12, at 441 (describing the ways in which the Burger, Rehnquist, and Roberts Courts have curtailed the availability of federal habeas relief); see also Reinhardt, *supra* note 13 (providing a federal circuit judge’s perspective on this curtailment).
- 17 *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion).
- 18 *Stone v. Powell*, 428 U.S. 465 (1976).
- 19 John C. Jeffries, Jr. and William Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. 679, 681 (1990). See also 17B Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure* § 4266 (3d ed. 2008).
- 20 See *Pennsylvania v. Finley*, 481 U.S. 551 (1987) (declining to extend the Sixth Amendment right to effective assistance of counsel to post-conviction proceedings).
- 21 *Ibid.*
- 22 *Coleman v. Thompson*, 501 U.S. 722, 752 (1991) (citing *Wainwright v. Torna*, 455 U.S. 586 (1982)) (“[A] petitioner cannot claim constitutionally ineffective assistance of counsel in [state post-conviction] proceedings.”).
- 23 Eve Brensike Primus, *Effective Trial Counsel After Martinez v. Ryan: Focusing on the Adequacy of State Procedures*, 122 YALE L. J. 2604, 2609 (2013).
- 24 *Martinez v. Ryan*, 566 U.S. 1, 22 (2012) (Scalia, J., dissenting) (citing statistics showing that procedural default is the most common basis for the dismissal of federal habeas corpus petitions).

- 25 Primus, *supra* note 20, at 2609–10.
- 26 Primus, *supra* note 20, at 2608.
- 27 566 U.S. 1 (2012).
- 28 569 U.S. 413 (2013).
- 29 137 S.Ct. 2058 (2017).
- 30 373 U.S. 83 (1963).
- 31 372 U.S. 391 (1962).
- 32 *Ibid.* at 438.
- 33 *Ibid.* at 439.
- 34 *Francis v. Henderson*, 425 U.S. 536, 539 (1976).
- 35 433 U.S. 72 (1977).
- 36 *Ibid.* at 87.
- 37 *Ibid.* at 84.
- 38 *See, e.g. Davila v. Davis*, 137 S.Ct. 2058, 2065 (2017).
- 39 433 U.S. at 87 (“We leave open for resolution in future decisions the precise definition of the ‘cause’-and-‘prejudice’ standard . . .”).
- 40 *See, e.g., Sykes*, 433 U.S. at 100 (Brennan, J., dissenting) (“[L]eft unanswered is the thorny question that must be recognized . . . [h]ow should the federal habeas court treat a procedural default in a state court that is attributable purely and simply to the error or negligence of a defendant’s . . . counsel?”).
- 41 501 U.S. 722 (1991).
- 42 477 U.S. 478 (1986).
- 43 *Ibid.* at 488 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).
- 44 481 U.S. 551 (1987).
- 45 *Murray v. Giarratano*, 492 U.S. 1 (1989) (applying the *Finley* rule in death penalty cases).
- 46 *Coleman*, 501 U.S. at 752.
- 47 566 U.S. 1 (2012).
- 48 *Ibid.* at 12.
- 49 *Ibid.* at 15.
- 50 *Ibid.* at 10.
- 51 *Ibid.* at 9.
- 52 *Ibid.* at 11.
- 53 *Ibid.* at 13.
- 54 569 U.S. 413 (2013).
- 55 *Ibid.* at 417.
- 56 *Martinez*, 566 U.S. at 17.
- 57 569 U.S. at 430.
- 58 373 U.S. 83 (1963).
- 59 *See, e.g., Keith A. Findley, Innocence Protection in the Appellate Process*, 93 MARQ. L. REV. 591, 600 (2009) (“[T]ogether, ineffective assistance and Brady claims constitute the largest proportion of postconviction challenges to convictions.”).
- 60 *Martinez*, 566 U.S. at 19 (Scalia, J., dissenting).
- 61 *See, e.g., Aziz Huq, Habeas and the Roberts Court*, 81 U. CHI. L. REV. 519, 592 (2014) (“[T]he overall fault-oriented structure of habeas jurisprudence suggests that *Brady* claims

are an even stronger candidate for exculpating cause than [ineffective assistance of trial counsel] claims. . . .”); Megan Raker, Comment, *State Prisoners with Federal Claims in Federal Court: When Can a State Prisoner Overcome Procedural Default?*, 73 MD. L. REV. 1173, 1175 (2014) (concluding “that the nature of *Brady* claims—in how they are raised on collateral review and the constitutional rights they protect—are such that the *Martinez* exception can, and should, apply to *Brady* claims as well.”)

62 Emily Garcia Uhrig, *Why Only Gideon?: Martinez v. Ryan and the “Equitable” Right to Counsel in Habeas Corpus*, 80 MO. L. REV. 771, 806–807 (2015).

63 Kirsty Davis, Comment, *Justice Scalia Was Right: “No One Really Believes that [Martinez] Will Remain Limited to Ineffective-Assistance-of-Trial-Counsel-Cases”*, 54 HOUS. L. REV. 1349, 1374 (2017).

64 See, e.g., *Nguyen v. Curry*, 736 F.3d 1287, 1292–96 (9th Cir. 2013); see also Micah Horwitz, Note, *An Appealing Extension: Extending Martinez v. Ryan to Claims of Ineffective Assistance of Appellate Counsel*, 116 COLUM. L. REV. 1207, 1223–24 (2016) (analyzing the Ninth Circuit’s reasoning in *Nguyen* and contending that it represents the correct interpretation of *Martinez*).

65 See, e.g., *Long v. Butler*, 809 F. 3d 299, 314–15 (7th Cir. 2015), *aff’d sub nom Long v. Pfister*, 874 F.3d 544 (7th Cir. 2017) (en banc); *Reed v. Stephens*, 739 F.3d 753, 778 n. 16 (5th Cir. 2014); *Hodges v. Colson*, 727 F.3d 517, 531 (6th Cir. 2013); *Banks v. Workman*, 692 F.3d 1133, 1147–48 (10th Cir. 2013); *Dansby v. Norris*, 682 F.3d 711, 729 (8th Cir. 2012), *rev’d on other grounds sub nom Dansby v. Hobbs*, 569 U.S. 1015 (2013). See also Horwitz, *supra* note 64, at 1221–23, 1224 (summarizing the conclusions of the 5th, 6th, 7th, 8th, and 10th Circuits regarding the application of *Martinez* to ineffective assistance of appellate counsel claims and arguing that their reasoning does not comport with *Martinez*).

66 *Pizzuto v. Ramirez*, 783 F.3d 1171, 1176–77 (9th Cir. 2015).

67 *Hunton v. Sinclair*, 732 F.3d 1124, 1126–27 (9th Cir. 2013).

68 137 S.Ct. 2058 (2017).

69 *Ibid.* at 2063.

70 *Ibid.*

71 *Ibid.*

72 *Ibid.*

73 *Ibid.*

74 *Ibid.*

75 *Davila v. State*, No. AP-76, 105, 2011 Tex. Crim. App. Unpub. LEXIS 43* (Tex. Crim. App., Jan. 26, 2011), *cert. denied* 565 U.S. 885 (2011).

76 466 U.S. 668 (1984).

77 See, e.g., *Schwander v. Blackburn*, 750 F.2d 494, 501–02 (5th Cir. 1985) (adopting the *Strickland* standard for claims of ineffective assistance of appellate counsel).

78 *Ex parte Davila*, Nos. WR-75, 356-01, 2013 Tex. Crim. App. Unpub. LEXIS 486 (Tex. Crim. App., Apr. 17, 2013), *cert denied* 134 S. Ct. 784 (2013).

79 *Davila v. Stephens*, No. 4:13-CV-506-O, 2015 U.S. Dist. LEXIS 51854, at *52-54 (N.D.Tex. Apr. 21, 2015).

80 *Ibid.* at *53.

81 *Ibid.* at *53-54.

82 *Davila v. Davis*, 650 Fed. Appx. 850, 867–68 (5th Cir. 2015).

83 *Davila v. Davis*, 137 S. Ct. 810 (2017).

84 137 S. Ct. at 2064.

