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SAMUEL PILLSBURY AND THE "[L]OWEST OF THE [D]EAD"*

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I have known Professor Sam Pillsbury for about thirty years, though I am unable to remember exactly when we first met. Perhaps he remembers. I have read much of his scholarship and two of his novels. A third novel in draft form is sitting on my desk, calling out to me.

Sam is a person of many talents. Summarizing a career as impactful as Sam's is of course a terribly reductionist enterprise, but I shall attempt it anyway. He has a reporter's eye for detail, a philosopher's concern with fundamental truths, a moralist's need to make sense of why we harm others by punishing them, a legal scholar's desire to have legal doctrine cohere, a humanist's exaltation of the basic worth of all humans, and a chaplain's reservoir of Christian teachings to offer forgiveness when humans fail.

Sam has developed what he calls a "defense of value" theory of punishment that avoids having to decide whether an offender chose to be a person who harms others. For example, we can say that an offender has done something that violates our norms by disrespecting the value of others (e.g., murder, rape, robbery) without finding the offender chose to be that kind of person. In Sam's words:

> The defense-of-value approach undercuts the easy assumptions of moral superiority that deontologic views of

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* T.S. Eliot, *The Waste Land*, *in* THE ANNOTATED WASTE LAND WITH ELIOT'S CONTEMPORARY PROSE 57, 64 (Lawrence Rainey ed., 2d ed. 2006).

> I who have sat by Thebes below the wall
> And walked among the lowest of the dead.

Id.

** Rutgers University Board of Governors Professor of Law, Judge Alexander P. Waugh, Sr. Distinguished Scholar. Thanks of course to Sam Pillsbury for inviting me to contribute to this issue in his honor and for commenting on a draft, to Joshua Dressler for reading and commenting on a draft, and to Jill Duffy, United States Supreme Court Librarian, for helping me locate the Appendix to the Petition for Certiorari in *Strickland v. Washington*, 468 U.S. 668 (1984). The assistance of Daniel Gordon and William Tunkey will be described in my Essay.

> punishment often inspire. It should make us realize that we punish persons for deeds "we" might have done in their situations. We also see that in punishing we do not—or should not—condemn the offender as a person. Even while punishing the offender's action, we should value the offender as a person. Any other approach violates the moral basis of punishment. Most fundamentally, the defense-of-value approach does not contend that the wrongdoer chose to be a bad person; it only asserts that the wrongdoer chose to disregard our concept of basic human value. The approach reveals the potentially tragic nature of punishment.[1]

To be sure, Sam is no Pollyanna who denies the presence of evil. The recent Texas school murders remind us in a vivid, unforgettable way that evil exists.[2] Indeed, Sam's scholarship acknowledges and explores evil. His 1998 book, *Judging Evil*, recounts the case of Ernest John Dobbert, Jr. and his horrific child abuse that killed two of his children and left a third almost blind.[3] Evil indeed. Yet did Dobbert, who was abused as a child, have any choice other than to do what he did? This presents the age-old problem of whether we choose our actions or are merely the product of forces beyond our control—free will versus determinism. If one embraced determinism, one might be tempted to say that evil does not exist; how can we be evil if we do not choose?

One "solution" to the dilemma is to navigate between the two poles and thus avoid the either-or approach of free will or determinism. Sam acknowledges evil while admitting the power of determinism as an explanation of human action. This approach, sometimes termed compatibilism, holds that we praise or condemn certain actions even as we concede the actor might have had no choice. One way to put this is that "we should judge the nature of human conduct, not human worth."[4]

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1. Samuel H. Pillsbury, *The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility*, 67 IND. L.J. 719, 722 (1992) (footnote omitted).

2. Of course, as Joshua Dressler pointed out to me, the Texas killer might have been mentally ill. But this is the value of the defense-of-value approach. We can, we should, condemn the actions in Uvalde as evil without having to make the same judgment about the killer.

