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IS THERE A FEDERAL CONSTITUTIONAL RIGHT TO COUNSEL IN CAPITAL POST-CONVICTION PROCEEDINGS?

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This year marks the twenty-fifth anniversary of *Gideon v. Wainwright*[1] and *Douglas v. California*,[2] the two cases in which the Supreme

* Assistant Professor, Vermont Law School; B.A. Mary Washington College, 1979; J.D. University of Virginia, 1982. In the interest of full disclosure, I should note that between 1983 and 1986 my practice consisted solely of representing condemned Florida inmates in post-conviction proceedings: I worked in the Office of the Public Defender, West Palm Beach, Florida (1983-1985) and in the Office of the Capital Collateral Representative (1985-1986). I presently represent several death row inmates.

I sought, and unfailingly received, advice and encouragement on this article from Susan Apel, James Coleman, Sandy D'Alemberte, Karen Gottlieb, Michael Millemann, David Reiser, Jerrrey Robinson, and Ruthann Robson; I want to thank them for their help. James Hanson and Leslie Stout provided invaluable research assistance. Any errors are mine.

1 372 U.S. 335 (1963).

2 372 U.S. 353 (1963).

Court held that indigent criminal defendants have a right to counsel at felony trials and on the first non-discretionary appeal. At the direct appeal stage of the judicial process, however, the right seems to end: The Court to date has drawn the line at the first appeal of right, at least in non-capital cases. The Court has not yet decided whether death row inmates wishing to challenge their convictions and sentences have a constitutional right to counsel in the capital post-conviction process.

In a recent article entitled *Facing Death Alone: The Post-conviction Counsel Crisis On Death Row*,[3] this author argued that courts in post-conviction must remain open to the condemned because the post-conviction system reveals injustices not detected earlier in the criminal justice process.[4] As a practical matter, meaningful access requires lawyers. Denial of post-conviction lawyers is tantamount to a denial of access to the post-conviction process to the condemned because death penalty law and post-conviction law are extremely subtle, nuanced, complex and rapidly changing; confinement on death row makes impossible the factual and legal investigation essential to effective capital post-conviction litigation; the press of impending execution dates increases the difficulties inherent in pro se capital post-conviction litigation; widespread illiteracy, retardation and mental illness on death row conspires to make pro se representation meaningless; the increasingly stringent rules against successive post-conviction challenges means that the post-conviction litigant must get it right the first time.[5]

A counsel crisis results from the fact that the demand for lawyers on death row far outstrips the availability of lawyers willing or able to represent condemned inmates; death row inmates thus must face impending execution without counsel.[6] The purpose of this Article is to explore whether the phenominological reality of the need for lawyers, described in *Facing Death Alone*, lends itself to a constitutional solution. The only case to date to analyze this question, *Giar-*

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[3] Mello, *Facing Death Alone: The Post-Conviction Counsel Crisis On Death Row*, 37 AM. U.L. REV. 513 (1988).

[4] In the interest of uniform style it is the policy of the *Journal of Criminal Law and Criminology* not to publish articles written in the first person. This Article was edited accordingly over the objections of the author.

[5] Mello, *supra* note 3, at 530-67.

[6] Mello, *supra* note 3, at 569-85; Howe, *More Texas Law Firms Needed to Represent Death Row Inmates*, TEX. BAR J. 850 (Sept. 1988); Sales, *Indigent Death Row Inmates — Society's Ultimate Sentence and the Lawyer's Ultimate Obligation*, TEX. BAR J. 782 (Sept. 1988); Silas, *Death Row: A Cry For Help*, BAR LEADER 17 (May-June 1988); Torry, *Lawyers Scramble to Fill Void in Death Row Appeals*, Washington Post, June 24, 1988, at 27.

ratano v. Murray,[7] has provided inconclusive answers. Following a brief description of the post-conviction process and a discussion of *Giarratano*, this Article argues that recognition of a right to counsel in capital post-conviction proceedings is demanded by prevailing constitutional doctrine.

I. INTRODUCTION: THE POST-CONVICTION PROCESS

Persons convicted of a capital offense and sentenced to death have a right to a plenary appeal to the state court of appeals.[8] Counsel clearly must be provided at trial[9] and on this direct appeal.[10] Beyond this point, the availability of the right to counsel is unclear.

After direct appeal, the death row inmate is entitled to seek certiorari in the United States Supreme Court and then to seek post-conviction relief in state court.[11] The state post-conviction system provides a procedural mechanism for raising claims which were not or could not have been raised on the plenary direct appeal.[12] For this reason, it is fair to characterize the state post-conviction process as an extension of and supplement to the plenary appeal, at least as to these issues. State post-conviction litigation may be initiated either in the state trial court and subsequently appealed to the state appellate court, or litigation may be initiated in the state appellate court, depending on the type of claims raised and the requirements of local procedure.

Following completion of state post-conviction litigation, the condemned inmate is entitled to file a petition for writ of habeas corpus in federal district court,[13] the denial of which may, in most cases, be appealed to the appropriate federal circuit court of appeals. At least since *Brown v. Allen*,[14] the controversial[15] Great Writ

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7 668 F. Supp. 511 (E.D. Va. 1986), *rev'd*, 836 F.2d 1421 (4th Cir. 1988) *aff'd*, 847 F.2d 1118 (4th Cir. 1988) (en banc), *cert. granted*, 109 S. Ct. 303 (1988).

8 *See generally* D. PANNICK, JUDICIAL REVIEW OF THE DEATH PENALTY (1982); Dix, *Appellate Review of the Decision to Impose Death*, 68 GEO. L.J. 97 (1979); Skene, *Review of Capital Cases: Does the Florida Supreme Court Know What It's Doing?*, 15 STETSON L. REV. 263 (1986).

9 Gideon v. Wainwright, 372 U.S. 335 (1963).

10 Douglas v. California, 372 U.S. 353 (1963).

11 *See generally* Wright & Miller, *In Your Court*, 18 URB. L. 659 (1983).

12 *See, e.g.*, Atkinson v. United States, 366 A.2d 450, 452-53 (D.C. 1976); McCrae v. State, 437 So. 2d 1388, 1390 (Fla. 1983).

13 28 U.S.C. § 2254 (1982).

14 344 U.S. 443 (1953).

15 For a sampling of the academic debate, *see, e.g.*, Allen, Schachtman & Wilson, *Federal Habeas Corpus and Its Reform: An Empirical Analysis*, 13 RUTGERS L.J. 675, 675-76 (1982); Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1961); Brennan, *Federal Habeas Corpus and State Prisoners: An Exercise in Feder-*

of habeas corpus permits relitigation of federal constitutional claims which have been presented previously to the state courts.[16]

Of the almost two thousand people who presently live under sentence of death in thirty-three states,[17] more than five hundred are in the post-conviction process already, and many others will be there soon.[18] Most of these inmates are indigent and cannot afford

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alism, 7 UTAH L. REV. 423 (1961); Doub, *The Case Against Modern Habeas Corpus*, 57 A.B.A. J. 323 (1971); Friendly, *Is Innocence Irrelevant?*, 38 U. CHI. L. REV. 142 (1970); Mitchell, *Restoring the Finality of Justice*, 55 JUDICATURE 203 (1971); Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 91977); O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801, 802 (1981); Olsen, *Judicial Proposals to Limit the Jurisdictional Scope of Federal Habeas Post-Conviction Claims of State Prisoners*, 31 BUFFALO L. REV. 301 (1982); Peller, *In Defense of Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579 (1982); Pollack, *Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ*, 66 YALE L.J. 50, 64 (1956); Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. PA. L. REV. 461 (1960); Reynoldson, *Iowa's Chief Justice Discusses State-Federal Judicial Relations*, 6 ST. CT. J. issue 3, p. 24 (1982); Robbins, *The Habeas Corpus Certificate of Probable Cause*, 44 OHIO ST. L.J. 307, 311 (1983); Robbins & Sanders, *Judicial Integrity, the Appearance of Justice and the Great Writ of Habeas Corpus : How to Kill Two Thirds (Or More) With One Stone*, 15 AM. CRIM. L. REV. 63, 66 (1977); Rosenberg, *Constricting Federal Habeas Corpus: From Great Writ to Exceptional Remedy*, 12 HASTINGS CON. L.Q. 597 (1985); Rosenberg, *Jettisoning* Fay v. Noia*: Procedural Default By Reasonably Incompetent Counsel*, 62 MINN. L. REV. 341 (1978); Rosenn, *The Great Writ—A Reflection of Social Change*, 44 OHIO ST. L.J. 269 (1983); Smith, *New "Federalism" Proposals Outlined by Smith*, 6 ST. CT. J. issue 3, p. 25 (1982); Soloff, *Litigation and Relitigation: The Uncertain Status of Federal Habeas Corpus for State Prisoners*, 6 HOFSTRA L. REV. 297 (1978); Tague, *Federal Habeas Corpus and Ineffective Assistance of Counsel: The Supreme Court Has Work to Do*, 31 STAN. L. REV. 1 (1978); Yackle, *The Reagan Administration's Habeas Corpus Proposals*, 68 IOWA L. REV. 609, 610 (1983); Note, *Proposed Modifications of Federal Habeas Corpus for State Prisoners—Reform or Revocation?*, 61 GEO. L.J. 1221 (1973); *Symposium: State Use of Federal Habeas Corpus Procedures*, 44 OHIO ST. L.J. 337 (1983); Comment, Lundy, Isaac & Frady: *A Trilogy of Habeas Corpus Restraint*, 32 CATH. U.L. REV. 169, 169-70 (1982).

[16] At some point between direct appeal and execution, the condemned inmate may seek executive clemency. Sullivan v. Askew, 348 So. 2d 312 (Fla. 1977).

[17] As of August 1 1987, a total of 1,911 prisoners were under sentences of death in 33 states. NAACP, Legal Defense and Educational Fund, Inc., Death Row, U.S.A. (Aug. 1, 1987)(unpublished compilation). This is the highest figure ever recorded in the United States. AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: THE DEATH PENALTY 3 (1987). These figures will continue to grow, even if executions resume at a frequent rate. Greenberg, *Capital Punishment as a System*, 91 YALE L.J. 908, 929-36 (Appendix) (1982) (tracking additions to and deletions from death row between 1976 and 1981). The population awaiting execution is showing a net increase of five per week. *Death Day*, Washington Post, Aug. 28, 1987 at A22.

[18] As of the summer of 1987, at least 487 capital cases were in state post-conviction or federal habeas corpus processes; these figures do not include Texas, Arizona or Virginia, three states with substantial death row populations. *See* 1987 Airlie Status Report 1 (unpublished compilation). Texas has 248 people on death row; Arizona has 64; Virginia has 33. *Death Row, U.S.A.*, *supra*, note 17.

In 1983, the Supreme Court noted that "it is a matter of public record that an increasing number of death sentenced petitioners are entering the appellate stages of the federal habeas process." Barefoot v. Estelle, 463 U.S. 880, 887 (1983). *See also* Brief for NAACP Legal Defense and Educational Fund (amicus curiae), at 35, Barefoot v. Estelle,

to hire lawyers.[19] The American Bar Association has estimated that 99%[20] of death row prisoners are paupers: "these prisoners, many of whom cannot read or write, are left to their own devices. They end up filing pathetic motions that can't be taken seriously."[21] Yet, with few exceptions,[22] the vast majority of capital states make no formal provision for counsel in capital post-conviction proceedings. These states include Texas, Georgia, Alabama and Virginia. Until October 1985, they also included Florida.