85 *Ibid.* at 2065–66.

86 *Ibid.* at 2066.

87 *Ibid.*

88 *Ibid.* (citing *Halbert v. Michigan*, 545 U.S. 605, 610 (2005)).

89 *Ibid.* (quoting *McFarland v. Scott*, 512 U.S. 849, 859 (1994)) (“The trial ‘is the main event at which a defendant’s rights are to be determined . . .’”).

90 *Id.*

91 *Ibid.* (citing *Ross v. Moffitt*, 417 U.S. 600, 610 (1974)).

92 *Ibid.* (citing *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979)).

93 *Ibid.*

94 *Ibid.* at 2067 (citing *Martinez*, 566 U.S. at 10, 12).

95 *Ibid.*

96 *Ibid.*

97 *Ibid.*

98 *Ibid.*

99 *Ibid.* (citing *Smith v. Robbins*, 528 U.S. 259, 288 (2000)).

100 *Ibid.* at 2067–68.

101 *Ibid.*

102 566 U.S. at 13.

103 *Davila*, 137 S. Ct. at 2068.

104 *Ibid.* (quoting *Trevino v. Thaler*, 569 U.S. 413, 427 (2013)).

105 *Ibid.*

106 *Ibid.* at 2070.

107 *Ibid.* at 2068–69.

108 *Ibid.* at 2069.

109 *Ibid.*

110 *Ibid.*

111 *Ibid.*

112 *Ibid.* at 2070 (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)).

113 *Ibid.* (quoting *Calderon v. Thompson*, 523 U.S. 538, 555–556 (1998)).

114 *Ibid.*

115 *Ibid.*

116 *Ibid.*

117 *Ibid.* at 2071–72.

118 *Ibid.* at 2066.

119 *Ibid.* at 2072 (citing *Strickland v. Washington*, 466 U.S. 668, 686 (1984)).

120 *Ibid.* (citing *Evitts v. Lucey*, 469 U.S. 387, 396 (1985)).

121 *Ibid.* at 2073.

122 *Ibid.*

123 *Ibid.* at 2074 (citing “an increase of ‘dozens’ of cases out of 7,500 [habeas petitions] in total” filed in the 9th Circuit post-*Martinez*).

124 *Ibid.* (quoting *Davila*, 137 S.Ct. at 2069).

125 *Ibid.* at 2075.

126 *Ibid.* at 2062.

- 127 In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court held that “the suppression by the prosecution of evidence favorable to an accused upon request violates [\[the Due Process Clause of the Fifth and Fourteenth Amendments\] where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.](#)” *Id.* at 87. In subsequent cases, the Court clarified that “[t]here are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.” *Strickler v. Greene*, 527 U.S. 263, 282–83 (1999). A full discussion of contemporary *Brady* doctrine is beyond the scope of this paper. For a history of the *Brady* rule and a summary of contemporary doctrine, see, e.g., Bennett L. Gershman, *Reflections on Brady v. Maryland*, 47 S. TEX. L. REV. 685 (2006).
- 128 *Ibid.* at 2067.
- 129 566 U.S. 1, 12 (2012).
- 130 373 U.S. 83, 87 (1963).
- 131 *United States v. Bagley*, 473 U.S. 667, 675 (1985).
- 132 See *Strickler v. Greene*, 527 U.S. 263, 282 (1999).
- 133 466 U.S. 688 (1985).
- 134 *Ibid.* at 685 (“An accused is entitled to be assisted by an attorney . . . who plays the role necessary to ensure that the trial is fair”).
- 135 *Ibid.* at 687 (“[T]he defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.”).
- 136 *Davila*, 137 S.Ct. at 2067.
- 137 *Ibid.* at 2073.
- 138 See, e.g., *Imbler v. Pachtman*, 424 U.S. 409, 443 (1976) (White, J., concurring) (“[T]he judicial process has no way to prevent or correct the constitutional violation of suppressing evidence.”).
- 139 *Ibid.* at 2067.
- 140 Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 689–90 (2007) (noting that most jurisdictions do not allow defendants to supplement the trial record post-verdict, and those that do impose strict deadlines (between 5 and 30 days post-verdict) that almost no defendant who discovers *Brady* evidence post-trial will be able to meet).
- 141 *Martinez v. Ryan*, 566 U.S. 1, 13 (2012).
- 142 *Trevino v. Thaler*, 569 U.S. 413, 427 (2013).
- 143 137 S.Ct. at 2068.
- 144 *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999) (“There are three components of a true *Brady* violation . . . [the] evidence must have been suppressed by the State, either willfully or inadvertently . . .”).
- 145 *Mooney v. Holohan*, 294 U.S. 103, 112–13 (1935) (“[T]he action of prosecuting officers on behalf of the State . . . may constitute state action within the purview of the Fourteenth Amendment.”).
- 146 Even if the actions of individual prosecutors were not attributable to the state, it is arguable that *Brady* violations are the foreseeable result of the state’s choice to rely on prosecutorial discretion in determining what qualifies as *Brady* material, as opposed to proposed alternatives such as “open file” discovery,” in the design of its criminal discovery regime, just as the Court reasoned in *Martinez/Trevino* that procedurally defaulted ineffective assistance of trial counsel claims were the foreseeable result of

- the state's choice to shift ineffective assistance of trial counsel claims out of the direct appeal process. *See, e.g.,* Brian Gregory, *Brady is the Problem: Wrongful Convictions and the Case for "Open File" Criminal Discovery*, 46 U.S.F.L.REV. 819 (2012).
- 147 Primus, *supra* note 140, at 689 (“[T]he vast majority of jurisdictions do not allow defendants to open or supplement the trial court record . . .”).
- 148 Primus, *supra* note 140, at 689–90.
- 149 *See Martinez*, 566 U.S. at 13.
- 150 137 S.Ct. at 2070.
- 151 BRANDON GARRETT, CONVICTING THE INNOCENT 203 (2011).
- 152 *See, e.g.,* Jon B. Gould et al., *Predicting Erroneous Convictions*, 99 IOWA L. REV. 471, 491 (2014) (identifying prosecutorial withholding of evidence in violation of *Brady* as a statistically significant predictor of wrongful conviction based on a large data set of wrongful convictions and “near miss” cases); THE NATIONAL REGISTRY OF EXONERATIONS, EXONERATIONS IN 2016 6-7 (Mar. 7, 2017), https://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2016.pdf (identifying official misconduct, most commonly *Brady* violations, as a factor in 42% of exonérations, and over two-thirds of homicide exonérations, in 2016).
- 153 JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM, PART II: WHY THERE IS SO MUCH ERROR IN CAPITAL CASES, AND WHAT CAN BE DONE ABOUT IT 41 (Feb. 11, 2002), <http://www2.law.columbia.edu/brokensystem2/report.pdf> (documenting *Brady* violations as the basis for nearly 20% of reversals of capital convictions and/or sentences on post-conviction review).
- 154 Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY 415, 416–19 (2010) (describing *Brady* violations during the corruption prosecution of former Sen. Ted Stevens).
- 155 *See, e.g., United States v. Olsen*, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, C.J., dissenting) (“There is an epidemic of *Brady* violations abroad in the land. Only judges can put a stop to it.”); Emmet Sullivan, *Enforcing Compliance with Constitutionally-Required Disclosures: A Proposed Rule*, 2016 CARDOZO L. REV. DE NOVO 138 (documenting a federal district judge’s efforts to ensure *Brady* compliance in criminal proceedings in his court).
- 156 137 S. Ct. at 2069.
- 157 *Ibid.* at 2070.
- 158 Nancy J. King, Fred L. Cheesman II & Brian J. Ostrom, *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* 5 (Vanderbilt Univ. Pub. Law & Legal Theory Working Paper Group, Working Paper No. 07-21, 2007), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1009640.
- 159 Tom Zimpleman, *The Ineffective Assistance of Counsel Era*, 63 S.C.L.REV. 425, 445 (2011) (citing *Diggs v. Welch*, 148 F.2d 667, 670 (D.C. Cir. 1945)); *Cf. Martinez v. Ryan*, 566 U.S. 1, 20 (2012) (Scalia, J., dissenting) (questioning, rhetorically and pejoratively, whether “a duly convicted defendant [has] ever been effectively represented?”).
- 160 *See, e.g., Connick v. Thompson*, 563 U.S. 51, 80 (2011) (Ginsburg, J., dissenting) (“*Brady* violations . . . are not easily detected.”); Jones, *supra* note 136, at 433 (“[A]bsent extraordinary circumstances, it is very likely that the defense will never learn of the existence of favorable evidence.”); Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 536 n. 27 (2007) (summarizing materials on the difficulty of identifying *Brady* violations post-conviction).
- 161 Gershman, *supra* note 160, at 535.