3. SAMUEL H. PILLSBURY, JUDGING EVIL: RETHINKING THE LAW OF MURDER AND MANSLAUGHTER vii–x (1998).

4. *Id.* at ix.

Thus, Sam's defense-of-value theory requires a separation of actions from the actor. His theory allows, perhaps requires, one to show compassion even for those who have committed evil acts. Sam's compassion shows up in pretty much everything he does, from his teaching to his scholarship, to his work as a volunteer chaplain who visits inmates in jails and juvenile detention facilities. One of his scholarly efforts that makes this plain is his 2013 essay in the *Ohio State Journal of Criminal Law*.[5] It is impossible to sum up his nuanced theory of compassion for those incarcerated, but one phrase jumped out at me when I reread his essay for this occasion: the need to see these incarcerated individuals "as individuals" rather than objectifying them by category and crime.[6] The person sitting across the table in the prison interview room is not a murderer or a rapist or a robber but a human being who, for whatever reasons, did an evil act.

Using this lens facilitates an objective assessment of how well or how poorly a defense lawyer performs the task of representing a defendant who has committed very evil acts. A case that has troubled me since it was announced is the seminal effective assistance of counsel case from the United States Supreme Court, *Strickland v. Washington*.[7] I have written about this case before,[8] but viewing it through Sam's defense-of-value lens gives me a new perspective on the case. I also drew, for the first time, on the Joint Appendix to the Petition for Certiorari, which contains evidence presented in the federal habeas corpus hearing.[9] In addition, thanks to the lawyer who represented Washington at trial, William Tunkey, I am in possession of an unpublished paper written by Daniel Gordon when he was a law student at George Washington University law school.[10] Mr. Gordon interviewed Mr. Tunkey, and his paper contains information provided by Tunkey as well as information gleaned from the trial records.[11]

This Essay will describe, in Part I, David Leroy Washington's horrific crimes and the beginning of his lawyer's representation. In

5. Samuel H. Pillsbury, *Questioning Retribution, Valuing Humility*, 11 OHIO ST. J. CRIM L. 263 (2013).

6. *Id.* at 278.

7. 466 U.S. 668 (1984).

8. George C. Thomas III, *History's Lesson for the Right to Counsel*, 2004 U. ILL. L. REV. 543.

9. *See* Joint Appendix to the Petition for Certiorari, Strickland v. Washington, 466 U.S. 668 (1984) (No. 82-1554), 1983 U.S. S. Ct. Briefs LEXIS 529 [hereinafter App. to Pet. for Cert].

10. Daniel Gordon, Strickland v. Washington: The Unlikely Case for Shaping Ineffective Assistance of Counsel Claims (Dec. 12, 2019) (unpublished manuscript) (on file with author).

11. Mr. Gordon gave me permission to quote from his paper.

Part II, I will briefly describe the defense lawyer's representation, David Washington's background and character, and speculate about how Sam Pillsbury might have viewed him and represented him. Part III will present the end for David Washington as he meets with his grieving family and the electric chair. He was, in the end, a human being who suffered profound guilt for what he had done.

I. THE CRIMES

David Washington's acts were horrific, in their own way as horrific as the acts of Dobbert that Sam described in *Judging Evil*. In autumn 1976, Washington had been out of work for almost two years; his mother made clear to him that she expected him to find a job.[12] He had a wife and children to support.[13]

Washington told the psychiatrist who examined him five years after his convictions that he had sex with his minister, Reverend Daniel Pridgen, in exchange for money.[14] This sex act led to what the psychiatrist characterized as a "homosexual panic" and a "dissociative hysteria."[15] Two days later, Washington and an accomplice made a plan to kill Pridgen; the accomplice was to pretend he wanted to have sex with Pridgen, and when the minister was naked, Washington would enter and stab him to death while the accomplice held a pillow over his face.[16] At the guilty plea colloquy when Judge Richard Fuller asked Washington why he killed Pridgen, he responded:

> I go to church and I believe in God and all of this. I want to say that Reverend Daniel Pridgen, I meant to stab him. I can't dig a man preaching in the church every Sunday and a homosexual. When I was stabbing, that was all that was going through my mind was him getting up on the pulpit every Sunday and taking these people in the pulpit money and he a homosexual.[17]

The next two murders were for monetary gain. Because Katrina Birk's husband had acted as a "fence" for property that Washington

12. App. to Pet. for Cert., *supra* note 9, at *5 (report of Sanford Jacobson, M. D.).
13. *Id.* at *35 (testimony of David Washington).
14. *Id.* at *297–98 (report of Jamal A. Amin, M.D.).
15. *Id.* at *300–01.
16. Washington v. State of Florida, 362 So. 2d 658, 660 (Fla. 1978).
17. Gordon, *supra* note 10, at 15 (citing Transcript of Plea at 22, State of Florida v. Washington, Nos. 76-8300, 76-9542, 76-9543, 76-8646 (Fla. Cir. Ct. Dec. 1, 1976)).

had stolen, he evidently assumed there was cash in the Birk house; he broke into the house when Mrs. Birk and her three sisters-in-law were present.[18] Mrs. Birk gave him money, and he then began to tie up the women.[19] At this point, Mrs. Birk began to "inch[] her way into the kitchen. An argument ensued between the two, and [Washington] shot Mrs. Birk in the head and repeatedly stabbed her with his knife, causing her death. [He] thereafter approached his bound victims, shooting each in the head and inflicting several stab wounds."[20] Amazingly, the three sisters-in-law survived, but one "became blind in one eye, one suffer[ed] breathing difficulties due to the knife wounds to her lungs, and one remain[ed] in a comatose, vegetable state."[21]

Though it is difficult to believe, the third murder might be even more gruesome than the first two. Pretending to be a buyer for a car advertised for sale by Frank Meli, a college student, Washington lured him to the house where Washington lived.[22] He tied Meli spread-eagle to a bed, forced him to call his family and ask for ransom money, and then sold his car.[23] Two days later, with Meli still tied to the bed, Washington stabbed Meli eleven times while an accomplice held a pillow over his face "to prevent others from hearing the victim's screams."[24] Leaving Meli fatally wounded but still alive, Washington proceeded to a place where the ransom money was to be paid.[25] Deciding that the police were staking out the area, Washington returned to "the bedroom in which Meli was being held and found his hostage dead. [He] then dug a shallow grave in his backyard and buried his victim's body."[26]

The trial judge would later find "that all three murders were especially heinous, atrocious, and cruel, all involving repeated stabbings,"[27] and it is impossible to disagree with that judgment. These murders occurred in a ten-day period,[28] all committed, oddly enough, by a man who had "no significant prior criminal record."[29]

18. *Washington*, 362 So. 2d at 660.
19. *Id.*
20. *Id.*
21. *Id.* at 660–61.
22. *Id.* at 661, 664.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. Strickland v. Washington, 466 U.S. 668, 674 (1984).
28. *Id.* at 671.
29. *Id.* at 672.

Police quickly found Meli's car and that led them to Washington and one of his accomplices, his half-brother, Nathanial "Winkie" Taylor, who consented to a search of the home where Meli was murdered.[30] The police discovered Meli's body in the shallow grave.[31] Washington and Taylor were arrested and the other accomplice, Johnny Mills, was soon arrested as well.[32]

In what I assume was a bit of gamesmanship, the public defender's office chose to represent the least culpable defendant, Mills, and then declared it was conflicted out of representing Washington and Taylor.[33] That meant the judge assigned to the case, Judge Richard Fuller, would have to appoint counsel.[34] William Tunkey had practiced criminal law exclusively for several years; he had represented over 1,000 defendants and had been appointed to represent over one hundred indigent defendants.[35] Judge Fuller thought Tunkey's reputation "impeccable. He worked hard. He . . . tried his cases as they should be tried and unlike other lawyers, did not argue unless he thought something was wrong or amiss."[36] He assigned Tunkey to represent David Washington.

