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DEATH BY DEHUMANIZATION: PROSECUTORIAL NARRATIVES OF DEATH- SENTENCED WOMEN AND LGBTQ PRISONERS

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INTRODUCTION

At the core of every capital sentencing proceeding is a guarantee that before condemning a person to die, the sentencer must consider the humanity¹ and dignity² of the individual facing the ultimate sanction. This principle—that “death is . . . different” and, therefore, requires consideration of the “diverse frailties of humankind”—echoes throughout the United States Supreme Court’s Eighth Amendment jurisprudence.³ And yet courts are reluctant to remedy the devastating impact of prosecutorial arguments that dehumanize marginalized persons facing the death penalty, condemning these arguments while nevertheless “affirm[ing] resulting convictions based on procedural doctrines such as harmless error.”⁴

These dehumanizing prosecutorial narratives are particularly problematic—and effective—when used against LGBTQ+ people,

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¹ *Woodson v. North Carolina*, 428 U.S. 280, 304–05 (1976) (stating that in capital cases, “fundamental respect for humanity underlying the Eighth Amendment” requires individualized sentencing).

² *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion) (“The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”); *see also* John R. Mills et al., “*Death Is Different*” and a Refugee’s Right to Counsel, 42 CORNELL INT’L L.J. 361, 373 (2009) (discussing dignitary interests protected by the Eighth Amendment).

³ *Woodson*, 428 U.S. at 304–05.

⁴ Mary Nicol Bowman, *Confronting Racist Prosecutorial Rhetoric at Trial*, 71 CASE W. RES. L. REV. 39, 42 (2020); *see, e.g.*, *Darden v. Wainwright*, 477 U.S. 168, 179 n.7, 180 n.12 (1986) (noting that the prosecutor referred to the crime as the work of “a vicious animal,” and said that the defendant “shouldn’t be out of his cell unless he has a leash on him and a prison guard at the other end of that leash”).

whose very identities have been criminalized, pathologized, and used as justification for condemning them to death. Dehumanizing stereotypes not only reinforce and leverage social biases as factors in aggravation, but also creates artificial barriers to connecting with the person charged, “othering” LGBTQ+ defendants in such a way as to minimize the impact of mitigating evidence.⁵

This Article explores the use of dehumanizing prosecutorial narratives that target LGBTQ+ people in the pursuit of state-sponsored execution and argues that such narratives violate the Constitution’s protection of the dignity of persons facing the loss of life or liberty. Part I examines the history of dehumanization and criminalization of LGBTQ+ people, particularly those with multiple marginalized identities. Part II sets forth examples of the most common death-seeking portrayals of LGBTQ+ defendants, including the Woman-Hating Gay Predator, the “Hardcore” Man-Hating Lesbian, and the Gender-Bending Deviant. Part III analyzes how these dehumanizing stereotypes further disadvantage LGBTQ+ defendants by undermining mitigating evidence. Finally, Part IV, drawing inspiration from the work of Pauli Murray, proposes a reframing of the constitutional doctrines limiting prosecutorial arguments in support of a death sentence, proposing that a focus on the dignity of the individual and the dignitary harm to the individual should be at the center of the inquiry.

I. HISTORY OF DEHUMANIZATION AND CRIMINALIZATION OF LGBTQ+ PEOPLE

The use of homosexuality and gender transgressions against those in the system of criminal sanction in the United States and, specifically, those facing the death penalty, long predates the “modern era” of the death penalty.⁶ It is rooted in early United

⁵ *Study: Dehumanizing Belief Systems Linked to Support for Guns [sic] Rights, the Death Penalty, and Anti-Immigration Practices*, DEATH PENALTY INFO. CTR. (June 12, 2020), <https://deathpenaltyinfo.org/news/study-dehumanizing-belief-systems-linked-to-support-for-guns-rights-the-death-penalty-and-anti-immigration-practices> [https://perma.cc/ZL7G-8J2Y] (citing David M. Markowitz & Paul Slovic, *Social, Psychological, and Demographic Characteristics of Dehumanization Toward Immigrants*, 117 PROC. NAT’L ACAD. SCI. 9260, 9268 (2020) (study finding “that dehumanization is linked to ‘how people talk about ‘less than’ outgroups, adverse childhood experiences, and perceived vulnerability in society’ ”)).

⁶ “The modern death penalty era begins with the Supreme Court’s ruling in *Furman v. Georgia*, holding then-extant death penalty statutes unconstitutional in

States history, traceable to the earliest days of the colonial period.⁷ The earliest American colonies intertwined homosexuality and capital punishment, enacting laws making sodomy, buggery, and in some instances, even lesbianism, a capital offense.⁸ Plymouth Colony enacted the first American capital code in 1636, which included witchcraft, sodomy, and buggery as crimes punishable by death.⁹ In the same year, the General Court of Massachusetts proposed a new law to add lesbianism as a capital offense.¹⁰ These laws continued to spread throughout the colonies through much of the 1600s, until, towards the end of the century, laws punishing homosexuality shifted from capital to lesser sentences.¹¹

The practice of criminalizing homosexual acts continued until *Lawrence v. Texas* in 2003, when the United States Supreme Court struck down sodomy laws targeting consenting same-sex adults.¹² Only seventeen years earlier, the Court had upheld a similar Georgia sodomy statute in which it characterized the “[p]roscriptions against [sodomy]” as “hav[ing] ancient roots.”¹³ At the time the Fourteenth Amendment was ratified, the Court noted, “all but 5 of the 37 States in the Union had criminal sodomy laws . . . [and] until 1961, all 50 States outlawed sodomy.”¹⁴ In *Lawrence v. Texas*, however, the Court recharacterized its position, asserting that the “ancient roots” argument it had used to previously justify sodomy law was less about condemnation of homosexuals, but instead was intended as a blanket prohibition of nonprocreative sexual activity.¹⁵ Yet the Court’s decision to recast the underpinnings of anti-sodomy laws failed to directly address the homophobic sentiments underlying them, doing nothing to rid the criminal legal system of anti-LGBTQ+ rhetoric and bias. Instead, the court system continues to be a place where homosexuality and gender identity are used against individuals, including during capital prosecutions.

