INCREASING EQUITY IN THE LEGAL SYSTEM:

A Collection of Legal Advocacy Papers by the LexisNexis® African Ancestry Network & LexisNexis® Rule of Law Foundation Fellowship 2022 Cohort

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Capital Punishment: The New Modern-Day Lynching

Talia Thomas

This project's mission is to analyze the racial disparities present within the American capital punishment system. This analysis argues that law schools should introduce and expose their students to additional career paths as federal defenders. The project results in a short video to be housed on a LexisNexis® platform or distributed to law students to bridge the "exposure gap" among law students in relation to potential careers in the capital habeas and federal defense field.

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Introduction

From 1976 through December 2021, 21 people in the United States have been executed in cases where the defendant was white and the murder victim black.[1] This figure compares with 297 black defendants executed for murders of white victims. In addition, 95% of elected prosecutors are white.[2] These statistics depict a stark reality of the racial bias present in our capital punishment system.

Though the courts and legislatures have addressed discrimination in jury selection, juries still largely fail to represent the communities they serve regarding race, resulting in harsher sentencing along racial lines.[3] Access to post-conviction appeal and habeas relief is arduous, expensive, and riddled with extremely high standards of review. Notably, regarding relief, "studies of post-conviction appeals have demonstrated that ineffective assistance of counsel is the most commonly raised issue."[4]

This paper analyzes the racial disparities present within the American capital punishment system. This analysis argues that law schools should introduce and expose their students to additional career paths as federal defenders. The goal of highlighting these disparities is to encourage students to pursue these alternative career paths post-graduation, to develop their skills over time, and to provide experienced and effective counsel in capital cases to help mitigate the damages from these experiences.

Part I of this paper provides a broad overview of the history of capital punishment in this country via its foundational case law. Part II addresses the instances of racial bias apparent in death penalty cases, specifically, in jury selection and prosecutorial strategy. Part III discusses the prevalence of claims of ineffective assistance of counsel and explains how the introduction of capital habeas corpus and criminal defense-oriented education into law school curricula can help reduce this prevalence and, in turn, mitigate harm to those seeking post-conviction relief.

I. The History of the Death Penalty in America

The death penalty in the United States has a long and tumultuous history, dating as far back as 1608 when the colony of Virginia executed its first criminal.[5] Since then, 16,018 people have been executed

[1] Deborah Fins, *Death Row U.S.A.: Winter 2022*, NAACP Legal Def. And Educ. Fund 5, https://www.naacpldf.org/wp-content/uploads/DRUSAWinter2022.pdf (last visited July 24, 2022).

[2] Reflective Democracy Campaign, *Tipping the Scales: Challengers Take On the Old Boys' Club of Elected Prosecutors,* WHOLEADS.US 2 (Oct. 2019), https://wholeads.us/wp-content/uploads/2019/10/Tipping-the-Scales-Prosecutor-Report-10-22.pdf (last visited July 24, 2022).

[3] *Race and the Jury: Illegal Racial Discrimination in Jury Selection*, Equal Justice Initiative, https://eji.org/report/race-and-the-jury/ (last visited July 24, 2022).

[4] Dr. Emily M. West, *Court Findings of Ineffective Assistance of Counsel Claims in Post-Conviction Appeals Among the First 255 DNA Exoneration Cases*, Innocence Project 1 (Sept. 2010), https://www.innocenceproject.org/wp-content/uploads/2016/05/Innocence_Project_IAC_Report.pdf (last visited July 25, 2022).

[5] *Early History of the Death Penalty*, Death Penalty Info. Ctr., https://deathpenaltyinfo.org/executions/methods-of-execution/description-of-each-method(last visited July 25, 2022).

through 2020.[6] Though the United States has a long history of executions, this history is not linear. No executions took place in the early 1970s when the death penalty was deemed unconstitutional.[7]

"On June 29, 1972, the Court decided in a complicated ruling, *Furman v. Georgia*, that the application of the death penalty in three cases was unconstitutional."[8] It is important to note that this ruling does not explicitly condemn executing someone as a punishment for a crime as unconstitutional.[9] However, the decision does proscribe the arbitrary and discriminatory nature in which the states applied the death penalty as "cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."[10]