II. *GIARRATANO V. MURRAY*

In *Giarratano v. Murray*,[23] a federal district court, on an extensive factual record, held that Virginia death row inmates have a constitutional right to attorney assistance in state post-conviction litigation[24]—but not in federal habeas corpus proceedings. This holding was based on the right of access to courts articulated in *Bounds v. Smith*.[25] The Commonwealth appealed the district court's decision in *Giarratano*, and a panel of the Fourth Circuit Court of Appeals reversed.[26] The en banc Fourth Circuit vacated the panel opinion, heard supplemental oral argument, and affirmed the district court.[27] The Supreme Court granted certiorari.[28] Regardless of the ultimate outcome in *Giarratano*, the district court and court of appeals opinions require examination.

The *Giarratano* litigation has its genesis in the counsel crisis described in *Facing Death Alone*.[29] Virginia's death row depended on

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463 U.S. 880 (1983)("[a]pproximately 60 [capital] cases have already reached the federal courts of appeal, and roughly 100 more are pending in the federal district courts."). As of April 21, 1986, the United States Court of Appeals for the Eleventh Circuit had decided the cases of 40 Florida condemned inmates and of 66 Georgia and Alabama inmates. *See* Computer Printout Prepared by Craig S. Barnard, Chief Assistant Public Defender, West Palm Beach, Florida (April 21, 1988).

19 H. BEDAU, THE DEATH PENALTY IN AMERICA 189 (1982).

20 *Death Row Inmates Can't Find Lawyers*, 73 A.B.A. J. 58 (Jan. 1, 1987).

21 *Id.* at 58 (quoting Steven Raiken, Staff Director, ABA Section of Individual Rights and Responsibilities). *See also* Hooks v. Wainwright, 536 F. Supp. 1330, 1366 (M.D. Fla. 1982), *rev'd on other grounds*, 775 F.2d 1433 (11th Cir. 1985) (95% of prisoners are indigent).

22 *See, e.g.*, FLA. STAT. § 27.702 (1988) (legislation creating Office of the Capital Collateral Representative of the State of Florida). *See generally* Mello, *supra* note 3 at 567-606.

23 668 F.2d 511 (E.D. Va. 1986), *rev'd*, 836 F.2d 1421 (4th Cir. 1988), *aff'd*, 847 F.2d 1118 (4th Cir. 1988) (en banc), *cert. granted*, 109 S. Ct. 303 (1988).

24 *Accord* Carey v. Garrison, 403 F. Supp. 395 (W.D.N.C. 1975).

25 430 U.S. 817 (1977).

26 Giarratano v. Murray, 836 F.2d 1421 (4th Cir. 1988), *rev'd* 847 F.2d 1421 (4th Cir. 1988) (en banc), *cert. granted*, 109 S.Ct. 303 (1988).

27 847 F.2d 1118 (4th Cir. 1988) (en banc).

28 109 S.CCt. 303 (1988).

29 *See supra* notes 3-7 and accompanying text.

volunteer, pro bono counsel, and the pool of volunteers was running dry. One volunteer attorney described the situation in Virginia as of mid-1986 in this way: "In Virginia, there is not even a manual, brief bank or a single staff attorney able to provide guidance for anyone who does volunteer. There is merely one coordinator, who is not an attorney and who has barely been able to muddle through on extremely meager resources."[30]

Joseph Giarratano, a Virginia death row inmate, filed in federal district court a *pro se* civil rights class action complaint[31] seeking appointment of counsel for post-conviction proceedings. Eventually, a large law firm was appointed as counsel for Giarratano as representative of a class of unrepresented Virginia death row inmates who wished to pursue post-conviction remedies.

Federal District Judge Robert Mehrige in *Giarratano* held that as to the class of unrepresented Virginia death row inmates, meaningful access to the courts in state post-conviction proceedings requires lawyers for the condemned.[32] "[O]nly the continuous services of an attorney to investigate, research, and present claimed violations of fundamental rights provides them [condemned prisoners] the meaningful access to the courts guaranteed by the Constitution."[33]

The district court in *Giarratano* based its holding on the meaningful access to courts rationale advanced in *Bounds v. Smith*.[34] *Bounds* requires states to provide either trained legal assistance or adequate law libraries to prisoners wishing to pursue post-conviction remedies.[35] Judge Mehrige read *Bounds* to mean that, in general, inmates are capable of using a law library.[36] This assumption accounted "for the alternative nature of the required relief: trained legal assistance or adequate law libraries."[37] Judge Mehrige found that the underlying assumption in *Bounds*, that inmates are capable of using law libraries, was invalid as applied to death row inmates. Three considerations provided the basis for this determination.

First, death row inmates have a limited amount of time to prepare and present petitions to the courts.[38] The "result is that a

30 Tabak, *The Death of Fairness*, 7 DEFENDER 36, 40 (1986).

31 The action was brought pursuant to 42 U.S.C. § 1983 (1986).

32 The judge also held that there is not a right to counsel in federal post-conviction proceedings. 668 F. Supp. at 516-17.

33 668 F. Supp. at 513.

34 430 U.S. 817 (1977).

35 *Id.* at 826.

36 *Id.*

37 668 F. Supp. at 513.

38 Under VA. CODE ANN. § 17-110.1 (1987) an execution can be carried out at any time as long as thirty days have elapsed since the date of conviction.

large amount of legal work must be compressed into a limited amount of time."[39] Second, the legal work involved is difficult and complex. A *pro se* petitioner would have to spend large blocks of time analyzing transcripts from the guilt determination phase, as well as dealing with mitigation and aggravation issues characteristic of the sentencing phase of a capital case.[40] Third, "an inmate preparing himself and his family for death is incapable of performing the mental functions necessary to adequately puruse his claims."[41] At the time when it is most critical that a condemned prisoner's mental faculties and legal attention be particularly acute, the imminent approach of death distracts.

The district judge also examined the legal assistance program in effect in Virgiinia and found, at least as far as those on death row were concerned, that it failed to pass muster under the *Bounds* standard. His conclusion on the evidence was that seven part-time lawyers, handling the legal questions of more than 2,000 non-capital prisoners, could not and did not meet the needs of death row inmates seeking post-conviction relief.[42] These lawyers did not conduct factual investigation, sign pleadings or appear in court. Their role was advisory.[43]

Going a step further, the judge ruled that even if the Commonwealth hired additional attorneys for the prisoner assistance program, its duty under *Bounds* would not be fulfilled. Death row inmates needed more than "talking law books"[44] that do no factual investigation, do not sign pleadings, and do not make court appearances.[45]

Virginia assigns counsel to inmates who, on their own, are ini-

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39 668 F. Supp. at 513.

40 *Id.*

41 *Id.*

42 Judge Mehrige recognized that there was authority for holding that the Virginia system did comply with *Bounds* for the needs of the general prison population. Williams v. Leeke, 584 F.2d 1336, 1339 (4th Cir. 1978). However, in the case of death row inmates, the judge found deficiencies, noting that the appointed attorneys were not full-time and could, at best, handle only a single capital case at a time. Indeed, there was testimony at trial from one of the court appointed institutional attorneys describing a three month period during which he and the other appointed attorneys were too "burned out" to even visit the prison and attend to the legal needs of the regular prisoners. Trial Transcript at 224, Giarratano v. Murray, No. 85-0655R (E.D. Va. 1986).

43 As to the court appointed institutional attorneys, of those who actually met with inmates the average time spent per prisoner was almost always less than an hour. Transcript, *supra* note 42, at 224-227. Additionally these visits were quite sporadic. The attorneys have no regularly scheduled visits and simply wait for the prisoner requests to pile up. *Id.*

44 Transcript, *supra* note 42, at 224.

45 668 F. Supp. at 515.

tially able to file a nonfrivolous petition.[46] However, Judge Mehrige found that the creation of the petition must be deemed a "critical stage" in the capital litigation process.[47] Therefore, "the timing of the appointment is a fatal defect with respect to the requirements of *Bounds*."[48] Judge Mehrige held that the continuous assistance of counsel was necessary in the development of a condemned prisoner's claim.[49] Post-petition assistance is simply too "untimely," while "the pre-petition assistance provided by institutional attorneys is too limited."[50]

The district court's discussion in *Giarratano* then turned to the counsel crisis on Virginia's death row. The judge noted that while in the past the Commonwealth did not need to worry about representation for inmates facing execution, today the situation is entirely different. "The evidence conclusively establishes that . . . few—very few—attorneys are willing to voluntarily represent death row inmates in post-conviction efforts."[51] The "stakes are simply too high for this Court not to grant, at least in part, some relief."[52]

Before moving into an explanation of the scope of the post-conviction right to counsel for the condemned, Judge Mehrige performed what can best be described as a due process analysis, although he did not characterize it as such. Nevertheless, it is outlined in *Matthews v. Eldridge*[53] and has recently been applied in the capital context in *Ake v. Oklahoma*.[54] Using the *Matthews/Ake* test, a court balances the value to be gained by the state and by the individual, through the recognition of the right against the risk of error absent the procedural protection at issue.

Judge Mehrige did not view the monetary cost to the Commonwealth as significant. Virginia already appointed attorneys for inmates who were able to file non-frivolous claims on their own. The

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46 VA. CODE ANN. § 14.1-183 (1986). *See also* Cooper v. Haas, 210 Va. 279, 170 S.E.2d 5 (1969); Darnell v. Peyton, 208 Va. 675, 160 S.E.2d 749 (1968).

47 668 F. Supp. at 513. This assertion was supported by testimony given at trial, during which one witness, an attorney with extensive experience as a capital post-conviction litigator, opined that "[t]he state post-conviction document is the most critical document in the capital litigation." Transcript, *supra* note 42, at 17.

48 668 F. Supp. at 515.

49 *Id.*

50 *Id.*

51 *Id. See also* Transcript, *supra* note 42, at 190-210 (discussion on the difficulty of finding counsel for the condemned). The court found that the amount of time that death cases consume and the emotional drain associated with defending them are major barriers to the acquisition of counsel. 668 F. Supp. at 515. *See also* Transcript, *supra* note 42, at 31, 59.

52 668 F. Supp. at 515.

53 424 U.S. 319 (1976).

54 470 U.S. 68, 77 (1985).

incremental difference in cost associated with providing counsel to the indigent on death row "should not impose an onerous burden on the Commonwealth."[55] This view can be juxtaposed with the judge's earlier comments on the risk of error absent the provision of counsel to death row inmates:

> The matter of a death row inmate's habeas corpus petition is too important—both to society, which has a compelling interest in insuring that a sentence of death has been constitutionally imposed, as well as to the individuals involved—to leave to what is at best, a patchwork system of assistance.[56]

After deciding that condemned Virginia prisoners must have a remedy of counsel to effectuate the right of meaningful access to the courts in the pursuit of state post-conviction remedies, the judge narrowed the scope of relief by drawing a line at federal habeas corpus proceedings. The Supreme Court's decision in *Ross v. Moffitt*[57] was the exclusive support for this conclusion. The Supreme Court in *Moffitt* had refused to find a right to counsel in proceedings seeking discretionary review beyond the first appeal as of right.[58]

Three factors from *Moffitt* weighed in the *Giarratano* district court's decision. First, the *Giarratano* court maintained that "[p]art of *Moffitt*'s rationale was that a court addressing a discretionary review petition is not primarily concerned with the correctness of the judgment below, but rather the jurisprudential importance of the issues involved."[59] Second, Judge Mehrige agreed with the holding of *Moffitt* that "it would be anomolous to require a state to provide counsel to one seeking federal statutorily created relief"[60] (certiorari in *Moffitt* and habeas in *Giarratano*). Third, in light of the requirement that habeas petitioners must exhaust state remedies prior to filing a habeas petition in federal court,[61] if states provide counsel in their own post-conviction proceedings there will be transcripts, appellate briefs, court opinions and other documentation available to aid the federal courts in their decisions by the time the case reaches the federal habeas stage of post-conviction.[62]

A Fourth Circuit panel unanimously affirmed the district court's denial of appointed counsel for death row inmates wishing to pre-

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55 668 F. Supp. at 515.