1972.” Brandon L. Garrett et al., *The American Death Penalty Decline*, 107 J. CRIM. L. & CRIMINOLOGY 561, 583 (2017).

⁷ James Hampton, *Homosexuality: An Aggravating Factor*, 28 TUL. J.L. & SEXUALITY 25, 27–30 (2019).

⁸ *Id.* at 27–28.

⁹ *Id.* at 27.

¹⁰ *Id.* at 27–28.

¹¹ *Id.* at 29–30.

¹² 539 U.S. 558, 578 (2003).

¹³ *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986).

¹⁴ *Id.* at 192–93 (footnotes omitted).

¹⁵ *See Lawrence*, 539 U.S. at 569–70.

II. DEHUMANIZING PROSECUTORIAL NARRATIVES OF LGBTQ+ DEFENDANTS

Prosecutors have seized on this history of violence and oppression to craft narratives that inflame jurors' biases, strip away a defendant's humanity, and pave the way for a death verdict. Below are four examples of how a prosecutor successfully leveraged homophobia and anti-gender variance bias to impose the ultimate penalty on LGBTQ+ defendants, two of whom were women of color.

A. *Jay Wesley Neill: The Woman-Hating Gay Predator*

On December 12, 2002, Jay Wesley Neill was executed for the 1984 murders of four people, including three women, in a Geronimo, Oklahoma bank robbery.¹⁶ From the beginning, the State of Oklahoma used homophobia to frame its robbery investigation and ensuing trial.¹⁷ Early in the investigation, the chief inspector for the Oklahoma State Bureau of Investigation told the media that in “‘most cases of overkill . . . the perpetrator turns out to be a homosexual,’ ”¹⁸ a feature that, he added, agents were trained to recognize.¹⁹ A local district attorney told the press that he immediately could tell from the bank robbery “ ‘[t]here had to be sexual overtones towards the women. It had to be someone with an emotional problem towards women and (who) needed to feel superior to them.’ ”²⁰ Another motive conveyed to the press by law enforcement tasked with investigating the crime was that “the killings might have been retaliation for an antigay slur made by one of the victims.”²¹

Homophobic rhetoric persisted at trial.²² During his opening statement, the prosecutor repeatedly referred to Mr. Neill as homosexual and referenced his “homosexual lover[]” and co-

¹⁶ Joan W. Howarth, *The Geronimo Bank Murders: A Gay Tragedy*, 17 L. & SEXUALITY 39, 39–40 (2008).

¹⁷ *Id.* at 49–51.

¹⁸ *Id.* at 50 (omission in original) (quoting Chris Brawley, *Police, Psychiatrist Dispute Homosexual Role*, OKLAHOMAN (June 16, 1985), <https://www.oklahoman.com/story/news/1985/06/16/police-psychiatrists-dispute-homosexual-role/62760636007> [<https://perma.cc/PR7J-TKUM>]). At the time of trial, a person who engaged in “homosexual conduct” was guilty of “the detestable and abominable crime against nature,” punishable by up to 10 years in prison. *Id.* at 51–52 (footnote omitted) (quoting OKLA. STAT. ANN. tit. 21, § 866 (West 2007)).

¹⁹ *Id.* at 50.

²⁰ *Id.* (quoting Brawley, *supra* note 18).

²¹ *Id.* at 51.

²² *Id.* at 56.

defendant.²³ The opening statement was also replete with references to “stereotypes about gay men, namely that they are woman-hating, materialistic, flamboyant, flighty, superficial, and selfish.”²⁴ The prosecutor highlighted instances in which Mr. Neill used the term “bitch” to refer to women and described that the co-defendants flew to San Francisco to attend parties in the Castro district, wore matching leather jackets, and brought a man back to their hotel suite.²⁵ Throughout the trial, the prosecutor established Mr. Neill’s identity “as a flamboyant, misogynist, materialistic, obsessive, sex-crazed, irresponsible homosexual” who was prone to violence.²⁶ Witnesses from the bank focused on the sexual orientation of Mr. Neill and his co-defendant, describing them as “certain people that draw attention.”²⁷ “[T]he state psychiatrist who testified that Neill was competent to stand trial described him as ‘a little guy who wants to pout and put on a show.’”²⁸ Finally, the prosecution made clear in the penalty phase that the reason to sentence Mr. Neill to death was that he was gay:

He is a homosexual. The person you’re sitting in judgment on—disregard Jay Neill. You’re deciding life or death on a person that’s a vowed [sic] homosexual. . . . I don’t want to import to you that a person’s sexual preference is an aggravating factor. It is not. But these are areas you consider whenever you determine the type of person you’re setting [sic] in judgment on. . . . The individual’s [a] homosexual.²⁹

Apparently effective, the jury complied with the prosecutor’s request to sentence Mr. Neill to death. He was executed on December 12, 2002.³⁰

²³ *Id.* (internal citation omitted).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 68.

²⁷ *Id.* at 51 (quoting Chris Kinyon, *Slaying Suspects Plagued by Debts*, OKLAHOMAN (Mar. 5, 1985), <https://www.oklahoman.com/story/news/1985/03/05/slaying-suspects-plagued-by-debts/62771885007> [<https://perma.cc/2SP5-HH8T>]).

²⁸ *Id.* at 52–53 (quoting Chris Kinyon, *Psychiatrist Says Killers Competent*, OKLAHOMAN (Sept. 2, 1987), <https://www.oklahoman.com/story/news/1987/09/02/psychiatrist-says-killers-competent/62678995007> [<https://perma.cc/839D-YGVZ>]).

²⁹ *Neill v. Gibson*, 278 F.3d 1044, 1060–61 (10th Cir. 2001) (internal citation omitted).