Things started badly. Washington had confessed to Meli's murder six days before Tunkey was appointed.[37] Tunkey advised his client not to speak to officers about the other two murders,[38] but, despite his advice, Washington confessed to those murders, too.[39] In each case, the officers told Washington he had a right to have counsel present and that the officers knew he was represented by Tunkey.[40] In each case, Washington executed a waiver of counsel that Tunkey conceded was a "free and voluntary waiver" of his constitutional rights.[41]

There was no point to pleading not guilty. Tunkey withdrew his motions to suppress the confessions.[42] Washington pled guilty to all three murders and, again ignoring Tunkey's advice, waived the right

30. Gordon, *supra* note 10, at 9–10.
31. *Id.* at 10.
32. *Id.*
33. *Id.* at 11–12 (citing Gordon's interview with William Tunkey on November 7, 2019).
34. *Id.* at 12.
35. App. to Pet. for Cert., *supra* note 9, at *251–52.
36. *Id.* at *266.
37. *Id*. at *1.
38. *Id*. at *17.
39. *Id*. at *17–18.
40. *Id*. at *18.
41. *Id*. at *18–19.
42. *Id*.

to have a jury decide the penalty.[43] All that was left was the life or death decision by the trial judge. He chose death.

II. HOPELESS

When Washington's case reached the U.S. Supreme Court, the Court used the word "hopeless" or "hopelessness" four times to refer to Tunkey's attitude toward Washington's case.[44] Tunkey had indeed drawn a bad hand. His client had confessed to three horrific murders and had waived the right to have a jury decide his fate. In preparing for the sentencing hearing, Tunkey spoke with Washington about his background and spoke with his wife and mother on the telephone.[45] But "he did not follow up on the one unsuccessful effort to meet with them. He did not otherwise seek out character witnesses for [Washington]. Nor did he request a psychiatric examination, since his conversations with his client gave no indication that respondent had psychological problems."[46]

I can stop there. The point to this Essay is not to criticize the Court's somewhat labored effort to create meaningful standards to measure effective assistance of counsel. The standards are, by the Court's own admission, far from precise. The Sixth Amendment, the Court tells us, guarantees performance that meets "an objective standard of reasonableness"—the Court then cautions, "More specific guidelines are not appropriate."[47] The prejudice standard is equally vague: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[48] That these standards are far from precise is obvious.

No, the point to this Essay is to imagine how a hypothetical Sam Pillsbury might have approached the three decisions that I set out earlier: the decision not to meet with Washington's wife and mother; the decision not to seek character witnesses; and the decision not to get a psychological assessment of Washington's mental state when he went

43. *Id*. at *39–42.
44. Strickland v. Washington, 466 U.S. 668, 672, 673, 699 (1984).
45. *Id.* at 672–73.
46. *Id.* at 673 (citation omitted).
47. *Id*. at 688.
48. *Id*. at 693.

on his ten-day crime spree. Let me put these issues in context. Washington's guilty pleas meant that his only chance to avoid the death penalty was in the sentencing phase. States are required by *Gregg v. Georgia*[49] to allow jurors, or the judge, to consider both aggravating and mitigating circumstances. The aggravating circumstances must be found beyond a reasonable doubt.[50]

My readers can of course easily figure out the aggravating circumstances. As I quoted from *Strickland* earlier, "all three murders were especially heinous, atrocious, and cruel, all involving repeated stabbings."[51] What about mitigating circumstances? Would evidence about Washington's background or his character have outweighed the aggravating circumstances? Unlikely. The Florida statute at the time of Washington's trial did not mention the defendant's character or background as a mitigating circumstance.[52] David Washington had an unhappy childhood, without a stable home and with a stepfather who abused him.[53] Even if background had been a statutory mitigating circumstance, this seems unlikely to outweigh the aggravating circumstances. But could background have been used to support a statutory mitigating circumstance?