56 *Id.*

57 417 U.S. 600 (1974).

58 *Id.* at 610.

59 668 F. Supp. at 516.

60 *Id.*

61 28 U.S.C. § 2254(b).

62 *Giarratano*, 688 F. Supp. at 517.

pare federal habeas corpus proceedings.[63] The panel majority, however, reversed the district court's order requiring Virginia to appoint attorneys for death row inmates pursuing state post-conviction remedies.[64] Judge Wilkins, writing for the majority, found that, based on the evidence before the district court, the district court's determination that the Commonwealth was not meeting its *Bounds* obligation was clearly erroneous.[65] Moreover, the panel majority found the district court had abused its discretion in ordering a remedy as extreme as appointment of counsel.[66]

The majority based its conclusion on primarily three grounds: (1) the district court's fact-finding was clearly erroneous; (2) after the district court decided *Giarratano*, the Supreme Court held in *Pennsylvania v. Finley*[67] that there is no constitutional right to counsel in non-capital state post-conviction proceedings;[68] and, (3) the unique nature of death as a punishment does not justify an exception to *Bounds v. Smith* or *Pennsylvania v. Finley*.[69]

After its examination of the evidence before the district court, the panel majority held that the prevailing legal assistance program that Virginia provided death row inmates satisfied the *Bounds* meaningful access requirement. The court noted that inmates were furnished upon request with copies of transcripts, briefs, and state court opinions from the plenary direct appeal.[70] The majority pointed to testimony from Giarratano's own witnesses to prove that these materials in fact assisted inmates in the preparation of their post-conviction petitions.[71] The majority also found the prison library facilities more than adequate to meet the needs of all inmates.[72] To support this conclusion, the majority noted that Joseph Giarratano had himself been successful in two previous *pro se* actions.[73] As the dissent by Judge Hall pointed out, the majority failed to distinguish between the complexity of a capital post-conviction petition and the relative simplicity of the *pro se* civil rights petitions

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63 *Id.*

64 Giarratano v. Murray, 836 F.2d 1421 (4th Cir. 1988), *rev'd*, 846 F.2d 1118 (4th Cir. 1988) (en banc), *cert. granted*, 109 S. Ct. 303 (1988).

65 *Id.* at 1423.

66 *Id.* The court characterized the district court's reading of the record to support a "sweeping extension" of *Bounds* as a guise to establish a right of counsel where none is required by the Constitution. *Id.*

67 107 S. Ct. 1990 (1987).

68 836 F.2d at 1423-24.

69 *Id.* at 1425-27.

70 *Id.* at 1423.

71 *Id.*

72 *Id.*

73 *Id.*

prepared by Giarratano.[74] The majority also failed to recognize that Joseph Giarratano is not a typical Virginia death row inmate.[75]

The majority intimated that the law library alone would suffice to fulfill the requirements of *Bounds*.[76] Even if the law library alone were not sufficient, the court found that the availability of part-time institutional attorneys satisfied the second prong of the *Bounds* obligation—the provision of legal assistance.[77]

To support its conclusion that there exists no constitutional right to counsel for discretionary proceedings, the majority relied upon *Pennsylvania v. Finley*.[78] The dissent, however, found the majority's reliance on *Finley* misplaced because *Finley* was not a meaningful access case, nor did it address the scope of the rule enunciated in *Bounds*.[79] Most significantly, the dissent pointed out, *Finley* was not a death penalty case.[80]

The majority considered whether the nature of the death penalty might constitute an exception to *Finley* or justify an "exceptional application" of *Bounds*.[81] The record did not establish the existence of complexity unique to death penalty legal issues.[82] In addition, the court found the evidence did not support the district court's findings that death row inmates labor under exceptional emotional pressure and under severe time constraints in preparing their post-conviction petitions.[83]

In contrast, the dissent argued that the death penalty is unique and that both society and the condemned prisoner have a compelling interest in insuring that it has been constitutionally imposed.[84] Also, the dissent argued that the complexity and difficulty of legal work involved in challenging a death sentence requires "particular safeguards" in order to assure meaningful access to the courts.[85]

The panel majority's opinion in *Giarrantano* was vacated when the full Fourth Circuit voted to rehear the case en banc. Upon rehearing, the en banc Fourth Circuit rejected the panel's reasoning

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74 *Id.* at 1430 (Hall, J., dissenting).
75 *Id.* (Hall, J., dissenting).
76 *Id.* at 1423.
77 *Id.*
78 *Id.* at 1423-24.
79 *Id.* at 1430 (Hall, J., dissenting).
80 *Id.* (Hall, J., dissenting).
81 *Id.* at 1426.
82 *Id.*
83 *Id.* at 1430 (Hall, J., dissenting).
84 *Id.* (Hall, J., dissenting).
85 *Id.* (Hall, J., dissenting).

and affirmed the district court by a majority of six to four.[86] Judge Hall's panel dissent essentially became the opinion of the en banc court. Judge Wilkins' panel majority opinion became the principal en banc dissent.

The en banc majority held that the district court's findiings were not clearly erroneous, and upheld both its judgment and remedy. The en banc court reiterated the three factors that Judge Merhige had deemed critical to the conclusion that the degree of legal assistance afforded death row inmates failed to satisfy *Bounds'* constitutional requirement of meaningful access.[87] Given the time constraints, the complexity of post-conviction litigation, and the emotional instability of the inmate facing impending death, death row inmates are incapable of effectively raising their post-conviction claims. The majority further recognized that the appointment of an attorney *after* an inmate successfully filed a petition raising a non-frivolous claim suffered from a "fatal defect" in timing.[88]

The en banc majority rejected the Commonwealth's reliance on *Pennsylvania v. Finley* for its contention that death-sentenced prisoners are not entitled to state-supplied attorneys in post-conviction proceedings. The majority stressed, as had the earlier panel dissent, that *Finley* was not a meaningful access case. *Finley* did not address the access rule set forth in *Bounds*. Most importatntly, *Finley* was not a capital case. Citing the Supreme Court's view that matters effecting an already condemned inmate require "no less stringent standards than those demanded in any other aspect of a capital proceeding,"[89] the majority held *Finley* inapplicable.[90]

Finally, the en banc court upheld the district court's judgment that death row inmates are not entitled to state-appointed counsel for *federal* habeas corpus proceedings and certiorari petitions.[91] The majority agreed with the district court's application of *Ross v. Moffitt*, emphasizing that counsel-assisted state post-conviction proceedings would generate briefs, transcripts and opinions for an inmate's use in federal proceedings.[92]

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86 Giarrantano v. Murray, 847 F.2d 1118 (4th Cir. 1988) (en banc), *cert. granted*, 109 S. Ct. 303 (1988).

87 *Id.* at 1120-21.

88 *Id.* at 1120.

89 Ford v. Wainwright, 477 U.S. 399, 411-12 (1986).

90 847 F.2d at 1122.

91 *Id.* at 1122.

92 *Id.* at 1121-22. The majority failed to explain how the death row inmate, encumbered by the same factors that would render self-help in state post-conviction proceedings ineffective, would be able to competently produce federal court pleadings and briefs.

Judge Wilkins, dissenting, reiterated the view expressed in his panel majority opinion that the district court "clearly erred" in concluding that Virginia had failed to meet its constitutional obligations under *Bounds*. The Commonwealth's provision of law libraries, assistance of institutional attorneys, and supply of transcripts, and documents from initial automatic appeals all demonstrated, according to Wilkins, that meaningful access was achieved. Further, Wilkins stated that *Finley* was clear in its statement that there is no constitutional right to counsel when mounting collateral attacks.[93] In the view of Wilkins, the notion that the death penalty requires heightened procedural safeguards should have no bearing on any expansion of constitutional rights to include assistance of counsel in post-conviction proceedings; the differences are significant only at the trial and sentencing stages.[94] Finally, Judge Wilkins disputed the factual base supporting the district court's premise for extending *Bounds* to require actual assistance of counsel. The record, Wilkins concluded, provided no support for the conclusion that an inmate would be hindered by his emotional state, time constraints, or any unusual complexity of capital post-conviction proceedings.[95]

Judge Wilkinson's dissent echoed Wilkins' belief that no authority exists for a constitutional entitlement to post-conviction representation. Wilkinson stressed that once the direct appeal process is completed, "a presumption of legality and finality attaches to the conviction and sentence."[96] The Constitution, he argued, required no more. Finally, Wilkinson expressed his concern over the intrusion of federal courts into the domain of state courts and legislatures. Wilkinson reasoned that "state post-conviction remedies will now move one step closer to the status of a federal protectorate. . . . If every state initiative is to involve yet another blanket of federal administrative oversight, the capacity and incentives for the states to undertake meaningful reforms will disappear."[97]

Judge Widener's dissent expressed doubt that the death row inmates in *Giarratano* had standing as plaintiffs, because each had the assistance of appointed attorneys "upon request."[98] He also questioned the consistency of the majority's finding that an inmate is entitled to counsel in state, but not federal, post-conviction proceedings.

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93 *Id.* at 1126-27.
94 *Id.* at 1128 (Wilkins, J., dissenting).
95 *Id.* at 1129 (Wilkins, J., dissenting).
96 *Id.* at 1124 (Wilkinson, J., dissenting).
97 *Id.* at 1125 (Wilkinson, J., dissenting).
98 *Id.* at 1123 (Widener, J., dissenting).

The three *Giarratano* opinions form a starting point for inquiry into the doctrinal complexities of the counsel question. The remainder of the Article will explore these complexities.

III. Doctrine: A Discrete Right or A "Complex" Right?

A right to counsel in capital post-conviction proceedings could find its source in a discrete constitutional doctrine. It could be predicated on: the sixth amendment's guarantee of the right to counsel in criminal prosecutions; the fourteenth amendment's explicit guarantees of due process and equal protection, or its implicit guarantee of meaningful access to courts; or the eighth amendment's guarantee of heightened reliability in capital cases. Any one of these doctrines could fairly support a requirement of counsel in the capital post-conviction system.

On the other hand, the right to counsel at all stages of a capital case may be analyzed as an unrecognized right which can be inferred or constructed from rights which are already clearly established. It would be a "complex" right in the sense that it would be an aggregate of rights recognized in current law, none of which, taken by itself, may compel a right to counsel in capital post-conviction litigation.[99]

The need to develop federal constitutional law *through* habeas (using habeas as a form of federalist dialogue) is a powerful reason for making certain that it *works well* and produces good law. That value will be lost unless lawyers are available to inform the process. As a matter of procedural law and constitutional guarantee, the necessity of counsel in the post-conviction system could be viewed as a requirement for the meaningful operation of habeas corpus, especially as the law of habeas has developed over the last decade into an increasingly complex body of law. Further, a responsible jurisprudence could fairly infer a right to counsel in the post-conviction system from the doctrinal conjunction of *Gideon v. Wainwright*, the access to court cases[100], and the post-*Furman* cases which stress the unique status of death as a punishment.[101]

In a series of non-capital cases, the most recent being *Pennsylvania v. Finley*,[102] the Supreme Court has held that there is no right to counsel beyond the first non-discretionary appeal. The cases holding this are non-capital cases which the Court could and

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99 This is in the primitive "found law" sense of somnambulistic judicial compulsion. *See* K. Llewellyn, The Common Law Tradition (1960).