³⁰ Bob Doucette, *Geronimo Bank Slayer Executed at Penitentiary*, OKLAHOMAN (Dec. 13, 2002), <https://www.oklahoman.com/article/2818651/geronimo-bank-slayer-executed-at-penitentiary> [<https://perma.cc/M3N8-DEER>].

B. *Bernina Mata: The "Hardcore" Man-Hating Lesbian*

In the case of Bernina Mata, sexual orientation was presented as the motive for the crime as well as a reason for the death penalty.³¹ Ms. Mata, a Latina lesbian, was accused of fatally stabbing John Draheim, a white heterosexual man, after meeting him at a bar.³² The prosecution told the jury that "Ms. Mata killed Mr. Draheim because he made an unwanted pass at her that caused her, as a . . . 'hard core lesbian,' to kill him."³³

The prosecutorial narrative throughout the proceedings centered on Ms. Mata's sexual orientation.³⁴ The State introduced a mountain of evidence spanning ten witnesses concerning either Ms. Mata's lesbianism, book titles she owned touching on issues concerning lesbianism—including THE LESBIAN READER—or both. The State then cited that evidence to argue Ms. Mata's motive to kill.³⁵ The prosecution also referred to Ms. Mata's lesbian identity on seventeen distinct occasions, asserting that she was "overtly homosexual" and "proclaiming her sexuality to anyone who would listen."³⁶

In addition to using Ms. Mata's lesbian identity as a motive for murder, the prosecutorial narrative of Ms. Mata as a "hard core lesbian" was leveraged to prove the sole aggravating circumstance underlying her death sentence—that she had "acted in a 'cold, calculated premeditated manner pursuant to a preconceived plan, scheme or design.'"³⁷ The State crafted this narrative by exploiting the stereotype of a man-hating lesbian "who by nature loathed men, was repulsed by men, and would harm a man who dared to touch her," thus inventing a narrative whereby "Ms. Mata hatched a devious plan of revenge to lure the victim to her home and kill him for making an unwanted pass at her."³⁸ The jury agreed, convicting Ms. Mata in 1999 and sentencing her to death.³⁹

³¹ Joey L. Mogul, *The Dykier, the Butcher, the Better: The State's Use of Homophobia and Sexism to Execute Women in the United States*, 8 N.Y.C.L. REV. 473, 485, 487 (2005).

³² *Id.* at 484.

³³ *Id.* at 473 (internal citation omitted).

³⁴ *Id.* at 485.

³⁵ *Id.*

³⁶ *Id.* at 485–87 (internal citation omitted).

³⁷ *Id.* at 487 (internal citation omitted).

³⁸ *Id.*

³⁹ *Id.* at 474; *People v. Mata*, 853 N.E.2d 110, 112–13, 117 (Ill. App. Ct. 2006). Ms. Mata was spared execution in 2003, when Illinois Governor George Ryan commuted the death sentences of 167 prisoners on the state's death row. *Id.* at n.1. See GEORGE H. RYAN SR. WITH MAURICE POSSLEY, UNTIL I COULD BE SURE: HOW I STOPPED THE

C. *Wanda Jean Allen: The Gender-Bending Deviant*

The prosecutorial narrative in the case of Wanda Jean Allen focused on perceived gender transgressions as a reason for death.⁴⁰ Wanda Allen was convicted of the 1989 murder of her lover, Gloria Leathers, in Oklahoma City.⁴¹ Throughout the trial, the State emphasized the ways in which Ms. Allen deviated from social constructions of womanhood.⁴² The prosecutors portrayed her as the “man” in the “homosexual relationship.”⁴³ The prosecutor argued to the jury that Ms. Allen “wore the pants in the family” and spelled her middle name “G-E-N-E,” calling attention to the stereotypically masculine spelling.⁴⁴ This evidence, he told the jury, was relevant to show that Ms. Allen “was the aggressive person in the relationship,” while Ms. Leathers was “more passive.”⁴⁵ The strategy was successful; in 1989, Ms. Allen was convicted and sentenced to death.⁴⁶

On appeal, the Court of Criminal Appeals of Oklahoma held that the trial court did not err in admitting the above evidence and, in effect, the related argument.⁴⁷ Dissenting, Judge James F. Lane expressed his belief that such evidence was introduced solely to devalue the life of the defendant:

I also take exception to the majority finding the evidence the appellant was the “man” in her lesbian relationship has any probative value at all. Were this a case involving a heterosexual couple, the fact that a male defendant was the “man” in the relationship likewise would tell me nothing. I

DEATH PENALTY IN ILLINOIS 136 (2020); David Blanchette, *George Ryan Looks Back*, ILL. TIMES (Sept. 9, 2021), <https://www.illinoistimes.com/springfield/george-ryan-looks-back/Content?oid=14050079> [https://perma.cc/KHY7-LH5T]; Lee Hockstader, *Dead Men Walking*, WASH. POST (Feb. 23, 2003), <https://www.washingtonpost.com/archive/lifestyle/magazine/2003/02/23/dead-men-walking/15867492-fda4-4060-873b-ddf02a207b0d>.

⁴⁰ Mogul, *supra* note 31, at 489–90.

⁴¹ *Id.* at 489.

⁴² *Id.*

⁴³ *Id.* at 490 (quoting *Allen v. State*, 871 P.2d 79, 95 (Okla. Crim. App. 1994)).

⁴⁴ *Id.* (first citing *Allen*, 871 P.2d at 97; then quoting Richard Goldstein, *Queer on Death Row*, VILLAGE VOICE (Mar. 13, 2001), <https://www.villagevoice.com/2001/03/13/queer-on-death-row> [https://perma.cc/8RCV-FQNL]).

⁴⁵ *Allen*, 871 P.2d at 95. This prosecutorial tactic of ascribing stereotypically feminine traits to Ms. Leathers served make her a more sympathetic victim, despite her lesbian identity. Mogul, *supra* note 31, at 490. Interestingly, Ms. Leathers had killed a woman in Tulsa, Oklahoma, ten years prior to her death, information which was presented by Ms. Allen as part of her self-defense claim. *Id.* at 490 n.69.