In *Furman*, Georgia had sentenced the three petitioners to death for rape and murder.[11] All three were black, and two had some form of mental or intellectual disability.[12] According to Justice Douglas' concurring opinion, not enough facts were on the record to surmise that these petitioners received the death penalty because they were black.[13] However, the Court did recognize that the application of the death penalty could be seen as arbitrary and discriminatory.[14] The source of the arbitrariness and discrimination resulted from discretionary statutes that were "pregnant with discrimination."[15] Justice Douglas noted that the Cruel and Unusual Punishments Clause of the Eighth Amendment requires legislatures to pass laws that are "evenhanded, nonselective, and non-arbitrary" and to apply these laws in a similar manner.[16] The Court ruled that the application of the death penalty in these cases constituted cruel and unusual punishment for the reasons discussed above, and was, therefore, unconstitutional pursuant to the Eighth Amendment.[17] This ruling led to a four-year moratorium on capital punishment in the United States.[18]

This suspension of the death penalty ended with *Gregg v. Georgia*[19] in 1976.[20] As mentioned, the issues regarding the death penalty cited in *Furman* were due to the discretionary and often discriminatory nature in applying the death penalty.[21] In the years following the decision, many state legislatures rewrote their death penalty statutes to provide more specific sentencing guidelines such as requiring courts to con-

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[6] *Executions in the U.S. 1608-2002: The Espy File*, Death Penalty Info. Ctr., https://deathpenaltyinfo.org/executions/executions-overview/executions-in-the-u-s-1608-2002-the-espy-file (last visited July 24, 2022). This figure encompasses all executions occurring in the United States from 1608 to December 31, 2020. Between January 1, 2021 and July 13, 2022, 18 more people were executed.

[7] Scott Bomboy, *On This Day, Supreme Court Temporarily Finds Death Penalty Unconstitutional*, Nat'l Const. Ctr. (June 29, 2022), https://constitutioncenter.org/interactive-constitution/blog/on-this-day-supreme-court-temporarily-finds-death-penalty-unconstitutional#:~:text=On%20June%2029%2C%201972%2C%20the,in%20three%20cases%20was%20unconstitutional.

[8] Bomboy, *supra*, note 7.

[9] *Furman*, 408 U.S. at 241-42.

[10] *Id.* at 256-57.

[11] *Id.* at 238, 240.

[12] *Id.* at 252-53.

[13] *Id.* at 253.

[14] *Id.* at 256.

[15] *Id.* at 256-57.

[16] *Id.* at 256.

[17] *Id.* at 239.

[18] David Von Drehle, *The Death of the Death Penalty,* Time (June 8, 2015), https://time.com/deathpenalty/.

[19] Gregg v. Georgia, 428 U.S. 153 (1976).

[20] *The History of the Death Penalty: A Timeline*, Death Penalty Info. Ctr, https://deathpenaltyinfo.org/stories/history-of-the-death-penalty-timeline (last visited July 24, 2022).

[21] *Furman*, 408 U.S. at 256 (Douglas, J., concurring).

sider aggravating and mitigating factors.[22] These revisions also included mandating capital punishment for certain crimes.[23]

The *Gregg* case also introduced other notable procedural changes to capital punishment trials.[24] First, trials in which defendants could be subject to the death penalty should be bifurcated.[25] Defendants first go through a guilt phase and, if convicted, proceed to a separate sentencing proceeding.[26] Second, those convicted and sentenced to death have a right to appeal both their convictions and sentences.[27] Third, the state appellate court performs a proportionality review on all capital punishment sentences to reduce or eliminate sentencing disparities.[28] These enhanced death penalty statutes, approved in the *Gregg* decision, presumably ended arbitrary and discriminatory death sentences.[29] Unfortunately, the reality of the death row landscape tells a different story. Jury selection and prosecutorial strategy continue to perpetuate racial disparities among those sentenced to death.

II. Racism in the Capital Punishment System

A. Jury Selection and Prosecutorial Strategy

"Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process."[30] Serving on a jury is so important to our values as Americans that our Constitution codifies the right to a jury of one's peers to protect us from state and federal government abuses of power.[31] Moreover, the Supreme Court has even recognized on numerous occasions that "[e]qual opportunity to participate in the fair administration of justice is fundamental to our democratic system."[32] The Court has also recognized that eliminating racial bias in jury selection is essential to ensuring public confidence in our criminal justice system.[33] Unfortunately, even with these legal assurances and the Court's recognition of these discriminatory issues, minorities, specifically the black community, have historically been excluded from serving on juries.[34]

One of the strategies that prosecutors frequently use to produce all white juries is the preemptory strike.[35] Unlike a challenge for cause, an attorney does not have to justify a preemptory strike to remove a

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[22] *Constitutionality of the Death Penalty in America*, Death Penalty Info. Ctr, https://deathpenaltyinfo.org/facts-and-research/history-of-the-death-penalty/constitutionality-of-the-death-penalty-in-america (last visited July 24, 2022).