100 *See infra* notes 217-41 and accompanying text.

101 *See infra* notes 242-56 and accompanying text.

102 107 S. Ct. 1990 (1987); *see also* Ross v. Moffitt, 417 U.S. 600 (1975).

must distinguish if it is to preserve judicial respectability in its death penalty jurisprudence. As will be shown below, current limitations on the right of counsel are arbitrary. The Court is not trapped by cases outside the capital context unless it elects to be.

The following sections are intended to suggest a basis for recognizing this vital right from a jurisprudential standpoint. They will also show where there is some play in the joints of an increasingly arthritic criminal law. It should be kept in mind that this is not a neat, abstract manipulation of case law. The niceties of doctrine *allow* the amalgamation of a "complex" right to counsel out of materials already at hand. The human evidence presented in *Facing Death Alone* compels it.

IV. The Effective Operation of the Post-Conviction System

The first element justifying the right to counsel in the capital post-conviction system is the need for lawyers to assure the effective operation of the post-conviction system itself. Meaningful access to the capital post-conviction process is necessary to expose injustices that otherwise escape detection in the judicial process, at least in capital cases.[103] Meaningful access to the capital post-conviction system is also essential as a matter of theory.

As Cover and Aleinikoff have persuasively argued,[104] the habeas system operates as a federalist dialectic—it is the focus of an on-going dialogue between the state and federal court systems which contributes to the fine-tuning of post-conviction law. The habeas system brings the more "pragmatic" state courts into a dialogue with the more "utopian" federal judiciary.[105] The habeas literature, and a few recent Supreme Court opinions, tend to interpret federal habeas as mere redundancy—as a means of double-checking the accuracy of convictions in a federal court, presumably well-attuned to the substance of federal rights. The redundancy of habeas, which is frequently challenged as a barrier to finality, is more than a double-track insurance scheme to promote accuracy. At a second, more sophisticated level, the vindication of federal rights by federal courts justifies habeas, given the existence of doubts as to the interpretation of federal law by state courts, which endure their own local pressures.[106]

On a third level, which is the territory explored by Cover and

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103 Mello, *supra* note 3.

104 Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 Yale L.J. 1035 (1977).

105 *Id.* at 1050.

106 Neuborne, *The Myth of Parity*, 90 Harv. L. Rev. 1105 (1977) (arguing that state

Aleinikoff, the redundancy of habeas procedure can be viewed as a forging ground for rights.[107] The state and federal courts engage in a dialogue which sharpens the meaning of asserted rights, turning them into rights recognized and defined.[108] In turn, this dialectical rights discourse informs the Supreme Court by presenting opinions offering different reasoned responses to a given post-conviction issue.[109] Under this picture, the dual court systems operate analogously to counsel on appeal—sharpening, refining and abandoning claims so that the decision-maker has a clear-cut choice which is informed by the "adversarial" context.

Given the importance of this procedure as a rights-defining dialogue, the importance of counsel throughout the post-conviction process becomes clear. Just as the Supreme Court is aided by the presence of well-articulated opposition, the lower courts, as they mould claims for final consideration, depend on the dialectical opposition of counsel. This point is also an institutional point. Given the importance of the post-conviction system as a crucible of rights, the *quality* of legal discourse here is of enormous, case-transcending import.

The courts and the commentators have been engaged in a thirty-year battle over the meaning and uses of habeas corpus.[110] That battle has focused on the finality-defying nature of habeas and the historical basis for using habeas to correct federal constitutional errors at the post-conviction stage. Bator urged the courts to restrict habeas corpus to federal collateral review of state court process.[111] The *Brown v. Allen*[112] model of relitigation of all federal constitutional claims struck Bator as a wastefully redundant use of judicial resources.[113] Peller has pointed out in his penetrating discussion of Bator's vision[114] that the philosophical premise underlying Bator's dislike of relitigation is that absolute *certainty*—as to factfinding and the "truth" of a legal rule—is not possible. In Bator's words, "we can never absolutely recreate past phenomena and thus can never have final certainty as to their existence."[115] Thus,

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court selection process and concomitant majoritarian pressure renders state courts a less preferable forum for civil liberties limitation).

107 Cover & Aleinikoff, *supra* note 104, at 1048.

108 *Id.*

109 *Id.*

110 *See supra* note 15 and accompanying text.

111 Bator, *supra* note 15, at 453-54.

112 344 U.S. 443 (1953).

113 Bator, *supra* note 15, at 451-52.

114 Peller, *supra* note 15, at 587.

115 Bator, *supra* note 15, at 447.

for Bator, "rights" must be defined as the outcome of adequate institutional processes.[116] For this reason, Bator would restrict habeas to an inquiry by federal courts into the adequacy of state process.

Peller pointed out that the redundancy problem Bator identified is illusory; if, in fact, the state courts have failed in their task, there *is* not redundancy, for the federal courts are then the first courts to do the job correctly.[117] More damaging to the conclusion Bator drew from his philosophical skepticism is the point Cover and Aleinikoff make mathematically: The issue is not one of nihilism, but of prohibility.[118] A second look is not a guarantee of absolute truth, nor is a seventh look. Redundancy, however, increases the probability that the ultimate result will be more accurate. *Provided* that the post-conviction process is not an arid ritual of pathetic *pro se* claims which cannot advance the inquiry, Cover and Aleinikoff's probability study will work.

Bator's adequacy review also depends on the presumption that state courts will make a strong effort to enforce federal rights.[119] Because the Court in *Brown v. Allen* was not willing to make this assumption,[120] the redundancy technique was a logical consequence. Bator used the formalistic notion that the supremacy clause and the structure of federalism must be presumed to be working to deny this aspect of *Brown*. In some sense this presumption would prove more than even Bator suggested: Ought not federalism and supremacy self-enact on the level of state process as well? If one admits that a little checking up is necessary on a procedural level, why not on the substantive plane as well?

Perhaps Bator would reply that facts must be viewed skeptically. But the possible hostility of local courts to federal rights is no more fact-based than their institutional processes. The articulation of federal rights, a textual operation, takes a set of facts as given. For purposes of legal theory, courts assume facts, facts are conceded, claims are surrendered along the way. The indeterminacy of truth, which, if taken to its final Humean limits would render all of law a little suspicious, is not a pertinent way of limiting the rhetorical elaboration of rights. Even if three out of five of my criminal activities have been misconstrued—and not even Descartes could convince the court that I "really" was someplace else at the time—the

116 *Id.* at 449.
117 Peller, *supra* note 15, at 589.
118 Cover & Aleinikoff, *supra* note 104, at 1045.
119 Bator, *supra* note 15, at 510-12.
120 Stone v. Powell, 428 U.S. 465, 493-94 n.35 (1976).

process whereby my rights are mapped out upon the surface of probabilistic reality is not affected. One could argue that the *rights* do not really exist if they are articulated upon an indeterminate "reality," but it is doubtful that the legal system is prepared to play so ghostly a role.

Nor did Bator suggest that the fundamentally doubtful character of fact should prevent punishment. Unless one is so skeptical as to doubt that an unjust punishment is absolutely happening, because it cannot be the subject of certain proof, the reality of punishment is more determinate than any "beyond a reasonable doubt" standard. But this disparity, which is narrowed by the probabilistic improvements of redundancy, was not raised by Bator.

The concern for finality which Bator expressed has merged in the Supreme Court with two other issues: the question of whether habeas corpus should be available unless a prisoner can make a "colorable claim of innocence," and the historical issue of whether habeas was intended to function as the kind of writ of error meant under *Brown v. Allen*. The use of habeas as a reagent to test the "accuracy" of a finding of guilt is not particularly apposite of habeas claims based on the accuracy of a sentence, and the Court has admitted as much.[121] Although the Court has moved toward adopting the late Judge Henry Friendly's idea[122] that the balance between finality and relitigation should tilt to granting the writ where claims did not receive fair attention in state court or where a "colorable claim of innocence" exists,[123] the Court's formula, which speaks of trying to use the writ to prevent "a fundamentally unjust incarceration," could be recast to include a probing review of sentences.

In fact, the history of habeas corpus in America shows that the justice of sentencing was a traditional use of the writ long before *Brown v. Allen*.[124] Although Bator was interested in using the writ primarily as an institutional check on process, in his own influential history of habeas he admitted that by 1873 the Court was using "habeas corpus . . . to reexamine, not substantive errors going to the conviction, but alleged illegality in the sentence."[125] Even if Bator's version of habeas history is correct (which is hotly disputed)[126] and the initial American use of the writ was as a "strict jurisdictional

121 Smith v. Murray, 477 U.S. 527, 538 (1986); *id.* at 545-48 (Stevens, J., dissenting).

122 Friendly, *supra* note 15.

123 *Id.* at 160.

124 Bator, *supra* note 15, at 471.

125 *Id.* at 467.

126 Peller, *supra* note 15, at 610-42.

test,"[127] he admitted that the "sanctity of a judgment' of conviction was not ascribed to a sentence because it was felt that the judge's sentencing function is not judicial' in the same sense as his decision of the issues bearing on the substantive outcome."[128] Bator disliked this idea and would not allow modern defendants to "gain comfort"[129] from what he regarded as exceptions to simple jurisdictional review, because he found it "unhistoricial" to decide that the old "rubrics were meaningful and useful."[130] This is actually a curious statement coming from Bator, given the significance he would attach to the rubric of "jurisdiction." For, as Peller pointed out, the jurisdictional review of the Supreme Court has altered drastically since the 19th century.[131] Peller went to some lengths to show that the 19th century Supreme Court's treatment of habeas cases was based on "lack of appellate jurisdiction, not a narrow view of the habeas remedy,"[132] because the Court at that time simply lacked appellate jurisdiction over criminal judgments. The lower federal courts, which were not so circumscribed, interpreted the writ in merits terms, not as a purely formal jurisdictional inquiry.

The contemporary Supreme Court, which has narrowed the federal rights relitigation role of *Brown v. Allen*, has yet to come to grips with the historical significance of the sentencing review noted by Bator. Although the Court has generally adopted Justice Powell's reworking of Bator's historical thesis as a revisionist means of defining the role of habeas, and of narrowing *Fay v. Noia*,[133] the Court's historicism has yet to achieve a penalty or sentencing dimension. Assuming the Court continues to be convinced by Bator's history, the Court need not be bound by the categories he uses. Where Bator finds the review of sentencing to be an "extension" of the writ, the Court could make the same distinction as the 19th century Court—sentencing is not the kind of judicial act which requires only a processual review.