- 162 See, e.g., Stephen A. Saltzberg, *Perjury and False Testimony: Should the Difference Matter So Much?*, 68 FORDHAM L. REV. 1537, 1578–79 (2000) (“In many instances, withheld evidence will never see the light of day.”)
- 163 Gershman, *supra* note 160, at 537.
- 164 Jones, *supra* note 154, at 433 n. 81 (citing *United States v. Arnold*, 117 F.3d 1308 (11th Cir. 1997)).
- 165 *Id.* (citing Ken Armstrong and Maurice Possley, *The Verdict: Dishonor*, CHI. TRIBUNE, Jan. 11, 1999, at A1).
- 166 See *Connick v. Thompson*, 563 U.S. 51, 86 (2011) (Ginsburg, J., dissenting) (describing the discovery of *Brady* evidence as “serendipitous” where, in a death penalty case, *Brady* evidence was discovered in an “eleventh-hour” search of crime lab archives days prior to an execution).
- 167 See, e.g., *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (“We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions . . . and we decline to so hold today.”).
- 168 See, e.g., Daniel Givelber, *The Right to Counsel in Collateral, Post-Conviction Proceedings*, 58 MD. L. REV. 1393, 1409 (1999) (“[M]ost states provide for the appointment of [capital post-conviction] counsel either by statute or judicial decision . . .”).
- 169 See, e.g., *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (opinion of Burger, J.) (“[T]his qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.”).
- 170 Liebman, *supra* note 153, at 41 (indicating a nearly equal rate of capital conviction reversals based on *Brady* in state and federal courts).
- 171 527 U.S. 263, 282–83 (1999) (citing *Murray v. Carrier*, 477 U.S. 478, 488 (1986)).
- 172 *Strickler v. Greene*, 527 U.S. 263, 282–83 (1999).
- 173 *Bobby v. Van Hook*, 558 U.S. 4, 7 (2009).
- 174 *Strickland v. Washington*, 466 U.S. 668, 690 (1984).
- 175 See Zimpleman, *supra* note 159, at 439–45 (describing the variety of circumstances in which post-conviction courts have identified ineffective assistance of counsel).
- 176 *Martinez v. Ryan*, 566 U.S. 1, 14 (2012) (citing *Miller-El v. Cockrell*, 537 U.S. 322 (2003)).
- 177 28 U.S.C. § 2253.
- 178 537 U.S. 322 (2003).
- 179 *Ibid.* at 336 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2002)).
- 180 *Ibid.* at 338 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)).
- 181 *Ibid.* at 336.
- 182 *Harrington v. Richter*, 562 U.S. 86, 102 (2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 332, n.5 (1979) (Stevens, J., concurring in judgment)).

**THE STRUGGLE AGAINST THE DEATH
PENALTY MOVES FORWARD IN
WASHINGTON STATE: REFLECTIONS
ON *STATE V. GREGORY***

Introduction

My paternal grandfather came from what is now Belarus, a small country that used to be in the former USSR, now nestled between Russia, Ukraine, Poland and Lithuania. It is the only European country that still has the death penalty. Executions in Belarus take place without notice either to the prisoners or their families. Condemned prisoners are taken blindfolded to a basement, where they kneel and someone shoots them in the back of the head.¹

Capital punishment in the United States of America is different. We do not shoot people in the middle of the night in the basement. But the system in this country is no more fair, and no more humane. On the one hand, capital punishment in the U.S. is characterized by extreme arbitrariness and randomness. There is no apparent reason why the State kills some people, but not others. Serial killers and mass murderers regularly escape the death penalty, while others end up on death row for no apparent reason other than bad luck. On the other hand, the death penalty system in the U.S. is characterized by the opposite of randomness – race and class are *the* determinative factors that land someone on death row. Generally, the lethal combination of a white victim and a black defendant is what leads to execution, while there are no rich people on death row. Countless studies have verified this combination of arbitrariness and racism.²

Since the inequities of the death penalty exemplify all that is wrong with the American penal system, one would think that its days are numbered. But despite powerful pressures for abolition, there are powerful forces within this country that are wedded to the death penalty, and not just in the areas of the country that voted for Trump. At the time that Governor Gavin Newsom announced the recent moratorium in California – a key “blue state” – there were 737 inmates on death row in that state.³

Like California, Washington State is another purported liberal bastion, but it was a state where hanging was still practiced until the 1990s.⁴ The

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death penalty actually survived in so-called “blue” areas of the state, with recent major capital prosecutions taking place only in the large population centers of Western Washington (King, Snohomish and Pierce County).

In October of 2018, the Washington Supreme Court struck down Washington’s capital punishment system on state constitutional grounds in *State v. Gregory*.⁵ In this article, I want to put the *Gregory* case into a broader context – the political background of capital punishment in the United States and the development of opposition to the death penalty, including a discussion of the role (or non-role) of the National Lawyers Guild.

Opposition to the Death Penalty

Opposition to the death penalty has not been on the front burner of recent mass movements in the U.S. Activists against the death penalty tend to come from faith communities and groups of lawyers, such as the ACLU, the NAACP Legal Defense Fund and state affiliates of the National Association of Criminal Defense Lawyers. And although national initiatives connected to the Black Lives Matter movement have called for abolition of capital punishment,⁶ my own anecdotal experience over the past few years is that there have been few, if any, mass protests on the streets addressing capital punishment, even when activists are protesting against mass incarceration.

Perhaps because of the lack of street protests against the death penalty, the National Lawyers Guild has not been on the forefront of abolition, even as it has taken a vanguard position on prison abolition generally.⁷ The subject only occasionally comes up at national conventions, and the organization has not provided any support for capital defense lawyers – support such as legal training seminars, amicus briefing, the sharing of legal research, and recruitment of lawyers in states without the death penalty to do cases in states with the death penalty. While the NLG has a lot to be proud of for its national work in so many areas, as noted, other groups such as the ACLU or the NAACP Legal Defense Fund have been the main legal organizations fighting against the death penalty machinery. In *Gregory*, for instance, the ACLU provided extensive amicus support. The NLG did not.⁸

Yet, the NLG’s history as a leading left-wing legal organization has a lot to offer the struggle for abolition. Our radical analysis provides an opportunity to link opposition to the death penalty to a more general critique of society, a critique that is critically absent from, for example, purely moral opposition to the death penalty.⁹ Religious principles can go only so far given the powerful forces advancing an opposing conservative religious “eye for an eye” agenda, an agenda that forces many liberal politicians to

the right as they are afraid of being attacked as “soft” on crime. Similarly, although awareness of DNA exonerations over the last 25 years has been a powerful force for abolition, a possible solution to the risk of error in capital prosecutions is simply to provide more resources to the defense – the idea that if capital defendants are provided with sufficient lawyers and investigators then there should no longer be any barriers to execution.

We need to expand objections to the death penalty from those based simply on morality or inefficiency to broader criticisms of our society as a whole. Only in this way can we link opposition to the death penalty to social movements working to change the very fabric of our country and the world, movements seeking to build a new society premised on principles of human rights, opposition to racism, and economic equality.