⁴⁶ *Id.* at 491.

⁴⁷ *Allen*, 871 P.2d at 95.

find no proper purpose for this evidence, and believe its only purpose was to present the defendant as less sympathetic to the jury than the victim.⁴⁸

The majority view, however, prevailed and Ms. Allen was executed in 2001.⁴⁹

D. Aileen Wuornos: The Money Hungry Lesbian Prostitute

Aileen Wuornos was portrayed by the prosecution and the media as a money- and sex-hungry prostitute.⁵⁰ The media ran with these stereotypes, exploiting the story about the woman they dubbed “‘the man-hating murderer,” apparently because Wuornos was an admitted lesbian.’”⁵¹ “The themes of lesbianism, man-hating, deceitfulness, greed, deviance, and manipulateness that frame the stories society tells itself about women who use violence pervade the transcripts and media reports of the Wuornos trials.”⁵²

The defense presented mitigating evidence to explain how she was forced into prostitution at an early age.⁵³ Ms. Wuornos was raised by her alcoholic grandparents, who were both physically and verbally abusive to her.⁵⁴ She had been taken in and adopted by them after her mother abandoned her and her father hanged himself while in prison.⁵⁵ In junior high, she started having problems in school, some of which were facilitated by loss of hearing and vision, and she was given a mild tranquilizer to improve her behavior.⁵⁶ The defense also presented evidence that at age fourteen, she “was raped by a family friend,” which resulted in a pregnancy.⁵⁷ She kept the pregnancy hidden for six months and then was shamed by her grandparents who “blamed her for the pregnancy” and “forced her to give up the child for adoption.”⁵⁸ After this, Ms. Wuornos was not allowed back in her home, leaving

⁴⁸ *Id.* at 105 (Lane, J., dissenting).

⁴⁹ *Case Summaries of Executed Women*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/stories/case-summaries-of-executed-women> [<https://perma.cc/K99K-AHEY>] (last visited Mar. 22, 2022).

⁵⁰ Chimène I. Keitner, *Victim or Vamp? Images of Violent Women in the Criminal Justice System*, 11 COLUM. J. GENDER & L. 38, 59 (2002).

⁵¹ *Id.* at 58 (internal citations omitted).

⁵² *Id.*

⁵³ *Wuornos v. State*, 644 So.2d 1000, 1005 (Fla. 1994) (per curiam).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

her to live on the streets, where she began engaging in sex work and abusing drugs and alcohol.⁵⁹ Her sex work continued into adulthood, and “[a]t about age 20, [Wuornos] settled in Florida, and began working as a highway prostitute at least four days of the week. Her job was dangerous, she said. On some occasions she had been maced, beaten, and raped by customers.”⁶⁰

The defense presented evidence to mitigate the crime, conceptualizing for the jury how Wuornos was brutally raped by her victim, Richard Mallory, prior to killing him.⁶¹ The prosecution minimized the dangers and horrors inflicted on prostitutes generally, and Wuornos specifically, by arguing that she killed to be in “‘control’” and out of a voracious appetite for sex and money.⁶² The prosecution argued during closing that Wuornos was not a victim—that being a prostitute was her “‘preferred way to make a living” and that she “‘indicated she likes sex.”⁶³

The prosecution was able to use this dehumanizing narrative to minimize any impact the defense’s mitigating evidence had on the jury.⁶⁴ Ultimately, the jury and the courts sided with the prosecution’s interpretation of Ms. Wuornos’s life history.⁶⁵ The Supreme Court of Florida’s per curiam opinion focused on two aspects of who Aileen Wuornos was: her sexuality and her sex work.⁶⁶ In upholding her sentence of death, after briefly discussing the victim’s body being found, the court first noted that Ms. Wuornos and Tyria Moore “‘lived together as lovers for about four and a half years” and that “‘Wuornos worked as a prostitute along Central Florida highways.”⁶⁷

III. THE PROSECUTION’S USE OF STEREOTYPES TO UNDERMINE MITIGATING EVIDENCE

In each of these cases, prosecutors relied on degrading homophobic stereotypes to both enhance the aggravated nature of the crimes as well as dehumanize the defendants, turning evidence of their “‘diverse frailties” against them, in support of an

⁵⁹ *Id.*

⁶⁰ *Id.* at 1004.

⁶¹ *Id.* at 1004; see Keitner, *supra* note 50, at 59–60.

⁶² Keitner, *supra* note 50, at 59 (internal citation omitted).

⁶³ *Id.* at 62 (internal citation omitted).

⁶⁴ *Id.* at 63–64.

⁶⁵ *Id.* at 64–65.

⁶⁶ *Wuornos*, 644 So.2d at 1003.

⁶⁷ *Id.*

argument that they should not be permitted to live, even in prison.⁶⁸ Yet this is directly contrary to the mandate of the United States Supreme Court, which has recognized the critical role that mitigation plays in capital cases.⁶⁹ Sentencing juries in death penalty cases must be able to consider all available mitigating evidence about the defendant, regardless of whether it has a specific nexus to the crime.⁷⁰ The Constitution requires individualized sentencing where mitigating evidence is not restricted and is “fully consider[ed].”⁷¹ The presentation of mitigating evidence is often the difference between a life and death sentence, even in highly aggravated cases.⁷² The purpose of presenting such evidence is to humanize the individual facing a death sentence, helping the jury to see beyond the crime in order that they might show mercy.

In these cases, however, the prosecutors argued that that the mitigation was actually aggravating, or “double-edged.”⁷³ Though arguably unconstitutional, this tactic has been reinforced in some jurisdictions where courts have found that a failure to present significant mitigating evidence, or even uncover it through

⁶⁸ *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

⁶⁹ *See Wiggins v. Smith*, 539 U.S. 510, 537 (2003) (“Had the jury been able to place petitioner’s excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance.”); *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (per curiam) (finding ineffective assistance of counsel where the jury “heard almost nothing that would humanize Porter or allow them to accurately gauge his moral culpability”).