[23] *Id.*

[24] *Gregg*, 428 U.S. at 163.

[25] *Id.*

[26] *Id.*

[27] *Id.* at 166.

[28] *Id.* at 163-67.

[29] *The Constitutionality of the Death Penalty in America*, Death Penalty Info. Ctr, https://deathpenaltyinfo.org/facts-and-research/history-of-the-death-penalty/constitutionality-of-the-death-penalty-in-america (last visited July 24, 2022).

[30] Flowers v. Mississippi, 139 S. Ct. 2228, 2238 (2019) (citing Powell v. Ohio, 499 U.S. 400, 407 (1991)).

[31] Duncan v. Louisiana, 391 U.S. 145, 151-53, 156 (1968).

[32] J.E.B. v. Alabama, 511 U.S. 127, 145 (1994).

[33] Foster v. Chatman, 578 U.S. 488, 522 (2016) (Alito, J., concurring).

[34] *Race and the Jury: Illegal Racial Discrimination in Jury Selection*, Equal Justice Initiative, https://eji.org/report/race-and-the-jury/ (last visited July 24, 2022).

[35] *Id.*

juror.[36] We've seen all white juries as a result of preemptory strikes in cases like *Swain v. Alabama*[37] and the infamous case against activist Angela Davis.[38] In *Swain*, the Court even raised the hurdle for showing racial discrimination in using preemptory strikes by requiring the defendant to demonstrate a pattern of discrimination over a number of cases rather than just in the defendant's case.[39] It wasn't until the 1986 *Batson v. Kentucky*[40] decision that the Supreme Court recognized that an already established and apparent pattern of preemptory strikes excluded black jurors.[41] To remedy this situation, the Court provided a feasible three-part legal standard to enable defendants to prove racial discrimination in jury selection.[42]

III. The Remedy

Black people are underrepresented in juries.[43] In addition, "more than 40% of Americans are people of color,[44] but 95% of elected prosecutors are white."[45] To mitigate this situation, more black people, especially black lawyers, must enter the criminal law system. Currently, instead of operating on the offense or through the prosecutor's office, black people must, quite literally, operate on the defense.

One of the most claimed issues on post-conviction appeals is ineffective assistance of counsel. Though the Sixth Amendment of the U.S. Constitution guarantees the right to counsel, even if we are not able to afford an attorney, the Constitution does not speak to or guarantee the quality of counsel we receive.[46] The widely accepted standard requires the court to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[47] To meet this standard, the defendant must first show that counsel's performance was deficient. This condition requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" that the Sixth Amendment guarantees. Second, the defendant must show that the deficient performance prejudiced the defense. This condition requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.[48] The Court handed down this standard in *Strickland v. Washington*.[49] In

[36] *Id.*
[37] Swain v. Alabama, 380 U.S. 202, 205 (1965).
[38] *Race and the Jury: Illegal Racial Discrimination in Jury Selection*, Equal Justice Initiative, https://eji.org/report/race-and-the-jury/ (last visited July 24, 2022).
[39] *Swain*, 380 U.S. at 224 (1965).
[40] Batson v. Kentucky, 476 U.S. 79 (1986).
[41] *Id.* at 99.
[42] *Id.* at 96-97.
[43] *Race and the Jury: Illegal Racial Discrimination in Jury Selection*, Equal Justice Initiative, https://eji.org/report/race-and-the-jury/ (last visited July 24, 2022).
[44] *QuickFacts: United States*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/PST045221 (last visited July 24, 2022).
[45] Reflective Democracy Campaign, *Tipping the Scales: Challengers Take On the Old Boys' Club of Elected Prosecutors*, WHOLEADS.US 2 (Oct. 2019), https://wholeads.us/wp-content/uploads/2019/10/Tipping-the-Scales-Prosecutor-Report-10-22.pdf (last visited July 24, 2022).
[46] Dr. Emily M. West, *Court Findings of Ineffective Assistance of Counsel Claims in Post-Conviction Appeals Among the First 255 DNA Exoneration Cases*, Innocence Project 1 (Sept. 2010), https://www.innocenceproject.org/wp-content/uploads/2016/05/Innocence_Project_IAC_Report.pdf (last visited July 25, 2022).
[47] Strickland v. Washington, 466 U.S. 668, 689 (1984).
[48] *Id.*
[49] *Id.*

capital cases, ineffective counsel can not only end in the defendant's ultimate demise but can also bar the defendant from other procedural opportunities to have a sentence overturned or reduced.[50]