The Death Penalty as a Tool of Social Control

The NLG’s 2015 resolution on prison abolition noted the explicit link between prisons and capitalism, declaring that “prisons are designed to maintain economic and racial inequality, legitimize capitalism, and feed corporate wealth.”¹⁰ Modern capital punishment has its origins in the same forces – a need to legitimize capitalism and maintain economic and racial inequality. From its origins in 18th century England,¹¹ the death penalty in the United States has always been a tool of the ruling classes used to control large groups of people who have not fit into dominant Anglo-American Protestant culture. These groups include the surviving Native Americans, the African slave population freed after the Civil War, Mexicans in territories seized in mid-19th century, Asians, and millions of Irish, Eastern European and Southern European immigrants. The ruling classes have always been afraid of the revolutionary potential of the masses, and executions and their attendant publicity were used as way to solidify power.

As an example, one need only read one of the first reported Washington Supreme Court decisions, from 1857, in which the court upheld the conviction and hanging of Chief Leschi for protecting his people against foreign invaders:

The prisoner has occupied a position of influence, as one of a band of Indians, who, in connection with other tribes, sacrificed the lives of so many of our citizens, in the war so cruelly waged against our people on the waters of Puget Sound.

It speaks volumes for our people that, notwithstanding the spirit of indignation and revenge, so natural to the human heart, incited by the ruthless massacre of their families, that at the trial of the accused deliberate impartiality has been manifested at every stage of the proceedings.¹²

Thirty years later, during a time of rising labor unrest, the State of Illinois hung four anarchist leaders who were leading attempts to obtain the 8 hour work day (the “Haymarket Martyrs”).¹³ The wave of anti-immigrant and anti-labor repression during and after the First World War led to the execution of anarchists Sacco and Vanzetti.¹⁴ The extraordinary execution of Ethel and Julius Rosenberg in 1953 should be viewed as an anti-semitic attempt to destroy labor militancy and the Communist Party in Cold War America,¹⁵ while Pennsylvania’s unsuccessful attempt to kill Mumia Abu-Jamal needs to be viewed in the context of state repression of the Black Panthers and the MOVE organization in Philadelphia.¹⁶

But no view of capital punishment in the U.S. would be complete without understanding the history of lynching. From 1882-1968, there were over 4000 lynchings in the United States.¹⁷ Most were carried out in public, along with the mutilation of the victims (often castration), with the tacit support of the police, local political figures and government bodies.¹⁸ Like the Nazi soldiers who happily photographed their genocidal acts against Jewish victims in Eastern Europe, there is extensive photographic evidence of lynchings, capturing the “party” like atmosphere enjoyed by the white spectators.¹⁹ While the majority of lynchings took place in the South as a way to terrorize the black population into submission, White settlers also used lynchings as a way to control the Mexican population in the newly conquered Southwest.²⁰

Public lynching became politically unpopular by the 1950s and 1960s. The murder of Emmett Till in 1955 in Mississippi and his subsequent open casket funeral in Chicago burst into national consciousness at the height of the Cold War. Explicit unabashed racist brutality began to hurt U.S. foreign policy goals of building “soft power” to stop the advance of Soviet influence in the Third World. By the 1960s, the era of widespread public lynchings came to an end, particularly as the federal government began to assert more control over the states. Executions would now exclusively take place in more private settings (behind the walls of prisons), under color of law.²¹ Henceforth, the State would assume a monopoly on violence and executions, and would supposedly become more race neutral, subject to due process and the jury trial right.

The Near Abolition of the Death Penalty in 1972 and Its Subsequent Revival

In many senses, the death penalty is a remnant of medieval methods of punishment. As French philosopher Michel Foucault has explained, execu-

tions in the pre-modern era were part of a system of spectacle and gruesome public torture, by which the King's authority was physically demonstrated upon the body of the condemned prisoner, in full view of the populace. The transition to modern society included the birth of the prison system, characterized by surveillance, regimentation, and attempts to change the prisoner's consciousness, which itself served as the foundation of the carceral state.²² Modern states could more efficiently establish structures of social control without the primitive death penalty.

Thus, by the late 1960s and early 1970s, as part of a transition to modern liberal democracy, many countries began abolishing the death penalty.²³ Within the U.S., greater social consciousness about race and class led to a general social liberalization of American society, which included opposition to capital punishment.²⁴ Opposition was sufficiently widespread that supporters of capital punishment feared that jurors would not impose death, which led to the practice of "death qualifying" jurors – i.e. removing from capital juries those who had a principled opposition to the death penalty.²⁵ With the *Warren* Court's extension of federal constitutional protections to states and the expansion of federal habeas jurisdiction, there was an expectation in the 1960s and early 1970s that the U.S. would join other liberal democracies and abolish the death penalty.

In 1972, the U.S. Supreme Court issued its decision in *Furman v. Georgia*,²⁶ invalidating the death penalty in the United States under the Eighth and Fourteenth Amendments. But one can only understand *Furman*, and what occurred after 1972, by understanding how capital cases had been litigated for at least a hundred years previously. Prior to 1972, death was a possible punishment not just for murder, but for other felonies such as rape and kidnapping. The system was characterized by unitary jury trials. Juries decided both guilt and the penalty in a single proceeding, with very few guidelines governing the jury's discretion as to who will live and who will die. The lack of standards had its roots in the common law's jury nullification²⁷ and even as late as 1971, the U.S. Supreme Court had rejected challenges to this system.²⁸

Furman was a fractured decision, with a very simple lead *per curiam* opinion, followed by five concurring opinions and four dissenting opinions.²⁹ However, the common theme of the majority of justices centered on the lack of standards and the seemingly unbridled discretion of jurors to impose death, even for less serious crimes. This discretion made the then-prevailing system either arbitrary³⁰ or susceptible to being infected by racism (the opposite of arbitrary).³¹ These twin problems – arbitrariness and the risk of racism – led to the invalidation of unitary jury trials with no standards for determining who lived and who died. Because all states that

had capital punishment in 1972 had such procedures, the effect of *Furman* was to invalidate all existing capital sentencing schemes in the United States.

Following *Furman*, 37 states adopted new death penalty statutes, seeking to revive capital punishment. Some states tried to address the problem of arbitrariness by making capital punishment mandatory for certain crimes. However, the Supreme Court invalidated those laws on the grounds that the Eighth Amendment requires individualized sentencing, including “consideration of the character and record of the individual offender and the circumstances of the particular offense.”³²

In contrast, in *Gregg v. Georgia*,³³ the Supreme Court upheld statutes (1) ostensibly retaining individualized sentencing, (2) limiting the discretion of prosecutors, judges, and juries by allowing death sentences for only a supposedly narrow category of crimes, and (3) “specifying the factors to be weighed and the procedures to be followed in deciding when to impose a capital sentence.”³⁴ The new statutes, approved by the Supreme Court, bifurcated trials between the “guilt” and “penalty” phases and often contained mandatory “proportionality” review provisions.³⁵ These procedures, it was hoped, would provide the type of “guided discretion” that would eliminate arbitrariness in capital sentencing.

Whether *Gregg* ever actually made sense is not the issue. Rather, the decision must be viewed as a symbol of the shift to the right in American society. The *Warren* Court was becoming a distant memory. *Gregg* and the popularity of new death penalty schemes, even in “liberal” jurisdictions, should be seen in the same light as Ronald Reagan’s 1980 Philadelphia, Mississippi campaign speech, calling for “states’ rights,” just a few miles from the site of 1964 murders of civil rights activists Andrew Goodman, Mickey Schwerner and James Chaney. The transition of America to a true liberal democracy hit a brick wall. Right-wing reaction appeared to prevail, at least on this front.