⁷⁰ Elizabeth S. Vartkessian, *Dangerously Biased: How the Texas Capital Sentencing Statute Encourages Jurors to be Unreceptive to Mitigation Evidence*, 29 QUINNIPAC L. REV. 237, 237–38 (2011).

⁷¹ Kathryn E. Miller, *The Eighth Amendment Power to Discriminate*, 95 WASH. L. REV. 809, 836 (2020) (discussing *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 267 (2007); *Brewer v. Quarterman*, 550 U.S. 286, 289 (2007); and *Penry v. Johnson (Penry II)*, 532 U.S. 782, 800 (2001)).

⁷² *See, e.g., Porter*, 558 U.S. at 32–33, 43 (finding prejudice in part because evidence of his “abusive childhood” “may have particular salience for a jury” in the murder of an ex-girlfriend that was especially “heinous, atrocious, or cruel”); *Rompilla v. Beard*, 545 U.S. 374, 378, 393 (2005) (finding prejudice in case where “murder was committed by torture” and where defendant had “significant history” of violent felony convictions because omitted mitigating evidence of extreme emotional and physical childhood trauma contributed “to a mitigation case that bears no relation” to what the jury heard); *Williams v. Taylor*, 529 U.S. 362, 367–68, 398 (2000) (internal citation omitted) (finding prejudice where evidence omitted at trial of “Williams’ childhood, filled with abuse and privation” despite a brutal killing over “a couple of dollars” and where aggravating evidence was presented at sentencing including evidence of arson and other brutal assaults on elderly victims).

⁷³ *See John H. Blume & Sheri Lynn Johnson, The Fourth Circuit’s “Double-Edged Sword”: Eviscerating the Right to Present Mitigating Evidence and Beheading the Right to the Assistance of Counsel*, 58 MD. L. REV. 1480, 1480–81 (1999).

reasonable investigation, is not prejudicial under *Strickland*⁷⁴ if a jury could potentially find the evidence to be “two-edged.”⁷⁵

This becomes doubly problematic in cases involving marginalized defendants, where prosecutors may prey on the very traits and experiences which make an individual more vulnerable. In capital cases involving LGBTQ+ defendants, prosecutors often diminish the impact of compelling mitigation by relying on negative stereotypes to argue that the mitigation presented is actually aggravating, or “two-edged.”⁷⁶ The use of prosecutorial narratives against women and LGBTQ+ individuals are often rooted in the societal norms that are enforced in and out of the courtroom. For instance, “[t]he demonization of violent women in American society illustrates one way in which a country’s criminal justice system, including both its formal and informal components, constructs and reinforces norms of appropriate behavior—norms that encompass more than the proscribed acts at issue in a given trial.”⁷⁷ This is in large part due to the idea that “violent women have committed a double transgression,” both by committing a violent crime and by “violati[ng] . . . sex-role boundaries.”⁷⁸ Intersectionality further exacerbates the stereotypes used by the prosecution to strip the defendant of humanity.

As in the cases discussed in Part II, the prosecution was able to use the very details of the defendants’ respective identity to urge the jury to see them as less, not more, human. Each defendant’s attempts to live authentically with respect and dignity were portrayed as aggressive threats against society. An individual’s refusal to comply with gender and sexual norms became their refusal to comply with societal rules. Their desire to be with a person of the same sex was transformed into a hatred of the opposite sex. Their efforts to find love and partnership were painted as deviant criminal acts, in accordance with this country’s penal history, as discussed in Part I.

In the case of Charles Rhines, jurors voted to execute him instead of allowing him to live in prison because of the risk that he might be “a ‘sexual threat to other inmates and take advantage of

⁷⁴ *Strickland v. Washington*, 466 U.S. 668, 691 (1984).

⁷⁵ Blume & Johnson, *supra* note 73, at 1496 (quoting *Gilbert v. Moore*, 134 F.3d 642, 654–55 (4th Cir. 1998) (en banc)).

⁷⁶ *Id.*

⁷⁷ Keitner, *supra* note 50, at 40.

⁷⁸ *Id.*

other young men in or outside of prison.’”⁷⁹ At trial, the prosecution presented evidence that Mr. Rhines was gay, which later led the jurors in his case to send a note to the judge asking about what life in prison would be like for Mr. Rhines if they were to give him a life sentence.⁸⁰ Based on the jurors’ notes, it was clear that the jury was fixated on Mr. Rhines’ ability to interact with other men, specifically those in general population.⁸¹ Later investigation revealed that Mr. Rhines’ sexuality was a central discussion point during jury deliberation, including sentiments of “disgust” and expressions that giving Rhines, “[t]hat SOB queer,” a life sentence would “be sending him where he wants to go” so that he could “spend his life with men in prison.”⁸²

By capitalizing on stereotypes, homophobia, and bigotry, prosecutors are also able to exploit the very vulnerabilities that should support a cry for mercy. For example, trauma histories are often conveyed to a jury in order to compel mercy, to explain behavior as compulsive rather than premeditative, or to help the jury see the defendant as a whole person.⁸³ However, in the cases of some LGBTQ+ defendants, prosecutors have argued that their trauma history is actually aggravating rather than mitigating.⁸⁴ A prior rape or sexual assault becomes support for the prosecutor’s argument of future dangerousness.⁸⁵ In the *Wuornos* case, Ms. Wuornos’s own trauma history was used to paint her as more dangerous rather than as a person who spent her life in danger.⁸⁶ Prosecutors have also used an individual’s sexual orientation to minimize evidence of their remorse.⁸⁷ All of these tactics strip the

⁷⁹ Petition for a Writ of Habeas Corpus at 7, *In re Rhines*, 140 S. Ct. 488 (2019) (No. 19-6479) (internal citation omitted); see also Daniel S. Harawa, *Sacrificing Secrecy*, 55 GA. L. REV. 593, 603 (2021) (“On November 4, 2019, South Dakota executed Mr. Rhines in the face of compelling evidence that his sexual orientation played a critical role in the jury’s decision to sentence him to die.”).