The intervention of Judge Friendly's "colorable claim of innocence" into habeas law provides another avenue for the Court to consider sentencing as an integral part of habeas. The holdings in *Rose v. Mitchell*[134] and *Vasquez v. Hillary*,[135] as they interact with the

127 Bator, *supra* note 15, at 471.
128 *Id.*
129 *Id.* at 472.
130 *Id.*
131 Peller, *supra* note 15, at 611.
132 *Id.*
133 372 U.S. 391 (1963).
134 443 U.S. 545 (1979).
135 474 U.S. 254 (1986).

limitations of *Stone v. Powell*,[136] suggest that an amalgam of Friendly and Bator is in the works.[137] While *Stone* emphasized the guilt related nature of collateral review, *Rose* and *Hillary* re-examined claims of racial discrimination in jury selection which did not affect the determination of guilt.[138] Peller speculated that the Court seems to be developing a bifurcated approach to habeas which will amount to full collateral review of guilt related claims and a selective review of non-guilt claims amounting to "personal constitutional rights" rather than "judicially created remedies."[139] Peller was quite right to suggest that this sort of bifurcation reveals conflicting views of the "nature of legality"[140]—for the guilt review method is result oriented, while cases like *Rose* and *Hillary* are process oriented.[141]

Whatever the logical inconsistencies of this approach, the question of sentencing review will be central. The issue of the "accuracy" of a death sentence, if presented apart from claims which call into question the finding of guilt, should be reviewed as a process oriented claim. This is so because the right to appropriate punishment is a personal constitutional right, not a judicial remedy such as the fourth amendment "rights" cut off from review by *Stone v. Powell*. It seems from the cases, however, that the view more likely to prevail is that sentencing should be reviewed under the result prong of the bifurcated habeas scheme. Justice O'Connor, writing for the Court, and Justice Stevens, in dissent,[142] have acknowledged that the factual innocence inquiry is not apposite to sentencing review.[143] There is, however, the idea that "innocence" as applied to sentencing has vitality in the sense that a person given a sentence is factually innocent if he or she does not merit that particular penalty. The claim is not that a prisoner is innocent in the sense that he or she should be set free, but that the sentence is inappropriate. One federal court of appeal's judge put it this way in dissent:

> In the context of death penalty habeas corpus litigation, one may be guilty of murder and yet not subject to the death penalty. Thus, when I advocate that a district judge ought to be able to hear a petition brought by one claiming innocence, I would interpret "innocence," where the death penalty is involved as being innocent of any statutory aggravating circumstance essential to eligibility for the death

136 428 U.S. 465 (1976).
137 Peller, *supra* note 15, at 602.
138 *Id.* at 597.
139 *Id.* at 599.
140 *Id.* at 602.
141 *Id.*
142 *Id.* at 2672-73.
143 Smith v. Murray, 477 U.S. 527, 538 (1986).

penalty.[144]

It is worth remembering in this context that Judge Friendly's idea of restricting habeas to cases in which colorable claims of innocence exist came at a time when the death penalty was itself moribund.[145] The balancing of finality as a virtue in the legal system against the search for an approximated probabilistic account of the truth is struck differently when the penalty is death.[146] Death has its own finality, and a separate jurisprudence, to be discussed below,[147] which stresses the need for more than ordinary care in review is necessary.

The complexity of the Court's bifurcated approach, which seems to be developing a hierarchy of rights[148]—some available for habeas review, others not—leaves current habeas law in a treacherously unpredictable state. As Peller pointed out, the statutory reinterpretation, which has been in progress since *Stone*, is sub rosa—some members of the Court denying that a reinterpretation is in progress, others decrying it *as law* and as judicial dishonesty. The current synthesis of result and process analyses contains a logical incoherence, perhaps a deep philosophic disagreement about the "nature of legality,"[149] which is probably as unstable from a predictive standpoint as it is logically. Doctrine, in short, is in metamorphosis. The "legal" question of how to present a claim, how best to appeal to a court's sense of its duty, is never a simple question. When doctrine is unstable and possibly undergoing silent revision, the task is a speculative one even for a professional.[150]

Doctrinal answers will be found as the Supreme Court selects cases already defined by the dialectical process identified by Cover and Aleinikoff. State and federal courts, struggling with the logical difficulties inherent in an unresolved tension between process and factual innocence, between personal rights and judicial remedies, will clarify the emergence of what may be a revision of the writ by accretion. The complexity of this process, which took Cover and Aleinikoff sixty-seven pages to explain, along with the rather rarified conceptual nature of the distinctions between result and process,

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144 Moore v. Kemp, 824 F.2d 847, 878 (11th Cir. 1987)(en banc)(Hill, J., dissenting), *cert. granted*, 109 S. Ct. 925 (1988).

145 Friendly, *Is Innocence Irrelevant?*, 38 U. CHI. L. REV. 142 (1970). Friendly's article appeared in 1970, during a ten year (1967-77) moratorium on executions in the United States.

146 *Smith*, 477 U.S. at 545-48 (Stevens, J., dissenting).

147 *See infra* § VII.

148 Peller, *supra* note 15, at 599.

149 *Id.* at 602.

150 *Id.* at 600-601.

the definition of what is a right and what is a remedy, and the debate over the history of habeas, make this area of the law a theoretician's field day.

Keeping in mind the complexity of habeas law, and also keeping in mind the picture of an isolated, psychologically pressured, and illiterate, mentally ill retarded death row inmate described in *Facing Death Alone*, the reader is asked to estimate the likelihood that *pro se* entrants in this dialectic would be able to hold up their end of the conversation. The federalist dialectic Cover and Aleinikoff discerned in habeas relitigation—which informs the decision-making of the Supreme Court—depends, in its turn, on the small scale dialogue between the state and the condemned prisoner. The debate at the top of this pyramid implicates philosophical concerns about the nature of legality itself. At the broad base, prisoners concerned with staying alive present rights claims which are refined, winnowed and elaborated through two court systems. The ultimate defninition of our rights, on the rarefied theoretical level, is the result of this dialogic interaction. Cover and Aleinikoff's response to this was to stress the importance of keeping the federal courts involved in this dialogue to ensure its integrity. At the bottom level of the process, the interaction of pragmatic state courts, micro-managing criminal justice, and federal courts, representing the idealist strain in American legal history, provide the Supreme Court with well-defined and actual choices. Thus *all of us* have a stake in the effective functioning of a process which defines the rights individuals bear. The state and federal systems, if they are to contribute to this process, need a technically correct, philosophically informed dialogue between their litigants. Each level needs a pair of forceful and prepared participants capable of recognizing the institutional needs of successful dialogue.

We are committed, or so the courts often tell us, to the idea that dialectical processes inform those who make legal choices for us. The adversarial process is the local level of this creed. The federalist dialectic is the local/national level of it. At the federal level, the separation of powers produces a similar, often bitterly fought, interchange. While not forgetting the personal importance of counsel to the condemned, the purpose here is to argue that good lawyers are essential to the process itself. It is a complex area of the law, but also one which means a great deal to all of us as rights bearers. The legal system itself needs a vital and intelligent institutional framework for the definition of habeas corpus. Lawyers are essential to the quality of the adversarial dialectic. Judicial self-respect should be enough to require counsel at every conversational step, state or

federal, because the courts have an obligation to themselves that their information, the kinds of arguments they hear, and the implications of a given decision, are presented competently. In dissent in *Betts v. Brady*, Justice Black cited to the Indiana Supreme Court of 1854, for the proposition that:

> It is not to be thought of, in a civilized community, for a moment, that any citizen put in jeopardy of life or liberty, should be debarred of counsel because he was too poor to employ such aid. No Court should be respected, or respect itself, to sit and hear such a trial. The defense of the poor, in such cases, is a duty resting somewhere, which will be at once conceded as essential to the accused, to the Court, and to the public.[151]

The more abstract level at which post-conviction law works to define general principles is less humanly moving than the spectacle of a single life lost because of lack of counsel. But the institutional duty remains to ensure an informed process, beyond the kangaroo trial court indecency Justice Black loathed. For the flaws of dialogue left by inadequate argument come back to condemn other individuals, as yet unknown, whose lives depend on how well their rights are defined today.

V. THE SIXTH AMENDMENT OR THE FOURTEENTH AMENDMENT: *GIDEON V. WAINWRIGHT* AND *DOUGLAS V. CALIFORNIA*

The second constituent underlying the right to counsel for the condemned in post-conviction proceedings is the right to counsel at felony trials and on the first non-discretionary appeal, found in *Gideon v. Wainwright*[152] and *Douglas v. California*.[153] In a happier day, these cases would have been extended long ago to cover all aspects of the death penalty process from arrest to cemetery. They have not been used for this purpose in non-capital cases, but even this limitation has been achieved only through a stingy reading of precedent.

It is a time honored device of legal reasoning to show how a case can be gutted by a narrow reading.[154] Oftentimes, this consists of limiting a case to its facts or to the minima of its rationale.[155] This technique, which implies covert disapproval of a case, can be used honestly, although there are no rules which say it must be. To use a precedent or to limit it offers courts a way to rewrite history.

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[151] 316 U.S. 455, 476-77 (1942)(Black, J., dissenting) (quoting Webb v. Baird, 6 Ind. 13, 18 (1848)).

[152] 372 U.S. 335 (1963).

[153] 372 U.S. 353 (1963).

[154] *See* Kennedy, *Legal Education as Training for Hierarchy*, in THE POLITICS OF LAW 40, 45 (D. Kairys, ed. 1982).

[155] K. LLEWELLYN, *supra* note 99, at 87.

The first step is to maul a case by restating it. This can be seen as a necessary lubricant allowing the law to free itself gradually from odious disjecta membra of its past.

Whatever the advantages of this technique may be, the *Gideon-Douglas* line of cases has been subjected to it in an extraordinary way. The prestige of *Gideon* is such that only judicial tartuffery has been available to the Court. The result has been bad law in a sense having nothing to do with one's view of the results as *outcomes*. It is bad law considered from the loftiest peaks of neutrality and indifference.

Gideon is deservedly famous for its guarantee of the right to counsel in state trial felony courts, as well as for its forthright repudiation of *Betts v. Brady*[156] (reflecting a personal triumph for Justice Black and judicial honesty). The case needs its background or it is a faceless rule in a vacuum.[157]

Powell v. Alabama[158] had established the right to counsel in capital trials thirty years previously. It is no accident that *Powell v. Alabama*, the first case to interpret the federal Constitution to guarantee the right to counsel in state felony trials, was a capital case. To be sure, *Powell* did not explicitly create a right to counsel in all capital cases. Only in those capital cases in which the defendant was incapable of making his own defense—because, for example, of ignorance or illiteracy—was a defendant entitled to counsel. But even during the regime of the *Betts v. Brady*[159] "special circumstances" test, the right to counsel was deemed absolute in capital cases. The Court noted in 1961 that "[w]hen one pleads guilty to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted."[160]

In the principal brief for petitioner in *Gideon v. Wainwright*,[161] Clarence Earl Gideon argued—through counsel—that the distinction between capital and non-capital felony cases could not be defended. Counsel was indispensable in both.[162] The Court implicitly agreed, overruling *Betts v. Brady*. Justice Harlan, concurring, noted that "[t]he special circumstances rule has been formally abandoned in capital cases, and the time has now come when it should be simi-

156 316 U.S. 455 (1942).

157 *See* A. LEWIS, GIDEON'S TRUMPET (1964).

158 287 U.S. 45 (1932).

159 316 U.S. 455 (1942).

160 Hamilton v. Alabama, 368 U.S. 52, 55 (1961); *see also* Uvegers v. Pennsylvania, 335 U.S. 437, 441 (1948); Bute v. Illinois, 333 U.S. 640, 674 (1948).

161 372 U.S. 335 (1963).