From *Gregg* to the Present

Gregg’s claimed hope of a less arbitrary and non-racist death penalty, of course, never came to fruition. Poor state funding for capital defense,³⁶ sleeping lawyers,³⁷ racism during jury selection,³⁸ and corrupt judges³⁹ characterize the actual experience of capital trials in the generation since *Gregg*. Yet, despite multiple court decisions that routinely vacated death sentences for egregious procedural errors, prosecutorial misconduct, and ineffective assistance of counsel, the death penalty system expanded in the 1980s and 1990s, with the Clinton-sponsored Anti-Terrorism and Effective Death Penalty Act of 1996,⁴⁰ designed to speed the pace of executions by

stripping federal courts of their traditional habeas corpus powers.⁴¹ Rather than addressing issues about whether capital punishment was appropriate for modern society, the Supreme Court's capital jurisprudence became very technical in trying to parse out which mechanisms were unconstitutionally arbitrary and which were not.⁴²

It was also clear in the years after *Gregg* that the capital punishment system replicated the racism of American society. In Georgia, for instance, a far-reaching statistical study (the "Baldus Study") concluded that defendants who killed white victims were 4.3 times more likely to be sentenced to death than those who killed black victims.⁴³ Yet, in what can only be considered the nadir of the abolition movement, in a 5:4 decision, the U.S. Supreme Court rejected statistics as a method of proving race discrimination in capital cases.⁴⁴

By the early 2000s, though, the tide began to turn. High-profile DNA exonerations and awareness of false confessions began to convince many that the risk of error in capital cases was too high.⁴⁵ On that basis, the Republican Governor of Illinois cleared that state's death row.⁴⁶ The U.S. Supreme Court began excluding whole categories of defendants and cases from capital prosecutions,⁴⁷ while the expansion of Sixth Amendment jurisprudence following *Apprendi v. New Jersey*⁴⁸ restricted judicially-imposed death sentences.⁴⁹ Some states' governors adopted moratoria, while other states eliminated the death penalty legislatively.⁵⁰

In 2015, when Connecticut repealed the death penalty but only applied the repeal prospectively, the Connecticut Supreme Court issued a decision striking down the death penalty retroactively, on state constitutional grounds.⁵¹ Around the same time, in *Glossip v. Gross*,⁵² a case involving lethal injection protocols, Justice Breyer called for "full briefing on a more basic question: whether the death penalty violates the Constitution."⁵³

State v. Gregory

It was in this environment, as the U.S. slowly began to return to the abolition trajectory it had lost in the 1970s, that Allen Gregory's case came up on appeal to the Washington Supreme Court. Mr. Gregory was an African American man sentenced to death for a murder of one white woman in Tacoma, Washington, in 1996. He was only 24 years old at the time, with a very limited and non-violent criminal history. Arrested in 1998, he was convicted and sentenced to death in 2001, but the sentence was reversed in 2006 in part because of prosecutorial misconduct.⁵⁴ There was a new penalty proceeding and, in 2012, a jury once again imposed a death sentence, which was again appealed to the Washington Supreme Court.

Since 1981, Washington State had mandatory proportionality review by which the state supreme court had to determine “[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.”⁵⁵ The tools to be used for proportionality review were the so-called “Trial Reports” – a series of standardized reports that the Washington Legislature required every judge sentencing someone for aggravated murder (whether a death case or not) to fill out at the conclusion of the case.⁵⁶ Notably, the Washington Supreme Court never once vacated a death sentence based upon disproportionality, but every death appeal went through the ritual of trying to assess whether a particular death sentence was proportionate or not.

In 2006, in light of the life sentence given to Gary Ridgway (the so-called “Green River Killer”) who killed 48 people, four of the Washington’s nine justices believed that Washington’s system was broken and that no death sentence could ever be proportionate again.⁵⁷ Then, in 2012, a different array of justices dissented in another death case; this time with Justice Charles Wiggins raising the issue of the statistical significance of a seeming race disparity and calling for expert statistical analysis to determine the effect of race on imposition of the death penalty.⁵⁸

Following Justice Wiggins’ suggestion, Mr. Gregory’s defense lawyers⁵⁹ retained the services of University of Washington Sociology Professor Katherine Beckett and (then) graduate student, Heather Evans (now Ph.D.) (“Beckett and Evans”) to subject Washington’s capital punishment system to statistical analysis. Relying on the same “Trial Reports” used to conduct proportionality review as their data set, Beckett and Evans subjected 33 years worth of aggravated murder cases to regression analyses. They controlled for a series of factors including the key case characteristics that one would think should be tied to the decision to impose death, such as number of victims, number of aggravating and mitigating factors, or the defendant’s criminal history. They also examined a series of factors that ought not be (legally) connected to the decision to impose death, such as the race of victim and the defendant.⁶⁰

The Washington Supreme Court summarized Beckett’s and Evans’ results:

The Updated Beckett Report supported three main conclusions: (1) there is significant county-by-county variation in decisions to seek or impose the death penalty, and a portion of that variation is a function of the size of the black population but does not stem from differences in population density, political orientation, or fiscal capacity of the county, (2) case characteristics as documented in the trial reports explain a small portion of variance in decisions to seek or impose the death penalty, and (3) *black defendants were four and a half times more likely to be sentenced to death than similarly situated white defendants*.⁶¹

This race difference – that black defendants were four and half times more likely to be sentenced to death than similarly situated white defendants, controlling for other variables (such as numbers of victims and criminal history) – is the key “take” from the Beckett and Evans study.

Beckett’s and Evans’ study did not find, as in some other jurisdictions, that in Washington the race of the victim had statistical significance. Rather, the issue was the race of the defendant. Moreover, the study did not find a race effect at the charging stage – at the time in a case when the prosecutors made the decision to seek death or not.⁶² Instead, the problem was when juries were imposing sentences at trial, the very status of *being* black was equivalent to additional aggravating factors or criminal history for white defendants, while white defendants facing capital sentencing had a greater chance of obtaining leniency (from mostly white juries) simply because of the color of their skin. In this way, Beckett’s and Evans’ study confirmed modern research about implicit bias and in-group favoritism.⁶³

Using Beckett’s and Evans’ study, the defense challenged Mr. Gregory’s death sentence both as disproportionate under statutory proportionality review and as unconstitutional under article I, section 14 of the Washington Constitution (the ban on cruel punishment).⁶⁴ In response, the State challenged whether the Supreme Court should even consider Beckett’s and Evans’ report. The court denied the State’s motion to strike the report, and by February 2016, when oral argument took place, the State had not submitted any expert critique of Beckett and Evans. However, at oral argument,⁶⁵ the State acknowledged that it would like a chance to contest the defense report, and nearly two years of “special proceedings” before the commissioner of the Washington Supreme Court ensued.

The State hired an expert, Nicholas Scurich, of the University of California, Irvine, who filed a critique of Beckett’s and Evans’ study. Beckett and Evans responded by noting what they considered to be some basic technical mistakes made by Scurich in his critiques. The commissioner then submitted a series of written interrogatories to the parties, and additional statistical materials were filed. In November 2017, the commissioner issued a 97-page report to the Washington Supreme Court, summarizing the areas of agreement and disagreement of the experts and the overall strengths and weaknesses of the various reports. The parties (and amici) then submitted additional briefing.

On October 11, 2018, all nine justices agreed: the death penalty system in Washington State was unconstitutional under the Washington Constitution. Chief Justice Fairhurst explained:

Washington’s death penalty laws have been declared unconstitutional not once, not twice, but three times. And today, we do so again. None of these prior

decisions held that the death penalty is per se unconstitutional, nor do we. The death penalty is invalid because it is imposed in an arbitrary and racially biased manner. While this particular case provides an opportunity to specifically address racial disproportionality, the underlying issues that underpin our holding are rooted in the arbitrary manner in which the death penalty is generally administered. As noted by appellant, the use of the death penalty is unequally applied – sometimes by where the crime took place, or the county of residence, or the available budgetary resources at any given point in time, or the race of the defendant. The death penalty, as administered in our state, fails to serve any legitimate penological goal; thus, it violates article I, section 14 of our state constitution.⁶⁶

Notably, the court departed from its earlier decisions upholding the death penalty because of changes in the data (an additional 120 Trial Reports since its 2006 decision in *State v. Cross*, 156 Wn.2d 580, 132 P.3d 80 (2006)) and because:

Gregory commissioned a statistical study based on the information in the trial reports to demonstrate that the death penalty is imposed in an arbitrary and racially biased manner. . . . Where new, objective information is presented for our consideration, we must account for it. . . . Given the evidence before this court and our judicial notice of implicit and overt racial bias against black defendants in this state, we are confident that the association between race and the death penalty is *not* attributed to random chance.⁶⁷

Reflections and the Way Forward

How did the Washington Supreme Court evolve from *Leschi v. Washington Terr.*⁶⁸ – where the court upheld the death sentence against the Native American resistance leader – to *Gregory*? Particularly when the Washington Supreme Court members are elected, not appointed, for six-year terms. Unless they plan to retire, the judges who issued *Gregory* will need to be re-elected.⁶⁹ With the exception of one member,⁷⁰ the court is not composed of former capital defense lawyers – some are former prosecutors.