⁸⁰ Petition for a Writ of Habeas Corpus, *supra* note 79, at 2–3.

⁸¹ *Id.* at 3.

⁸² *Id.* at 3, 7 (alteration in original) (internal citations omitted).

⁸³ See Kathleen Wayland, *The Importance of Recognizing Trauma Throughout Capital Mitigation Investigations and Presentations*, 36 HOFSTRA L. REV. 923, 924, 926 (2008); Hampton, *supra* note 7, at 32–33.

⁸⁴ See Hampton, *supra* note 7, at 33, 37–38.

⁸⁵ *Id.* at 36–37 (describing how the prosecutor in Calvin Burdine’s case—who was a gay man on trial for his lover’s murder—stated that “[t]he only way to stop Burdine and make society safe . . . was to put him to death”).

⁸⁶ See Keitner, *supra* note 50, at 59.

⁸⁷ Hampton, *supra* note 7, at 37–38. Eddie Hartman was sentenced to death after the prosecutor used his sexuality to minimize repeated sexual abuse by older male relatives during his childhood. *Id.* at 38. In response to testimony regarding the abuse,

defendant of dimension and inhibit the life-saving “recognition of a kinship” between the accused and the decisionmaker, “which evokes the response ‘here but for the grace of God, drop I.’”⁸⁸

IV. REMEDYING THE HARM BY REFOCUSING ON THE DIGNITY OF THE HARMED.

The present treatment of these dignity-defying and humanity-denying narratives fails to give full meaning to the constitutional protection for the dignity of persons facing loss of life or liberty. It has long been recognized that, from the state, “improper suggestions [and] insinuations” have no proper weight in criminal cases.⁸⁹ Moreover, although a prosecutor “may strike hard blows, he is not at liberty to strike foul ones.”⁹⁰ But to establish a constitutional violation under present doctrine, “it ‘is not enough that the prosecutors’ remarks were undesirable or even universally condemned.’”⁹¹ Instead, an improper suggestion or insinuation from a prosecutor must have “‘so infected the trial with unfairness as to make the resulting conviction a denial of due process.’”⁹² And in making that assessment, courts do “not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning.”⁹³

the prosecutor asked Hartman’s mother during cross-examination, “Is your son not a homosexual?” *Id.* Over the defense’s repeated objections, the prosecutor argued that he questioned witnesses about Hartman’s sexuality “because shortly after he shot the victim he engaged in ‘homosexual activity’ with one of the State’s witnesses” and that this showed his lack of remorse. *Id.* The court sustained defense counsel’s objections, but the damage was done, though the defense correctly pointed out that these questions were merely a thinly veiled attempt to argue to the jury that Hartman was “asking for it” when he was being abused; the prosecution was thus able to minimize the horrors that Hartman suffered as a youth. *Id.* at 37–38.

⁸⁸ Russell Stetler, *The Mystery of Mitigation: What Jurors Need to Make a Reasoned Moral Response in Capital Sentencing*, 11 U. PA. J.L. & SOC. CHANGE 237, 241 (2008) (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 520 n.17 (1968)).

⁸⁹ *Berger v. United States*, 295 U.S. 78, 88 (1935); *see also* *Pool v. Superior Court of Pima Cty.*, 677 P.2d 261, 266 (Ariz. 1984) (“It is the prosecutor’s duty to refrain from improper methods calculated to produce a wrongful conviction just as it is his duty to use all proper methods to bring about a just conviction.”).

⁹⁰ *Berger*, 295 U.S. at 88; *see also* CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-6.8(c) (AM. BAR ASS’N 2017) https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition [<https://perma.cc/W2ZR-4HZT>] (“The prosecutor should not make arguments calculated to appeal to improper prejudices of the trier of fact.”).

⁹¹ *Darden v. Wainwright*, 477 U.S. 168, 180–81 (1986) (internal quotations omitted).

⁹² *Id.* at 181 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)).

⁹³ *Donnelly*, 416 U.S. at 647.

This high bar—an unambiguous argument infecting the entire trial—has led appellate courts to frequently find fault, but no error. That is, even where a prosecutor's argument crosses a line into unprofessional conduct via “improper suggestions [and] insinuations,”⁹⁴ courts affirm the convictions in question, even when the argument is made concerning whether a defendant will live or die,⁹⁵ a context in which courts must provide a “greater degree of scrutiny.”⁹⁶

As with other forms of state misconduct, “[t]here is a passel of reasons for these affirmances.”⁹⁷ As others have explored, these dynamics play out when the state uses religious arguments to support its case for a sentence of death.⁹⁸ In one study cataloguing cases in which a court found that a prosecutor had made an improper religious argument, only a small fraction resulted in a reversal.⁹⁹ And even among those, most were in the handful of jurisdictions that had a bright line rule against any religious argument.¹⁰⁰ The authors observed that the most common reasons for a lack of reversal were counsel's failure to object, the appellate court concluding that the religious argument was somehow invited by the defendant, and that although there was error, the error was not sufficiently pervasive or was otherwise harmless.¹⁰¹ Thus, despite repeated findings of misconduct, it was rare for a court to find that the misconduct so pervaded the proceedings that the Constitution required reversal.

With regards to race, however, at least at a doctrinal level, courts appear to more readily find a pervasive impact on the proceedings. Courts consistently condemn the use of “racially biased prosecutorial arguments” and provide relief to the injured party—the person suffering from a conviction or sentence on the

⁹⁴ *Berger*, 295 U.S. at 88.

⁹⁵ *See, e.g., In re Martinez*, 462 P.3d 36, 41–43 (Ariz. 2020) (collecting five death penalty cases where the court found that the same prosecutor committed misconduct in each case but affirmed the convictions and sentences).