162 Brief for Petitioner at 43-44, Gideon v. Wainwright, 372 U.S. at 335 (1963).

larly abandoned in non-capital cases, at least as to offenses which, as the one involved here, carry the possibility of a substantial prison sentence."[163]

In *Gideon*, Justice Black did more than incorporate *Powell* by reference—he quoted it at length.[164] In so doing, he brought Justice Sutherland's rhetoric back as part of his analysis of the "fundamental" character of the right to counsel. The fundamental status of the federal guarantee overcame *Betts v. Brady* under the logic of *Palko v. Connecticut*:[165] If the right is fundamental to "ordered liberty" under *Palko*, it applies to the states *via* the fourteenth amendment.[166] The Court, however, was not content to label the guarantee as fundamental and cryptically incorporate it that way. *Gideon reasoned* to find out *why* the right to counsel "in all criminal prosecutions" is fundamenta.[167] These reasons offer no basis for supposing that trial is different from appeal or post-conviction.

Gideon stated that the right is fundamental *because of* the adversarial process.[168] The fact is that governments make sure that *their* side is represented by the best lawyers they can obtain.[169] Furthermore, defendants hire lawyers whenever they can: "That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries."[170] The opinion then quoted from *Powell* at length:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.[171]

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163 372 U.S. at 351 (Harlan, J., concurring).

164 *Id.* at 344-45.

165 302 U.S. 319, 324-26 (1937).

166 *Id.* at 324-25, 326.

167 *Id.* at 339, 341-45.

168 372 U.S. at 344.

169 *Id.*

170 *Id.*

171 344 U.S. at 344-45 (quoting Powell v. Alabama, 287 U.S. at 68-69).

The Court in *Betts v. Brady* analyzed the issue as did Justice Black later in *Gideon*. The question in both cases was whether the presence of counsel was "so fundamental and essential to a fair trial, to due process of law, that it is made obligatory upon the states by the fourteenth amendment."[172] The Court in *Betts* refused to find counsel required for all cases, because the "totality of facts in a given case" might not always demand counsel.[173] The sliding scale approach of *Betts*, later condemned in *Gideon*, could be harmonized with the holding of *Powell* by distinguishing *Powell* as a *capital* case, that is, by taking the possibility of execution as part of the "totality" of the case in determining whether the absence of counsel would be "shocking to the universal sense of justice."[174]

Gideon decided that it shocks the fundamental sense of justice to let a defendant go into a felony trial without a lawyer.[175] The excerpt from *Powell*, and the Court's recognition of the adversarial context, form the heart of the ratio decedendi of *Gideon*.[176]

This analysis has two separate prongs. The first is the recognition that it is unfair to pit lay people against lawyers whom the state will invariably deploy on its behalf. The second is linked but shaded differently, taken out of the adversarial context to stand alone: The law is simply too complex to expect that a layperson could succeed even with what ought to be a successful claim. It follows that the nature of the legal *process* frustrates a *pro se* effort—an adversarial presentation of technically abstruse argument will frustrate the "noble ideal" of a fair trial, "if the poor man charged with crime has to face his accusers without a lawyer."[177]

Powell and *Gideon* dealt with trials, but they cannot fairly be so limited. Part of the reason for this comes from *Douglas*, but the true reason should be clear—the adversarial and technical law should not be available only to one side. *Each* stage of a "criminal prosecution"[178] contains these elements. The *reasons* for concern which lie behind *Gideon* do not evaporate after trial. The Court does not pretend that they do.

One could restate *Gideon* narrowly, as standing for the proposi-

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172 *Betts*, 316 U.S. at 465.

173 *Id.* at 462.

174 *Id.*

175 This is a way to fit *Gideon* in under *Betts*, which allows for an evolving standard of *legal* decency.

176 The only other task Black faced was incorporation under *Palko*. *Gideon*, 372 U.S. at 342.

177 *Gideon*, 372 U.S. at 345.

178 U.S. CONST. amend. VI.

tion that states (and the federal courts)[179] must furnish counsel at trial in felony cases. There is a reassuring black letter familiarity to that sort of treatment. It is no canard, however, to say that the *rule* of *Gideon* ought not be divorced from its logic, which is, after all, that lawyers are so important to due process that poor people ought to get them too. To this the riposte is doubtless true—at trial, because that is what "criminal prosecution" means in the sixth amendment.

To explore this idea it is necessary to turn to *Douglas v. California*.[180] In *Douglas*, petitioners had been denied court appointed counsel for their appeals as of right because the state appellate court belived it would do "no good whatever. . . ."[181] Justice Douglas, writing for the Supreme Court, agreed with Justice Traynor of the California Supreme Court that denial of counsel on appeal was "a discrimination at least as invidious as that condemned in *Griffin v. Illinois*. . . ."[182] The right to counsel was thus brought under the wing of *Griffin*, which *Douglas* restated in this way:

> In *Griffin v. Illinois*, we held that a State may not grant appellate review in such a way as to discriminate against some convicted defendants on account of their poverty. Their . . . right to a free transcript on appeal was in issue. Here the issue is whether or not an indigent shall be denied the assistance of counsel on appeal. In either case the evil is the same: discrimination against the indigent. For there can be no equal justice where the kind of an appeal a man enjoys "depends on the amount of money he has."[183]

The Court thus defined a *Griffin* situation as one in which the state may not "*grant* appellate review in such a way as to discriminate against some *convicted* defendants on account of their poverty."[184] The Court was reading *Griffin* and holding in *Douglas* that an appeal *when granted*—again, once it is in place *as a procedure*—may not operate to discriminate against the indigent.

Douglas guaranteed counsel for the first appeal as of right, which was the situation before the Court.[185] The opinion expressly denied that it was deciding the rule for discretionary appeals.[186] The contemplated threshold for future cases was said to be that "differences" may exist "so long as the result does not amount to a denial

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179 Johnson v. Zerbst, 304 U.S. 296 (1938).

180 372 U.S. 353 (1963).

181 *Id.* at 355.

182 *Id.* (quoting People v. Brown, 55 Cal.2d 64, 71, 357 P.2d 1072, 1076, 9 Cal. Rptr. 816 (1955) (Traynor, J., concurring)).

183 *Id.* at 355 (quoting Griffin v. Illinois, 351 U.S. at 19).

184 *Griffin*, 351 U.S. at 18 (emphasis added).

185 372 U.S. at 356.

186 *Id.*

of due process or an invidious discrimination."[187] This open-ended formulation was not all, for the Court went on to say that "[a]bsolute equality is not required: lines can be and are drawn and we often sustain them."[188] But "where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor."[189] At issue was whether the rich person could "require the court to listen to argument of counsel before deciding on the merits, but a poor [person] cannot."[190] This violates equal protection, the "equality demanded by the Fourteenth Amendment."[191]

The opinion in *Douglas* suggests that the real standard to be applied is whether "[t]he indigent . . . has only the right to a meaningless ritual, while the rich man has a meaningful appeal."[192] Underlying the obvious equal protection implications of the standard is the ominous use of "right" in "right to a meaningless ritual." In a rhetorical context, the use of "right" is clearly ironic. There is room however, to distinguish between a "right" and a "grant," in the sense in which "grant" is used in *Griffin*. For there is more than a hint in *Griffin*—and in the *Douglas* exposition of *Griffin*—that granted appeals have the power to "bootstrap" the state into due process. If this is so, the *Douglas* limitation on appeals "as of right" is a mere fortuity of caselaw development, and the crucial item of the analysis becomes the question of whether "invidious discrimination" degrades *granted* appeals into "meaningless ritual." To discover this requires examination of *Griffin* itself.

Griffin v. Illinois[193] dates from 1956 and thus predates *Gideon*. At that time, Illinois required payment of a fee to obtain a transcript of one's trial. Having a transcript was necessary to obtain appeal on a writ of error, since "to get full direct appellate review of alleged errors by a writ of error it is necessary for the defendant to furnish the appellate court with a bill of exceptions."[194] Illinois law defined writs of error as appeals of right.[195]

Counsel for the state conceded that petitioners needed their

187 *Id.*
188 *Id.* at 357.
189 *Id.*
190 *Id.*
191 *Id.* at 358
192 *Id.*
193 351 U.S. 12 (1956).
194 *Id.* at 13.
195 *Id.*

transcripts "in order to get adequate appellate review."[196] Therefore, the due process/equal protection claim was squarely before the Court. Despite the historical fact that appeals are not required by the federal Constitution, the Court found "no meaningful distinction" between trial, *per se*, and appellate review. Once the states impose appeals on themselves, they cannot go back on their pledge to provide a fair hearing: "Consequently, at *all* stages of the proceedings the Due Process and Equal Protection Clauses protect persons . . . from invidious discriminations."[197] Justice Frankfurter's concurrence, although stressing the idea that absolute equality ought not be the expectation, was equally clear on the point that self-imposed processes do trigger a fourteenth amendment analysis.[198] If the state has a "general policy of *allowing* criminal appeals, it cannot make lack of means an effective bar to the exercise of this opportunity. The State cannot keep the word of promise to the ear of those illegally convicted and break it to their hope."[199]

Thus the *stage* of a proceeding, even the non-required nature of a proceeding, binds the "grantor" of a right, since even created rights (if there is any other kind of right)[200] generate reciprocal obligations. The Court has not, however, so held. In a series of non-capital cases, the Court drew the line at the first appeal as of right.

The Court in *Ross v. Moffitt*[201] refused to extend *Douglas* to discretionary review beyond the first plenary appeal. Following *Moffitt*, the Court in *Wainwright v. Torna*[202] rejected a state prisoner's claim that he had been denied effective assistance of counsel when his appellate attorney filed an untimely application for certiorari in the Florida Supreme Court, which that court refused to entertain. The United States Supreme Court, relying on *Moffitt*, found that Torna did not possess a "constitutional right to counsel" in efforts to obtain such discretionary review and concluded that "since Torna had no constitutional right to counsel, he could not be deprived of the effective assistance of counsel by his retained counsel's failure to file the application timely."[203]

In *Pennsylvania v. Finley*,[204] the Court applied *Moffitt* to hold that

196 *Id.* at 16.
197 *Id.* at 18 (emphasis added).
198 *Id.* at 20 (Frankfurter, J., concurring).
199 *Id.* at 24.
200 *Cf.* R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977) *with* H. HART, THE CONCEPT OF LAW (1961).
201 417 U.S. 600 (1974).
202 455 U.S. 586 (1982).
203 *Id.* at 587-88.
204 107 S. Ct. 1990 (1987).

there is no right to counsel in state post-conviction proceedings:

> [W]e have never held that prisoners have a constitutional right to counsel when mounting collateral attacks to their convictions and we decline to so hold today. Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further. Thus, we have rejected suggestions that we establish a right to counsel on discretionary appeals. We think that since a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, a fortiori, he has no such right when attacking a conviction that has long since become final upon exhaustion of the appellate process.[205]

The Court reasoned that "post-conviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceeding itself, and it is in fact considered civil in nature."[206] It is a "collateral attack that normally occurs only after the defendant has failed to secure relief through direct review of his conviction. States have no obligation to provide this avenue of relief, and when they do, the fundamental fairness mandated by the Due Process clause does not require that the State supply a lawyer as well."[207]

The actual holding of *Finley* is most relevant to the inquiry here. But because *Finley* was based almost entirely on *Moffitt*, a focus on *Moffitt* is necessary. Chief Justice Rehnquist, writing for a majority of the Court in *Moffitt*, restated *Douglas v. California* as follows: "[*Douglas*] held that the State must . . . provide counsel for the indigent on his first appeal as of right."[208] After describing the history of the case, Rhenquist quoted from the *Douglas* opinion as it left open the right to counsel at subsequent stages of appeal. To leave *Douglas* or *Griffin* open to restatement, the *Moffitt* Court said that "[t]he precise rationale for the *Griffin* and *Douglas* line of cases has never been explicitly stated, some support being derived from the Equal Protection Clause . . . and some from the Due Process Clause."[209] *Moffitt* concluded that "[n]either clause by itself pro-

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205 *Id.* at 1993 (citations omitted).