The decision in *Gregory* was not driven by moral opposition to the death penalty, but rather by the issue of race discrimination and disproportionality, issues that the current membership of the court are very concerned about.⁷¹ The *Gregory* court made it clear that its decision was not based solely on Beckett's and Evans' study. Rather, the statistical evidence confirmed what was already known about the criminal justice system:

We need not go on a fishing expedition to find evidence external to Beckett's study as a means of validating the results. Our case law and history of racial discrimination provide ample support.⁷²

Following this language is a long string-cite of a series of cases involving racism in Washington courts (some of which resulted in losses to the defendants).⁷³ In this regard, *Gregory* is testament to the concept that we as practitioners need always to keep raising issues of racism in our legal system, even if at times it seems like we are shouting into the wind. The work that we do here in fact has the potential to pay off – it may take years, but the efforts are not for naught.

Moreover, raising issues of discrimination resonates with judges, particularly those who are elected, because these are issues that the growing diverse population of the United States care about. Most people in our country are not classic White Anglo-Saxon Protestants, despite the countless stories in the national media about what some people in small towns in Missouri may think about the current affairs. We are a country of immigrants from Eastern and Southern Europe, from the Caribbean, Asia and Latin America, and a country of descendants of slaves. Whether our legal system can be fairly administered is an issue that most people actually do care about. *Gregory* is an example of how judges who care about discrimination can in fact respond to what is of concern to our diverse society.

Another lesson of *Gregory* seems self-evident. The path forward does not go through the federal court system. Although Justice Breyer's dissent in *Glossip* in 2015 suggested that there might be a route available in the U.S. Supreme Court, that opportunity is clearly gone. The key is state constitutional litigation, in fora that are insulated from the U.S. Supreme Court's interference. The late Arthur Kinoy, a stalwart of the NLG from the 1950s until his death in 2003, always talked about digging deep into the law, going back to the beginning to find that kernel that would lead to victory.⁷⁴ We must look critically at our state constitutions⁷⁵ as an antidote to the right-wing reaction that will remain within us federally for the next generation. As noted above, the Washington Supreme Court led off its opinion in *Gregory* by citing its own history in striking down the death penalty in the past: "Washington's death penalty laws have been declared unconstitutional not once, not twice, but three times."⁷⁶ It is important to keep this local history in mind when challenging any jurisdiction's capital punishment scheme.

For the NLG, the lesson is that the struggle against the death penalty is deeply aligned with our core missions, to fight for human rights over property interests. Prison abolition and abolition of capital punishment are linked – both in terms of how prisons and capital punishment develop as tools of social control and in terms of how both reflect the pathology of race in the America. Expanding our own skill sets and becoming more active in capital litigation, we can build coalitions with others already engaged in capital defense work.

There is much more to do. As the right-wing furthers its grip over the federal judiciary, the pace of executions will quicken, and our skills and political analysis will be in demand more and more in coming years. Hopefully, *Gregory* offers an example of how to move forward in what appears to be a bleak period nationally.

NOTES

- 1 Hugo Bachega, *Belarus: The secret executions in Europe's 'last dictatorship'*, BBC News (May 15, 2018), available online at <https://www.bbc.com/news/world-europe-43799280>.
- 2 As for race bias, see *State v. Santiago*, 318 Conn. 1, 156, 122 A.3d 1, 93-94, rehearing denied 319 Conn. 912, 124 A.3d 496 (2015) (Norcott, J., concurring) ("All of the meta-analyses, and all of the major, multijurisdictional primary studies, have concluded, after subjecting evidence of racial disparities to advanced multivariate statistical analysis, that offenders who murder non-Hispanic white victims are more likely to be charged with a capital offense and/or sentenced to death than those who victimize members of racial minorities.") (footnote omitted). As for arbitrariness, see *Glossip v. Gross*, 135 S. Ct. 2726, 2759-62, 192 L. Ed. 2d 761 (2015) (Breyer, J., dissenting) (surveying research that shows how race, gender, local geography, political pressure, available resources "strongly suggests that the death penalty is imposed arbitrarily").
- 3 Office of the California Governor, *Governor Gavin Newsom Orders a Halt to the Death Penalty in California* (2019), available online at <https://www.gov.ca.gov/2019/03/13/governor-gavin-newsom-orders-a-halt-to-the-death-penalty-in-california/>.
- 4 Until 1996, the preferred method of execution was "hanging by the neck." Washington Laws of 1981, ch. 138, sec. 18. In 1996, the primary method became intravenous injection, but the prisoner could choose to be hung. Washington Laws of 1996, ch. 251, sec. 1.
- 5 *State v. Gregory*, 427 P.3d 621 (Wash. 2018).
- 6 See, e.g., The Movement for Black Lives, *End The War On Black People*, available online at <https://policy.m4bl.org/end-war-on-black-people/> (calling for end to capital punishment).
- 7 In 2015, the NLG adopted a "Resolution Supporting the Abolition of Prisons." National Lawyers Guild, Resolutions (2015), available online at <https://www.nlg.org/wp-content/uploads/2016/03/Resolution-Supporting-the-Abolition-of-Prisons-REV.pdf> (hereinafter *Resolution*).
- 8 Since I was the Northwest Regional Vice President of the NLG during the relevant time period, this is a self-criticism.
- 9 See Pope Francis, *New Revision of Number 2267 of the Catechism of the Catholic Church on the Death Penalty*, Rescriptum Ex Audientia Ss.Mi (May 11, 2018), available online at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20180801_catechismo-penadimorte_en.html ("Consequently, the Church teaches, in the light of the Gospel, that "the death penalty is inadmissible because it is an attack on the inviolability and dignity of the person", and she works with determination for its abolition worldwide.") (footnote omitted).
- 10 See *Resolution*, *supra* note 8.