⁹⁶ *Turner v. Murray*, 476 U.S. 28, 35–36 (1986) (quoting *California v. Ramos*, 463 U.S. 992, 999 (1983)).

⁹⁷ Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 *TULANE L. REV.* 1739, 1776 (1993).

⁹⁸ *See* John H. Blume & Sheri Lynn Johnson, *Don't Take His Eye, Don't Take His Tooth, and Don't Cast the First Stone: Limiting Religious Arguments in Capital Cases*, 9 *WM. & MARY BILL RTS. J.* 61, 82–83 (2000).

⁹⁹ *Id.* at 83–84.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 82–83.

basis of such arguments.¹⁰² Courts recognize that the invocation of racial prejudice, although “odious in all aspects, is especially pernicious in the administration of justice.”¹⁰³ Indeed, when the state discriminates on the basis of race during jury selection, reversal is always required.¹⁰⁴

The Supreme Court’s consistent and high-minded rhetoric in its racial justice jurisprudence offer hints at how it can give meaning to its bar on the prosecution’s use of “improper suggestions [and] insinuations.”¹⁰⁵ Instead of a focus on the peril to the proceedings, courts should focus attention on the dignitary harm to the individual. After all, this is the essence of the counter-majoritarian undertaking of protecting against mob rule: to insist on the dignity of “discrete and insular minorities.”¹⁰⁶ This is what the Court did in 1932, when it stood against the lynch mob and show trial in Ozie Powell’s case, holding that Powell was entitled, as a matter of due process of law, to a lawyer in his capital case.¹⁰⁷ The Court in his case provided the groundwork for what we now consider “bedrock” constitutional guarantees, including the right to counsel.¹⁰⁸

¹⁰² *McCleskey v. Kemp*, 481 U.S. 279, 309 n.30 (1987); *Buck v. Davis*, 580 U.S. 100, 119 (2017) (citing *Zant v. Stephens*, 462 U.S. 862, 885 (1983)) (“It would be patently unconstitutional for a state to argue that a defendant is liable to be a future danger because of his race.”).

¹⁰³ *Rose v. Mitchell*, 443 U.S. 545, 555 (1979); see also *McCleskey*, 481 U.S. at 309 (quoting *Batson v. Kentucky*, 476 U.S. 79, 85 (1986)) (“[Courts are] engaged in ‘unceasing efforts’ to eradicate racial prejudice from our criminal justice system.”); *Bennett v. Stirling*, 842 F.3d 319, 321 (4th Cir. 2016)) (“While recognizing full well the deferential standard of review under AEDPA, we nonetheless agree with the district court that the sentencing was suffused with racially coded references to a degree that made a fair proceeding impossible.”); but see *McCleskey*, 481 U.S. at 309 (upholding Georgia’s death penalty despite statistical evidence that it was applied in a racially discriminatory manner).

¹⁰⁴ See *Flowers v. Mississippi*, 139 S. Ct. 2228, 2235 (2019); *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991); *Crittenden v. Chappell*, 804 F.3d 998, 1003 (9th Cir. 2015) (emphasis added) (“[I]t is well established that a *Batson* violation is structural error.”).

¹⁰⁵ *Berger v. United States*, 295 U.S. 78, 88 (1935).

¹⁰⁶ *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938); see also ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 17 (1962) (discussing the “counter-majoritarian” dilemma of acting against the interests of the popularly elected branches).

¹⁰⁷ See *Powell v. Alabama*, 287 U.S. 45, 67–69 (1932); *McDonald v. City of Chicago*, 561 U.S. 742, 761–64 (2010) (discussing the Court’s rejection of Justice Black’s “total incorporation” theory, but holding that “the Due Process Clause fully incorporates particular rights contained in the first eight Amendments”).

¹⁰⁸ *Martinez v. Ryan*, 566 U.S. 1, 12 (2012) (first quoting *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963); then citing *Powell*, 287 U.S. at 68–69 (1932)).

But the Court's work in *Powell* was decidedly counter-majoritarian, and, even as it minimized the physical threat of harm Powell and his co-defendants faced, the Court grounded its reasoning in the dignitary harms he faced in a trial for his life.¹⁰⁹ The recitation of the only facts "necessary" to resolve the case begin with the defendants' race: "these defendants, together with a number of other negroes"¹¹⁰ The case then recounted how a group of "white boys" got into a fight with the defendants, leading to a near miss with a lynch mob in the deep South.¹¹¹ The capital trial was allowed to go forward, despite the failure of the trial court to appoint counsel.¹¹² The Supreme Court reversed, expressing outrage that the "defendants, young, ignorant, illiterate, surrounded by hostile sentiment, haled back and forth under guard of soldiers, charged with an atrocious crime regarded with especial horror in the community where they were to be tried, were thus put in peril of their lives" without having been previously provided counsel.¹¹³

That dignitary interest undergirding the Court's reasoning in *Powell* is a value that gives meaning and life to the due process protection the Constitution provides.¹¹⁴ It is our collective insistence that a person, at a minimum, be given notice and an opportunity to be heard.¹¹⁵ And it protects a person's dignity when their life and livelihood are imperiled by state actors.¹¹⁶ But as civil rights pioneer Pauli Murray long ago insisted, the Constitution's prioritization of dignity has even deeper roots, roots that took hold in soil wet with bloodshed.¹¹⁷ As Murray has argued, the Thirteenth Amendment's bar on enslavement makes concrete the notion that enslavement is contrary to the dignity of

¹⁰⁹ *Powell*, 287 U.S. at 50–53.

¹¹⁰ *Id.* at 50.

¹¹¹ *Id.* at 50–52; see also EQUAL JUST. INITIATIVE, LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR 39–43 (3d ed. 2017), <https://ejl.org/wp-content/uploads/2005/11/lynching-in-america-3d-ed-110121.pdf> [<https://perma.cc/H3F5-3A5W>].

¹¹² See *Powell*, 287 U.S. at 53–56.

¹¹³ *Id.* at 57–58.