206 *Id.* at 1994.

207 *Id.* (citations omitted). *Moffitt*, *Torna* and *Finley* were non-capital cases. One district court and a student commentator have powerfully distinguished *Moffitt* from capital cases on that basis. Note, *Due Process in State Capital Cases: The Right to Counsel for Indigent Defendants Beyond the Initial Appeal As of Right*, 7 N.Y.U. REV. L. & SOC. CHANGE 61, 79-80 (1978). District Judge McMillan wrote that "[w]here a man's life is at stake, I am not prepared to concede that the law in *Moffitt*, the case of a small time forger, should apply." Carey v. Garrison, 403 F. Supp. 395, 397 (W.D.N.C. 1975). *See also* In re Anderson, 69 Cal. 2d 613, 447 P.2d 117, 73 Cal. Rptr. 21 (Cal. 1968) (pre-*Moffitt* case requiring counsel for certiorari petition in capital case).

208 417 U.S. at 607.

209 *Id.* at 608-9.

vides an entirely satisfactory basis for the result reached."[210] The *Moffitt* opinion then addressed the bases of decision in those cases by using the *dissent* Justice Harlan wrote in *Douglas*, without looking to the majority opinion to see whether the "rationale" was "explicitly stated" or not.[211] Noting that "[t]he Court in *Douglas* stated that [w]hen an indigent is forced to run this gauntlet of a preliminary showing of merit, the right to appeal does not comport with fair procedure' "[212]—a sentiment lacking explicitness only in that it avoids a ritualistic incantation of quoting the fourteenth amendment. The *Moffitt* opinion then stated that Justice Harlan, in *dissent*, thought that the "due process issue . . . was the only one worthy of extended consideration."[213]

Having infiltrated the dissent—the *losing* side of the Court's majority—to sidestep the equal protection side of the opinion of the Court in *Douglas*, the only remaining leg of *Douglas* was due process. Due process was the only aspect of *Douglas* that the *Moffitt* Court wanted to talk about, and the fact that the dissent in *Douglas* wanted to eliminate equal protection allowed the Court to glide lightly past half the rationale of *Douglas*.[214] When the *Moffitt* opinion did discuss equal protection, it was only to say that many cases have indicated that "simple equality," to use Walzer's phrase,[215] is not what the clause is all about.

There are reasons for reading *Moffitt* narrowly which transcend one's sympathy for the victims of its logic. First, *Moffitt* was itself a piece of subterfuge. It read the due process and equal protection rationales of *Douglas through* the dissent, and without a meaningful discussion of the ratio decedendi of the majority opinion. Second, *Moffitt* posed an arbitrary boundary to extension of *Douglas* which was in no way founded on anything which decided *Douglas*. Third, the equal protection argument in *Moffitt* said only that that clause does not impose a regime of simple equality, but offered no intelligible basis for not trying to infuse some content into the clause. Fourth, the holding in *Moffitt* spoke of applying equal protection in degrees, but the Court did so using the wrong sliding scale. The degree to be used ought to be the risk to which a defendant or inmate is exposed, rather than where he or she is on the criminal law's assembly line.

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210 *Id.* at 609.
211 *Id.*
212 *Id.* (quoting *Douglas*, 372 U.S. 353, 357).
213 *Id.* at 609-10.
214 *Id.*
215 M.WALZER, SPHERES OF JUSTICE 14-26 (1983).

Fifth, the argument that counsel is not required on discretionary appeal is a flight from reality. State courts, the Court said in *Moffitt*, have no obligation to provide any appeals; therefore no counsel can be required. This proves too much, becuase *other* protections are offered on discretionary appeals. It also *shows* nothing. The historical moment has long since passed when it would have been intelligible to refuse appeals altogether. The system as is offers the promise of justice to appellants and petitioners; somewhere along the way a decision was made by our legal culture to safeguard the process and its potential victims. The optional quality of *that* decision is today no more up for grabs than the use of a net in tennis.

However, that is also not what *Gideon*, *Douglas* and *Griffin* were about. As discussed above, those cases recognized functional limits to legal equality, but stressed the need to prevent a one-sided "gladiators versus the martyrs" sanction for indigent prisoners interested in exercising their rights.

Death row prisoners are almost always indigent. Given the typically commercial nature of the law, American courts have noticed that economic disparities can affect the outcome of cases in ways not easily reduced to judicial formulae. Noticing this fact has not necessarily translated into reality—the equal protection clause has never been pressed into service as guarantor of "majestic equality."[216] Noble language has decorated pragmatic minima when the alternative would be a radical critique of an entire order in which justice is a saleable commodity.

The opinions in *Douglas* and *Gideon* were grounded in their rhetoric. There is no suggestion in either case that the rules they announce are limited by the procedural stage of the cases.

VI. Access To The Courts

The third prong of the complex right to capital post-conviction counsel is the Court's access to courts' jurisprudence. The principal cases here, *Johnson v. Avery*[217] and *Bounds v. Smith*,[218] are based on the due process clause of the fourteenth amendment. Both cases dealt with the non-capital post-conviction process.

The Court in *Johnson* recognized that to require prisoners to fend for themselves in the post-conviction process is "in effect" to

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216 *Griffin*, 351 U.S. at 23 (Frankfurter, J., concurring).

217 393 U.S. 483 (1969).

218 430 U.S. 817 (1977).

deny them access to the judicial system.[219] In *Johnson* the dispute was over access to jailhouse lawyers, for example, prisoners who assist other inmates in pressing their appeals. The State of Tennessee discouraged such assistance by removing jailhouse lawyers from the general prison population.[220] The Supreme Court found Tennessee's actions unconstitutional.[221]

Since the general prison population includes among its number "a high percentage of persons who are totally or functionally illiterate, whose educational attainments are slight, and whose intelligence is limited,"[222] the Court concluded that "for all practical purposes, if such prisoners cannot have the assistance of a jailhouse lawyer,' their possibly valid constitutional claims will never be heard in any court."[223] In "the case of all except those who are able to help themselves—usually a few old hands or exceptionally gifted prisoners—the prisoner is, *in effect*, denied access to the courts unless such help is available."[224]

Bounds v. Smith[225] expanded the fundamental constitutional right of access to courts. In *Bounds*, the Court held that adequate prison law libraries are *one* constitutionally accepted way of insuring meaningful access to the judicial system. The alternative is to provide adequate assistance from persons trained in the law. The Court noted that its decision in *Johnson v. Avery* "did not attempt to set forth the full breadth of the right of access,"[226] and that "the cost of protecting a constitutional right cannot justify its total denial."[227]

The complexity of the post-conviction process was the main focus of the *Bounds* opinion. "It would verge on incompetence for a lawyer to file an initial pleading without researching"[228] the many issues that inevitably arise when filing an appellate brief or post-conviction pleading. "If a lawyer must perform such preliminary research, it is no less vital for a 'pro se' prisoner."[229] Indeed, "it is often more important that a prisoner complaint set forth a nonfrivolous claim meeting all procedural prerequisites, since the court may

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219 *Johnson*, 393 U.S. at 487.
220 *Id.* at 484.
221 *Id.* at 489-90.
222 393 U.S. at 487.
223 *Id.* (quoting Johnson v. Avery, 252 F. Supp. 779, 784 (1968)).
224 *Id.* at 488.
225 430 U.S. 817 (1977)
226 430 U.S. at 824.
227 *Id.* at 825.
228 *Id.* at 825.
229 *Id.* at 825-26.

pass on the complaint's sufficiency before allowing filing 'in forma pauperis' and may dismiss the case if it is deemed frivolous."[230] Even the most dedicated trial judges are bound to overlook meritorious cases without the benefit of an adversary presentation.

Notably, neither *Johnson* nor *Bounds* depended on the "of right" appeal stage made much of in *Ross v. Moffitt*—although neither did the cases misinterpreted in *Moffitt*. The rhetorical stance of *Johnson* and *Bounds* was quite different from the due process/equal protection language which the *Moffitt* Court found insufficiently explicit in *Douglas*. For this reason, the meaningful access cases, while less lyrical than those cases in which Supreme Court Justices sang the praises of lawyers in general, do inject a whiff of reality into the picture of *pro se* living. The opinion in *Johnson* was based on the *effective* denial of access to prisoners who are *in reality* incapable of taking advantage of what the law has "promised to their ears."

Johnson was a habeas corpus case,[231] and *Bounds* was a civil rights case[232] claiming an access to courts right. The Court's opinions relied on a logic similar to that of *Douglas* or *Griffin* in that the mere *existence* of the procedural avenue was used as the basis for the access right.[233] As with the existence of appeal in *Griffin*, the "is" of habeas, and the Court's recognized obligation to "maintain it unimpaired,"[234] lead to the realization that "it is fundamental that access of prisoners . . . may not be denied *or obstructed*."[235] The *Johnson* opinion was adamant and generous in this respect—the entirety of post-conviction proceedings "must be more than a formality."[236]

Furthermore, *Johnson* made a crucial point about access which implied an equal protection basis: "[T]here can be no doubt that Tennessee could not constitutionally adopt and enforce a rule forbidding illiterate or poorly educated prisoners to file habeas corpus petitions."[237] But the rule barring assistance by other prisoners "effectively does just that."[238] There is a link here to the *Griffin* sentiment that procedures carry with them an obligation to make sure that they actually fulfill the function for which they were established. *Johnson* found that the effective denial of a procedural opportunity is

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230 *Id.* at 826.

231 In Wolff v. McDonnell, 418 U.S. 539 (1974), the Court extended *Johnson* to prisoners seeking relief under civil rights statutes.

232 *Bounds* fell under 42 U.S.C. § 1983 (1986).

233 *Johnson*, 393 U.S. at 485-86.

234 *Id.* at 485 (quoting Bowen v. Johnson, 306 U.S. 19, 26 (1939)).

235 *Id.* (emphasis added).

236 *Id.* at 486.

237 *Id.* at 487.

238 *Id.*

only trivially different from an outright denial. If the procedure is constitutionally endorsed (as in a habeas case) the state cannot deny the means of implementation. If the procedure is self-imposed, obligations are genuine ones.

Lodging the "moral" issue under the rubric of "access" strikes at the heart of "legalism" as a political theory.[239] But the literature of jurisprudence is replete with recognition of the internal constraints of a commitment to the rule of law.[240] This phrase—"the rule of law"—frequently comes across sounding like little more than a Sunday school concept with no hard applicability to the "reality" of deciding cases. Further, in some sense, the phrase is difficult to provide with a content. Fuller and other jurisprudes concerned with the *minimal* requirements necessary to say that a given society *has* a legal system at all have looked, however, to the internal constraints—Fuller used the expression "inner morality of law"[241]—which force self-respecting legal systems to use the procedures they hold out to their citizens.

On the most fundamental level, "access" is a procedural "offer" to prisoners. Without it—and without safeguards to make access more than a "meaningless ritual"—the rest of the hopes anticipated by having a "justice system" are insultingly out of reach. The rest of one's rights are meaningless unless access is meaningful.