To provide effective assistance of counsel in capital punishment and other criminal cases, law students should consider entering career paths as federal defenders to gain the experience and skills needed to defend the accused and to navigate the complex habeas relief and other appellate processes. We've seen throughout our legal history, and even most recently, how incompetence on counsel's part can be seriously detrimental to their clients facing capital punishment.[51] Whether this detriment results because of a failure to raise mitigating evidence during the sentencing phase,[52] failure to conduct an adequate investigation,[53] or failure to understand the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) tolling provisions,[54] the detriment remains a grave consequence for clients who trust the competence of their attorneys with their lives. Attorneys owe their clients, who usually are indigent, their best efforts and the highest level of competence when the consequence is death.

As the late Justice Ruth Bader Ginsburg once said, "people who are well represented at trial do not get the death penalty."[55] While this statement lacks a great deal of nuance, it does speak to an important principle that is recognized at even the highest level of legal interpretation: having a well versed, experienced, and prepared lawyer is paramount. This principle is also why it is important to introduce law students to career paths as federal defenders while they are still in law school. Early introduction to this vital topic allows students to explore the subject and develop an interest in this legal work. This interest can manifest itself by participating in internships or externships where students can gain the experience of working on capital punishment or federal habeas cases. It can also manifest itself in students taking courses on appellate procedure, advocacy, and complex statutes like AEDPA. The goal is to make sure that the first-time law students hear about AEDPA or deal with all the "heavy lifting" required in capital cases is not when the students are lawyers tasked with defending someone's right to live. Rather, the goal is to introduce law students to this subject matter while they are still in school so they can learn from their mistakes so as not to result in the death of their clients.

LexisNexis® has a plethora of products including various Social Justice Hubs on their Lexis+® search engine that aided in the research phase of this project and publication. The LexisNexis® social justice platforms provided the mentorship and development to spark innovation leading to a proposal and working in earnest on a solution to the lack of exposure issue among law students. For the past nine months, the team created a short video that can be used to bridge the "exposure gap" among law students in relation to potential careers in the capital habeas and federal defense field. This video will feature students who were exposed to this field as law students and have worked in this field post-exposure. It will also feature current federal defenders and professors who will shed light on the racial and systemic issues that are present in our capital punishment system. Lastly, the video will feature organizations that work with individuals needing

[50] Shinn v. Ramirez, 142 S. Ct. 1718 (2022). In this opinion, Justice Thomas noted that a post-conviction counsel negligently failing to develop the state court record will not allow the Court to set aside the equitable ruling given in *Martinez v. Ryan*, 566 U.S. 1 (2012) to allow prisoners/petitioners to have evidentiary hearings in federal habeas proceedings.

[51] *Id.*

[52] Andrus v. Texas, 140 S. Ct. 1875, 1879 (2020).

[53] Shinn v. Ramirez, 142 S. Ct. 1718 (2022).

[54] Holland v. Florida, 560 U.S. 631, 635-36 (2010).

[55] *Inadequate Representation*, ACLU, https://www.aclu.org/other/inadequate-representation (last visited July 24, 2022).

the help of law students, law clerks, and/or lawyers to help file, draft, or research their habeas claims to illuminate spaces where students and lawyers can hone and share their skills with those in the greatest need of them.

It is recommended that BLSA chapters, especially those at HBCUs, have special viewings of this important capital punishment crash course video. As a result of viewing the video, the goal is to inspire black law students and future attorneys specifically to pursue legal careers in this often-overlooked area of law. The video should encourage discussions about how students can garner the experience they need to be successful as federal defenders even as they matriculate through law school. Hopefully, these discussions would show the administration at these law schools that the interest is there for classes that center learning the skills necessary to bring habeas claims and defend those who have been sentenced to death. A secondary goal is to make this video available to law firms dedicated to diversity. Because the video would feature links to organizations looking for pro bono help, lawyers across these various firms and experience levels would be able to learn more about the capital habeas field while also having the opportunity to decide if they would like to complete their ABA recommended pro bono hours with the organizations identified. In the end, the increased traffic to this field of law will not only benefit these often-forgotten clients but provide students with tangible ways that they can affect change even before obtaining their degrees.