- 11 See Douglas Hay, "Property, Authority and the Criminal Law," in Douglas Hay, Peter Linebaugh, John G Rule, E.P. Thompson and Cal Winslow, *ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND*, 17-63 (1975) (addressing how the ideology of law in 18th Century England – with the key concepts of "majesty," "justice" and "mercy" – kept the ruling class in power). Regarding the American experience, see Louis P. Masur, *rites Of Execution: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE, 1776-1865* (1989).
- 12 *Leschi v. Washington Terr.*, 1 Wash. Terr. 13, 14 (1857). In contrast, the U.S. never actually tried, let alone hang, Jefferson Davis for his treasonous pro-slavery rebellion.
- 13 *Spies v. People*, 12 N.E. 865 (1887).
- 14 *Commonwealth v. Sacco*, 151 N.E. 839 (1926).
- 15 *United States v. Rosenberg*, 200 F.2d 666 (2d Cir. 1952).
- 16 *Abu-Jamal v. Sec'y, Pa. Dep't of Corr.*, 643 F.3d 370 (3rd Cir. 2011); see also Ed Pilkington "Intoxicating freedom, gripping fear": Mumia Abu-Jamal on life as a Black Panther, *The Guardian* (July 30, 2018), available online at <https://www.theguardian.com/us-news/2018/jul/30/intoxicating-freedom-gripping-fear-mumia-abu-jamal-on-life-as-a-black-panther>.
- 17 See Danny Lewis, *This Map Shows Over a Century of Documented Lynchings in the United States Mapping the History of Racial Terror*, *Smithsonian Magazine* (January 24, 2017), available online at <https://www.smithsonianmag.com/smart-news/map-shows-over-a-century-of-documented-lynchings-in-united-states-180961877/>. The effect of lynching on the American legal system is pervasive, even extending to the one-sided requirement that a state prisoner obtain a "certificate of appealability" before being able to appeal the denial of a federal habeas writ to the Circuit Court of Appeals. Congress adopted this requirement in 1908 with the specific purpose of speeding up executions to prevent "local dissatisfaction, not infrequently developing into lynching." *United States ex rel. Tillery v. Cavell*, 294 F.2d 12, 15 (3rd Cir. 1961) (quoting H.R. Rep. No. 23, 60th Cong., 1st SESS. (1908)). In other words, a "normal" modern procedural requirement for litigating a petition under 28 U.S.C. § 2254 has its origins in a desire to appease Southern lynch mobs.
- 18 Ironically, the lyrics of Billie Holiday's famous song "Strange Fruit," describing "black bodies swinging in the southern breeze," were written by Abel Meeropol, who adopted and raised the orphans of Julius and Ethel Rosenberg.
- 19 See Equal Justice Initiative, *Lynching in America: Confronting the Legacy of Racial Terror* (3rd Edition), available online at <https://lynchinginamerica.eji.org/report/> (stating "Public spectacle lynchings were those in which large crowds of white people, often numbering in the thousands, gathered to witness pre-planned, heinous killings that featured prolonged torture, mutilation, dismemberment, and/or burning of the victim. Many were carnival-like events, with vendors selling food, printers producing postcards featuring photographs of the lynching and corpse, and the victim's body parts collected as souvenirs.") (footnote omitted). Many white Southerners currently in positions of political and judicial power in the United States must have immediate relatives who were gleeful participants in these macabre executions, and may also still have possession of these gruesome souvenirs. Where one side to any modern conversation about race and the death penalty has such collective consciousness (a grandparent, for instance, who laughed at a suffering black torture victim) the result of the conversation will necessarily be toxic until such time as the white power structure's legacy is openly discredited.
- 20 William D. Carrigan and Clive Webb, *When Americans Lynched Mexicans*, *New York Times* (February 20, 2015, available online at <https://www.nytimes.com/2015/02/20/opinion/when-americans-lynched-mexicans.html>); Simon Romero, *Lynch Mobs Killed Latinos Across the West. The Fight to Remember These Atrocities is Just Starting*, "New

York Times (March 2, 2019), *available online at* <https://www.nytimes.com/2019/03/02/us/porvenir-massacre-texas-mexicans.html>.

- 21 In this way, the end of the essentially medieval system of public executions that lynching exemplified was a sign of the modernization of American society, tracking the shift to private executions in a prison setting that began a century and a half earlier. *See* Masur, *supra*, note 12.
- 22 Michel Foucault, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (1975).
- 23 England, for instance, essentially abolished the death penalty in 1965. Murder (Abolition of Death Penalty) Act 1965, 1965 ch. 71.
- 24 In 1960, for instance, California's execution of prisoner/author Caryl Chessman (overseen by Governor Pat Brown) crystalized national and international attention on the death penalty in the U.S. *See* Anthony Lewis, *He Was Their Last Resort*, New York Times (August 20, 1989), *available online at* <https://www.nytimes.com/1989/08/20/books/he-was-their-last-resort.html>.
- 25 *See Witherspoon v. Illinois*, 391 U.S. 510 (1968).
- 26 *Furman v. Georgia*, 408 U.S. 238 (1972).
- 27 *See Apprendi v. New Jersey*, 530 U.S. 466, 479, 479 n. 5 (2000) (discussing common law power of juries to avoid a jury verdict where the punishment was seen as too severe).
- 28 *See McGautha v. California*, 402 U.S. 183 (1971).
- 29 The dissenters were all recent Nixon appointees to the court, demonstrating the significance of the election of 1968, an election where many on the Left abandoned (for good reason) the Cold War liberal, Hubert Humphrey, with dire long-term consequences.
- 30 *See Furman*, *supra* note 27 at 309-10 (Stewart, J., concurring) ("These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. . . . [T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.").
- 31 *See ibid.* at 255 (Douglas, J., concurring) ("Yet we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position.").
- 32 *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).
- 33 428 U.S. 153 (1976).
- 34 *Ibid.* at 180.
- 35 *Ibid.* at 189-95.
- 36 Until 1999, Alabama paid capital lawyers \$40 an hour for work in court, \$20 an hour for work out of court, with a cap of \$1000 for out-of-court work. Equal Justice Initiative, *The Crisis of Counsel in Alabama*, *available online at* <https://eji.org/alabama-inadequate-counsel-death-penalty-cases>.
- 37 *See Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001) (counsel dozed throughout capital trial).
- 38 *See Foster v. Chatman*, 136 S. Ct. 1737, 1755 (2016) ("[T]he focus on race in the prosecution's file plainly demonstrates a concerted effort to keep black prospective jurors off the jury.").
- 39 *See Bracy v. Gramley*, 520 U.S. 899, 909 (1997) (noting that a judge in capital case "was shown to be thoroughly steeped in corruption").
- 40 Pub. L. No. 104-132, 110 Stat. 1214.

- 41 President Clinton used his support for the death penalty as a way of attracting centrist voters, cynically signing a death warrant for a mentally ill black man during the middle of the 1992 primary campaign. See Nathan Robinson, *The Death of Ricky Ray Rector*,” Jacobin Magazine (November 2016), available online at <https://www.jacobinmag.com/2016/11/bill-clinton-rickey-rector-death-penalty-execution-crime-racism/>.
- 42 This jurisprudence led to Justice Blackmun’s famous words in *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from the denial of certiorari) (“From this day forward, I no longer shall tinker with the machinery of death. . . . The basic question – does the system accurately and consistently determine which defendants ‘deserve’ to die? – cannot be answered in the affirmative.”).
- 43 Thus, white life was valued more than black life.
- 44 *McCleskey v. Kemp*, 481 U.S. 279 (1987).
- 45 See, e.g., *United States v. Burns*, 1 S.C.R. 283, 2001 SCC 7 (2001) (Supreme Court of Canada bars extradition to the United States for someone accused of a capital offense because of risk of error and the dangers of executing innocent people).
- 46 See Jodi Wilgoren, *Citing Issue of Fairness, Governor Clears Out Death Row in Illinois*,” New York Times (January 12, 2003), available online at <https://www.nytimes.com/2003/01/12/us/citing-issue-of-fairness-governor-clears-out-death-row-in-illinois.html>. A moderate Republican who ended up soon going to prison for corruption, Governor Ryan’s courage should be compared to Washington’s liberal Democratic Governor, Mike Lowry – once a friend to the Sandinistas in Nicaragua – who in 1994 oversaw the first execution of a non-“volunteer” since 1963. See Peter Lewis, Dee Norton, Jim Simon, Jack Broom, *Lowry Meets With Campbell, Refuses To Stop Execution – Supreme Court Also Declines To Intervene*, Seattle Times (May 26, 1994), available online at <http://community.seattletimes.nwsources.com/archive/?date=19940526&slug=1912492>.
- 47 See *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (excluding child rapists); *Roper v. Simmons*, 543 U.S. 551 (2005) (excluding juveniles); *Atkins v. Virginia*, 536 U.S. 304 (2002) (excluding those with a certain level of intellectual disabilities).
- 48 530 U.S. 466 (2000).
- 49 See *Hurst v. Florida*, 136 S. Ct. 616 (2016); *Ring v. Arizona*, 536 U.S. 584 (2002).
- 50 See Death Penalty Information Center, *States Without the Death Penalty* (Updated Mar. 13, 2019), available online at <http://www.deathpenaltyinfo.org/states-and-without-death-penalty>.
- 51 *State v. Santiago*, 122 A.3d 1, rehearing denied, 124 A.3d 496 (2015).
- 52 135 S. Ct. 2726 (2015)
- 53 *Ibid.* at 2755 (Breyer, J., dissenting).
- 54 *State v. Gregory*, 147 P.3d 1201 (2006).
- 55 Wash. Rev. Code § 10.95.130(2)(b).
- 56 Wash. Rev. Code § 10.95.120.
- 57 *State v. Cross*, 156 Wn.2d 580, 641, 132 P.3d 80 (2006) (Johnson, J., dissenting) (“When Gary Ridgway, the worst mass murderer in this state’s history, escapes the death penalty, serious flaws become apparent.”).
- 58 *State v. Davis*, 175 Wn.2d 287, 389, 290 P.3d 43 (2012) (Wiggins, J., dissenting) (“A review of the reports of prosecutions for aggravated first degree murder quickly discloses that African-American defendants are more likely to receive the death penalty than Caucasian defendants. . . . I would either reverse the death penalty . . . or remand

to superior court to take evidence on the statistical significance of the disproportionate number of African-Americans sentenced to death.”).