It is therefore a jurisprudential error to suppose that the access cases can be dealt with in a narrow way, as was done with *Douglas*, because their logical basis and linguistic emphasis on reality-based effectiveness of access are not fact bound holdings which can be limited to accidental caselaw accretions. The holdings of *Johnson* and *Bounds* are not based on "rules" of the black letter variety. They are premised on a jurisprudential fundamental which defines the parameters of "legality" as part of our political theory. To ignore the ratio decedendi of these cases would be to make no law in the sense that a betrayal of their concerns would be a betrayal of the concept of law and, in a basic sense, lawless.

VII. THE EIGHTH AMENDMENT AND THE IDEA THAT DEATH IS DIFFERENT

The final element of the right to counsel at all stages of a capital case is the uniqueness of the death penalty.[242] The Supreme Court

239 *See* Shklar, *Legalism*, in LAW AND MORALS (1986).

240 L. FULLER, THE MORALITY OF LAW (1934).

241 *Id.*

242 *See generally* C. BLACK, CAPITAL PUNISHMENT (2d ed. 1981); Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1 (1980).

recognized this qualitive difference even in the early modern era of constitutional criminal procedure. *Powell v. Alabama* guaranteed lawyers for capital trials, while *Betts* left non-capital cases open to a sliding scale of necessity. The Court's modern death penalty jurisprudence stresses the need for "a greater degree of reliability when the death sentence is imposed."[243] In restating the modern penalty, the Court has emphasized that it is "profoundly different from all other penalties."[244]

This sentiment depends on the finality of death. A prison term can be modified as time passes—there are the possibilities of probation, parole and post-conviction remedies into the far future.[245] It is also grounded on the unique severity of death as a punishment—the immense gravity of the decision.[246] The powerful condemnatory purpose of death, which makes a capital punishment "unique . . . in its rejection of rehabilitation of the convict as a basic purpose of criminal justice,"[247] removes death from the usual calculus of punishment. Death penalty law, as it has developed since *Furman*, is a response to this perception. The requirements of the Court's modern capital jurisprudence reflect the need to increase the accuracy of general criminal procedure when death is the possible outcome. The concern for accuracy and the seriousness of the punishment are factors that have made the capital post-conviction process so complex that a *pro se* prisoner cannot be expected to handle it without assistance of counsel.

This Article has been emphasizing the tension between the procedures which are held out to prisoners and the reality of *pro se* use of those procedures. The generalities of modern death penalty jurisprudence, with their emphasis on the need for reliability, are undermined by the growing shortage of lawyers willing or able to take death cases.[248] However, this simple picture of straight-forward systemic breakdown has been complicated by the Court's seeming tendency to grow impatient with the efforts of death row lawyers.[249] The Court's opinion in *Barefoot v. Estelle*[250] reflects this tendency. *Barefoot* allows federal appellate courts to compress stay of execution applications into proceedings on the merits of the habeas corpus petition and, therefore, to greatly expedite consideration of capital

243 Lockett v. Ohio, 438 U.S. 586, 604 (1978).
244 *Id.* at 605.
245 *Id.*
246 Woodson v. North Carolina, 428 U.S. 280, 305 (1976).
247 *Furman*, 408 U.S. 238, 306, (Stewart, J., concurring).
248 Mello, *supra* note 3, at 567-85.
249 Amsterdam, *In Favorem Mortis*, 14 HUMAN RIGHTS 13 (1987).
250 463 U.S. 880 (1983).

post-conviction cases. The *Barefoot* Court upheld the expedited procedures adopted by the United States Court of Appeals for the Fifth Circuit.[251]

But *Barefoot* is more complicated than that. *Barefoot* diminished the effect of the rhetoric and procedural hedges based on the need for heightened reliability in death cases. Yet a *Barefoot* rule—the kind of rule which collapses separate proceedings into a single event—*increases* the need for counsel. The Court's *Barefoot* opinion itself behaved as if counsel was a predicate to upholding a *Barefoot*-style procedure.

The Fifth Circuit's procedure was upheld precisely because that court had an adequate hearing on the merits. "Although the Court of Appeals moved swiftly to deny the stay, this does not mean that its treatment of the merits was cursory or inadequate. On the contrary, the court's resolution of the primary issue on appeal, the admission of psychiatric testimony on dangerousness, reflects careful consideration."[252]

The Supreme Court went on to say that it would uphold "expedited procedures" only under certain conditions, one of which is that "*counsel* has adequate opportunity to address the merits and knows that he is expected to do so. If appropriate notice is provided, argument on the merits may be heard at the same time . . . ."[253] At the hearing in *Barefoot*, "petitioner's *attorney* was allowed unlimited time to discuss any matter germane to the case."[254] After their adverse district court ruling, Barefoot's *counsel* had "71 days to prepare the briefs and arguments" for presentation to the Fifth Circuit.[255] When the circuit court ruled, it specifically mentioned that "*petitioner is represented here, as he has been throughout the habeas corpus proceedings in state and federal courts, by a competent attorney experienced in this area of the law.*"[256]

Thus, although *Barefoot* reflects an unfortunate lessening of the general need for accuracy and thorough procedure in capital cases,

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251 *Id.* at 887. As a gesture of judicial impatience with the death bar (unfortunately harming its clients more than the advocates), *Barefoot* has been roundly condemned. Note, *The Rush to Execution: Successive Habeas Corpus Petitions in Capital Cases*, 95 YALE L.J. 371 (1985); Note, *Habeas Corpus—Expedited Appellate Review of Habeas Corpus Petitions Brought By Death-Sentenced State Prisoners*, 74 J. CRIM. L. & CRIMINOLOGY 1404 (1983); Note, *Summary Processes and the Rule of Law: Expediting Death Penalty Cases in the Federal Courts*, 95 YALE L. J. 349 (1985).

252 463 U.S. at 892.

253 *Id.* at 894.

254 *Id.* at 886 (emphasis added).

255 *Id.* at 890.

256 *Id.* at 891 (quoting Barefoot v. Estelle, 697 F.2d 599, 600 (5th Cir. 1983))(emphasis added).

it is implicit in the case that expedited procedure cannot be fair without counsel. The obligation to provide counsel increases with the advent of *Barefoot* rules.

VIII. CONCLUSION

The lines of doctrine and philosophy discussed in this Article ought to have implications. The thrust of case rhetoric, and the judicially protected "space" mapped out by the cases, begs for a conclusion recognizing the right to counsel throughout the process—any process—in which a person is put at risk inside an adversarially constructed system in which the state marshalls *its* legal resources to take the life of a citizen.

The rhetoric and holding of a case like *Griffin* or *Douglas* is unmistakeable, despite the obvious and easy facts of decision. The decisions—thought of in terms of *outcomes*—stop short of the guarantee supported here. The "true" meaning of the cases is not as clear as the outcomes, and the business of telling a court that it is *bound* in any significant way by the thrust or jurisprudential energy of a precedent is admittedly tricky and not self-evident. This is so because the nature of appellate decision-making is designedly deliberate, incremental and timid; the grounds of appellate decision are fluid, and nothing is predetermined or dictated by precedent not on all fours. The move to recognizing a general right to counsel, although it would be an easy, comfortable, incremental judicial move, still is not a "finding the law" maneuver. The extension of the cases would be a classic casebook piece of logic, hardly a revolutionary maneuver, less of a leap forward than *Furman* was, less than *Gideon*—*Gideon*, which required, after all, converting a dissent by Justice Black into a holding by Justice Black, flatly repudiating *Betts v. Brady*.

It would be neither complex nor daring to knit together these cases into the proposition that a right to counsel in capital post-conviction proceedings is constitutionally required. The only judicial act of any subtlety, and that marginal, would be distinguishing *Ross v. Moffitt* and *Pennsylvania v. Finley*, for which task the "death is different" jurisprudence beginning with *Furman* would do nicely. The entire post-conviction apparatus and the logic of *Douglas* converge at this point. Very little new law would need to be written.

The *result* would not be suprising. In fact, refusing to reach the result would be an implicit devaluation of *each* line of case law discussed. It would mean—in effect but also in linguistic terms—that the rationale of each line of cases had no weight. The force of the

language in *Gideon*, *Douglas*, *Griffin*, or *Powell* is one thing. *Moffitt* suggests the Court's willingness to cut off holdings from their rhetorical balist: "Our cases say this, but they go no further." That is a device of restatement, a device that Llewelyn fingered long ago—to restate the holding of a precedent is to capture its meaning.[257] "In *Douglas* we decided" could be followed by an infinity of subtle shavings of reinterpretation. This fluidity of definition is the lawyer's age-old art. Control is exercised today by the excision of meaning from the signs of decision, rather than by repudiating the case.

Thus, the Court is "not bound" by the rhetoric of *Griffin* or *Powell*—only by the closest, tiniest, cheapest, meanest version of what went on in those cases. They are at a discount. This would be easy to do for a Court which had ceased to take its own signs seriously. There is an implicit nihilism, or at least an ahistorical radicalism, to the technic of *Ross v. Moffitt*.

When a court ignores the resonance of its precedents, it deflates the significance of its own work. In a way the *power* of the Court resides in the stability of its rhetoric. The Court has fewer troops than the pope, and in the subtle incorporation of precedential language over time resides the Court's authority. Thus, the "scheme of ordered liberty" is no tinkertoy—it resonates in a legal mind and calls up not only *Palko v. Connecticut* and its facts, but also the febrile, luminous vision of Justice Cardozo, as if to say—*here*, I link this Court and this opinion to Cardozo, to the respect that we have for him, to the uses to which this phrase from the 1930's have been put over a half century of earnest effort to *hammer out* the meaning of ordered liberty in a hundred new contexts.

As more and more condemned people need lawyers and would like to have them to save their lives, the theoretical issue of constitutional law takes on a heightened significance. Bernard Williams has suggested that emergencies trigger a heightened ethical responsibility or obligation.[258] That is, the pressure of facts and the shortness of time can exact a higher degree of responsibility from the actor. The converse of this idea is that the *failure* to respond when the chips are down is a more vicious failure. The crisis on death row today is an occasion during which the moral fiber of a court is tested by the development of fact—the decision to require counsel for an increasing population at an accelerating risk of extinction would be a moral response fitting the crisis itself. Denial of the right would be a signal of failure in the face of heightened risk. It would grease the

257 K. LLEWELLYN, *supra* note 99, at 77-91.

258 B. WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY 185-86 (1985).

skids. It would not be a neutral disposition of a nice theoretical question.

The risk of course varies in intensity, and priorities will be needed given limits on resources. The risk of execution—final and irrevocable death—triggers a conclusive finding of emergency. No greater risk is available in our legal world. Nowhere is a mistake more profound. At the same time, the state, scenting blood and subject to a panopoly of external pressures, deploys its finest to secure a death. To restate plainly: The state sends its lawyers to seek the death of a person. It does so through the avenue it has imposed on itself—the adversarial process. Trial is adversarial. So is direct appeal, so is state post-conviction, and so is federal habeas corpus. The *posture* changes, but posture is an intermural concete of legalism, meaningless to laypeople, worthless to the person whose life is at risk.

More compelling than this, however, is the fact that later stages of the process move the condemned person closer to death. Anthony Amsterdam's lambent metaphor of the assembly line is apt:[259] The finished product is a dead person, but each step in the process from arrest to the cemetary is equally necessary to the final product. No stage is without its risk to the condemned. The state knows this; it sends its gladiators to fight in each round; one would like to see what would happen to state officials who neglected to do so. What point, then, can there be in treating the early stages of the assembly differently from the final touches?

259 Amsterdam, *In Favorem Mortis*, *supra* note 147, at 50.