¹¹⁴ See *id.*

¹¹⁵ See *In re Oliver*, 333 U.S. 257, 273 (1948) ("A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense . . . are basic in our system of jurisprudence.").

¹¹⁶ See *Powell*, 287 U.S. at 71–72.

¹¹⁷ Dahlia Lithwick, *Who Was Pauli Murray?*, SLATE (Aug. 31, 2021), <https://slate.com/news-and-politics/2021/08/my-name-is-pauli-murray-directors-interview.html> [<https://perma.cc/QU2N-WRNC>].

the individual.¹¹⁸ And it was only after the Civil War that we adopted the Fourteenth Amendment, which both guaranteed equal protection of the law and applied due process protections to both federal and state action and, ultimately, applied the Bill of Rights to limit state action.¹¹⁹

These limits on state action include the First Amendment's guarantees of free speech and religious practice, which constitutionally enshrine an individual's dignity interest in their own thoughts.¹²⁰ These limits also, through the Fourth Amendment, guard "against unreasonable searches and seizures," which protects both bodily integrity and the privacy of the home.¹²¹ And, perhaps most powerfully, the Eighth Amendment empowers the judiciary to protect the dignitary interests of those whose lives and liberty are being threatened in criminal court proceedings.¹²²

Refocusing the inquiry on the dignity of the individual—as opposed to the court's own interests in an uninfected trial—better reflects the Constitution's guarantee that each person in a criminal case will be treated with dignity. A grounding in dignity is also better at "keep[ing] the Constitution relevant, useful, and compelling to 'the people' in the present day."¹²³ There is no

¹¹⁸ U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."); Florence Wagman Roisman, *Lessons for Advocacy from the Life and Legacy of the Reverend Doctor Pauli Murray*, 20 U. MD. L. J. RACE, RELIGION, GENDER & CLASS 1, 34 (2020) (crediting Murray with developing the legal theories that extended the Thirteenth Amendment's reach to "counter other badges and incidents of slavery," regardless of the presence of state action).

¹¹⁹ See U.S. CONST. amend. XIV, § 1. Although the "incorporation doctrine," the application of the Bill of Rights to state and federal government action alike, is frequently attributed to the "Warren Court," its origins are properly traced to an earlier Court, which began the task of regulating unconstitutional behavior of state officials—first in the context of the First Amendment, but then with increasing regularity in the context of death penalty cases in southern states. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925); *Powell*, 287 U.S. at 71; *Brown v. Mississippi*, 297 U.S. 278, 287 (1936); *Chambers v. Florida*, 309 U.S. 227, 240–41 (1940).

¹²⁰ U.S. CONST. amend. I.

¹²¹ *Id.* amend. IV.

¹²² *Id.* amend. VIII.

¹²³ Trevor W. Morrison, *Lamenting Lochner's Loss: Randy Barnett's Case for a Libertarian Constitution*, 90 CORNELL L. REV. 839, 851 (2005) (book review); see also *Lawrence v. Texas*, 539 U.S. 558, 579 (2003) ("As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."); William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 19 U.C. DAVIS L. REV. 2, 7 (1985) ("[T]he genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in

question that dignity today means something quite different than it did to our framers.¹²⁴ However, the constitutional conveners in 1792 and 1868 had the wisdom and vision to protect each individual's dignitary interests over and over again.

Centering an analysis of prosecution misconduct on the dignitary harm to the individual before it makes manifest this fundamental guarantee. Recentering the court's analysis on the dignitary harm, as opposed to whether a trial is infected, will better empower courts to constitutionally regulate the state's efforts to demean the dignity of the persons before them. Reorienting around an individual's dignity interests is also in line with the Court's more recent affirmations of its commitment to protect individual rights against majoritarian attacks on fundamental dignitary interests. "[O]ur laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."¹²⁵ The Court has repeatedly described why this protection is at the core of our constitutional democracy:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.¹²⁶

Thus, the Court has reviewed with heightened scrutiny and held unconstitutional attacks on human dignity that are related to these core aspects of personhood in the contexts of same-sex marriage and criminalization of same-sex sexual conduct. Perhaps most poignantly, with regards to same-sex relationships, the Court has condemned states and state actors when they engage in behavior that may "raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of

the adaptability of its great principles to cope with current problems and current needs.").

¹²⁴ *Lawrence*, 539 U.S. at 578–79 (noting the founders did not "presume to have th[e] insight" to know "liberty in its manifold possibilities").

¹²⁵ *Id.* at 574.

¹²⁶ *Id.* (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

persons affected.”¹²⁷ This is because “if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”¹²⁸ To do so would make “a class of persons a stranger to [our] laws,” demeaning them as citizens and their very personhood.¹²⁹

CONCLUSION

It is against this backdrop that we propose providing the same searching, dignity-centered scrutiny of prosecution arguments that implicate a person’s gender and sexual identity that the courts have traditionally applied to race. Just as the judiciary will not tolerate racial animus in a prosecutor’s argument for a conviction or sentence of death and will set aside a conviction if racial bias plays a substantial role in striking a single potential juror, so too must the courts act with unceasing vigilance to eliminate the harmful use of stereotyping and bigotry.

When the state engages in even a single instance of such misconduct, the injured party should be relieved of any obligation to demonstrate the harm inherent to it. Use of the tropes, stereotypes, and bigoted arguments discussed *supra* should create a presumption in favor of a new trial. At most, it should be the state’s obligation to explain why the misconduct was not, in fact, injurious to the individual.

Reframing the legal discourse to the dignitary harm to the individual, instead of how a trial might be “infected,” will provide a more consistent approach to state use of suspect classifications generally. And, more specifically, doing so would give fuller meaning to the Constitution’s guarantee that the persons whose lives and liberty are at stake are treated with dignity.

¹²⁷ *Romer v. Evans*, 517 U.S. 620, 634 (1996).

¹²⁸ *U.S. Dep’t of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) (emphasis added).

¹²⁹ *Romer*, 517 U.S. at 635.