59 Lila Silverstein and the current author.

60 Katherine Beckett & Katherine Evans, *The Role of Race in Washington State Capital Sentencing, 1981-2014* (October 2014). All of the key documents connected to Gregory including the different statistical studies can all be found on the website of the Washington Supreme Court, *available online at* http://www.courts.wa.gov/appellate_trial_courts/SupremeCourt/?fa=supremecourt.StatevGregory.

61 *Gregory*, *supra* note 6 at 630 (emphasis added).

62 Because the study used the aggravated murder “Trial Reports” as the data set, the study did not look at race and prosecutorial discretion even to charge aggravated murder as opposed to first degree murder.

63 The amicus brief of Seattle University’s Fred Korematsu Center for Law and Equality set out in some detail the issues of implicit bias and in-group favoritism, *available online at* <https://www.courts.wa.gov/content/publicUpload/State%20v.%20Gregory/880867AmicusFredTKorematsuCenter.pdf>. (There was other significant amicus support including briefs by the ACLU (joined ultimately by 75 retired judges), briefs by the Washington Coalition to Abolish the Death Penalty, and a brief by a group of social scientists with expertise in statistics and the death penalty.)

64 The sentence was also challenged under the Eighth Amendment, as well as a series of other issues many of which were specific to the case.

65 Defense counsel ceded some of their oral argument time to Jeffrey Robinson, the director of the ACLU Trone Center for Justice and Equality. In poignant remarks, Mr. Robinson reminded the justices of how the death penalty was linked to the 100-year history of lynching in the South. *See* Washington Supreme Court, Oral Arguments, *available online at* <https://www.tvw.org/watch/?eventID=2016021270> (from 51:45 to 52:35).

66 *Gregory*, *supra* note 6 at 626-27 (internal citations and footnotes omitted).

67 *Ibid.* at 632-33, 635 (emphasis in original). Four justices signed a concurring opinion focusing not just on race, but also on overall concerns about arbitrariness, rather than just race. *Id.* at 642 (Johnson, J., concurring) (“Based on a current review of the administration and processing of capital cases in this state, what is proved is obvious. A death sentence has become more randomly and arbitrarily sought and imposed, and fraught with uncertainty and unreliability, and it fails state constitutional examination.”).

68 1 Wash. Terr. 13 (1857)

69 When thinking about elected judges striking down the death penalty, one must inevitably remember recall campaign against Chief Justice Rose Bird of the California Supreme Court, whose opposition to the death penalty led to her removal from the court in 1986. *See* Robert Lindsey, *Deukmejian and Cranston Win as 3 Judges are Ousted*, New York Times (November 6, 1986), *available online at* <https://www.nytimes.com/1986/11/06/us/elections-story-some-key-states-deukmejian-cranston-win-3-judges-are-ousted.html>.

70 Before she joined the Washington Supreme Court, the Hon. Sheryl Gordon McCloud was a well-known defense lawyer with deep experience as a capital litigator. *See, e.g., In re Pers. Restraint of Stenson*, 276 P.3d 286 (2012); *Lord v. Wood*, 184 F.3d 1083 (9th Cir. 1999).

- 71 Soon after *Gregory*, in a case involving a white defendant convicted of murdering a prison guard, two justices, the Hon. Steven González, joined by the Hon. Mary Yu, stated in a concurring opinion:

I stress that *Gregory* controls only because it held our death penalty statutes are facially unconstitutional, not as applied. But for the sweeping holding of *Gregory*, Scherf could not show the death penalty was unconstitutional as applied to him. . . . A system of justice that administers the death penalty in a manner that is arbitrary and applied unequally based on race cannot withstand constitutional scrutiny. Not affording the same relief to Scherf as *Gregory* would violate basic principles of equal protection under the law, even though Scherf has shown no prejudice from the racial discrimination that has resulted in the mercy he gets today. Scherf has not demonstrated that he deserves such mercy. But since *Gregory* controls, I concur.

State v. Scherf, 429 P.3d 776, 804 (2018) (González, J., concurring) (citation omitted).

- 72 *Gregory*, *supra* note 6 at 635.
- 73 The court also cited a study on race and the criminal law in Washington that it had itself commissioned. *See id.* (citing *Preliminary Report on Race and Washington's Criminal Justice System*, Task Force On Race & Criminal Justice Sys. (2011)).
- 74 *See, e.g.*, Arthur Kinoy, RIGHTS ON TRIAL: THE ODYSSEY OF A PEOPLE'S LAWYER 268 (1983) (describing the foundations for *Dombroski v. Pfister*, 380 U.S. 479 (1965): "Once again, we discovered the answer buried within the framework of the legal system itself. I could hardly believe my eyes when I stumbled across a federal statute from the old days that was exactly what we were looking for.").
- 75 As the NLG, of course, we need always to keep our eye on international law, to "leap-frog" over the U.S. Supreme Court. Unfortunately, while this path at one time seemed promising, the decision in *Medellin v. Texas*, 552 U.S. 491 (2008), dealt a death-blow to efforts to hold the U.S. accountable in international fora for its human rights violations.
- 76 *Gregory*, *supra* note 6 at 626.




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proceedings; and a discussion of the Washington Supreme Court's recent decision to strike down state murder in light of emerging, statistical research demonstrating the racial biases of capital jurors.

In *Counter-Revolutionary: Liberalism, Capital Punishment, and the Next Step Forward*, Jason Tiplitz attacks state-sanctioned murder on the grounds that it is unconstitutional and undermines the two core values of any post-enlightenment, liberal democracy: human rights and civil liberties. As the debate around capital punishment intensifies, *Tiplitz's article* gives us additional political and philosophical arguments against the practice.

In *Davila v. Davis, Brady, and the Future of Procedural Default Doctrine in Federal Habeas Corpus*, Ian Eppler analyzes the procedural default doctrine, a postconviction hurdle facing convicted defendants, including those condemned to death by the state, that makes relief for the accused much more difficult. Eppler provides a thorough, but still accessible, doctrinal overview of postconviction litigation, including criticisms of the procedural default doctrine and thoughtful considerations for postconviction lawyers and litigants alike. In a time when most defendants are represented by overworked public defenders, a viable and robust postconviction process is essential to safeguarding due process. Eppler's article is a starting place for reaching this goal and a must-read for any postconviction lawyer.

Finally, in *The Struggle Against the Death Penalty Moves Forward in Washington State: Reflections on State v. Gregory*, Neil Fox discusses the case he argued before his state's Supreme Court, which ultimately led—at long last—to the abolition of the death penalty in Washington. Fox discusses the critical role that statistics played in achieving this victory, offering yet another key strategy for anti-death penalty lawyers in state court litigation. Namely, he reviews the Beckett Report, a statistical study commissioned by defense lawyers in *Gregory* and conducted by University of Washington Sociology Professor Katherine Beckett and then-graduate student, Heather Evans. Among other conclusions, the study revealed that, in the prior three decades of capital litigation in Washington, black defendants were four and a half times more likely to be sentenced to death than white defendants in similar circumstances. This finding led the Washington Supreme Court to conclude that, while theoretically constitutional, the death sentence is not applied in a constitutional manner and cannot stand.

In these articles, another truth becomes clear: the current composition of the Supreme Court likely means that capital punishment will remain enshrined in the U.S. Constitution for at least another generation. Therefore, as the Guild has long-recognized, we cannot rely on the Supreme Court for reason and refuge. Rather, state courts provide the best arena for challenging this fundamentally unfair and racist practice. State by state, we are hopefully on our way to abolishing capital punishment nationwide.

National Lawyers Guild Review

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