Here, the answer is a resounding yes. The Florida statute lists as mitigating circumstances that the defendant was under the influence of extreme mental or emotional disturbance or was unable to conform his conduct to the requirements of law.[54] Ask yourself: what explains the horrific acts Washington committed in a few days when he had apparently never committed a violent crime in his life? The answer seems painfully obvious to me. But the Court batted away the failure on Tunkey's part to obtain a psychiatric examination by saying that "his conversations with his client gave no indication that respondent had psychological problems."[55] To me, the Court's easy dismissal of Tunkey's failure to obtain a psychiatric evaluation is wrong at two levels. First, lawyers are not psychiatrists. Second, the whole point of

49. 428 U.S. 153 (1976).

50. *Id.* at 206–07

51. *Strickland*, 466 U.S. at 674.

52. *See* FLA. STAT. § 921.141(6)(a)–(g) (1975). The current statute does allow evidence of the "existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty." *See* FLA. STAT. § 921.141(7)(h) (2022).

53. *See* Gordon, *supra* note 10, at 6.

54. FLA. STAT. § 921.141(6)(e)–(f) (1975); App. to Pet. for Cert., *supra* note 9, at *304.

55. *Strickland*, 466 U.S. at 673.

the extreme mental or emotional disturbance circumstance is to capture what might be called psychotic breaks—temporary periods where one loses control for the moment of the crime or crimes. This is one way to distinguish extreme mental or emotional disturbance from insanity. Thus, Washington could have had a psychotic break that led him to commit horrific crimes and later present no evidence of psychological problems. But the overarching defense failure here is not letting a trained psychiatrist make that judgment.

To be sure, a judge had ordered a psychiatric evaluation the day after Washington confessed to the murder of Frank Meli.[56] The psychiatrist concluded that Washington "at the time of the alleged offense had the substantial capacity to appreciate the wrongfulness of his conduct and to conform his conduct to the requirements of the law."[57] The evaluation did not address whether Washington was "under the influence of extreme mental or emotional disturbance." The lack of reference to a key mitigating circumstance should have screamed out for a defense psychiatric evaluation. Tunkey argued this mitigating circumstance at sentencing,[58] but the judge had no expert opinion on that critical issue and ruled against Washington on mitigation.[59]

One post-conviction psychiatric evaluation obtained by counsel for the habeas corpus hearing concluded that Washington was not "under the influence of extreme mental or emotional disturbance" when he committed the crimes.[60] But another defense psychiatrist who examined Washington for the habeas corpus hearing, Dr. Jamal A. Amin, concluded that he had suffered a "psychotic disturbance."[61] This is close to "extreme mental or emotional disturbance." And the salient point is that Tunkey could not have known as he prepared for trial what a defense psychiatrist would say if asked whether Washington was "under the influence of extreme mental or emotional disturbance" when he committed the murders.

Digging deeper into Dr. Amin's report suggests that a plausible case could have been made for "extreme mental or emotional disturbance." About the killing of Reverend Daniel Pridgen, Dr. Amin concluded:

56. App. to Pet. For Cert. *supra* note 9, at *2.
57. *Id*. at *7–8 (report of Sanford Jacobson, M.D.).
58. *Id*. at *201–02.
59. *Id.* at *198.
60. App. to Pet. for Cert., *supra* note 9, at *9 (report of George W. Barnard, M.D.).
61. *Id*. at *302 (report of Jamal A. Amin, M.D.).

> At the time of the first crime, Mr. Washington suffered an overwhelming homosexual panic which triggered a violent dissociative hysteria. He acted out his rage, protesting the destruction of himself and his idealized image: the church leader who was a homosexual. Ministers in the Black community are people of enormous status. Experiencing overwhelming mental and emotional stress, Mr. Washington could not tolerate seeing the flaws in his image. His reality became to him intolerable.[62]

But what about the horrific crimes that followed the initial killing? As to these crimes, Dr. Amin concluded that they were prompted by the initial rage:

> This episode began a 7–14 day violent hysterical, dissociative reaction, characterized by an inability to resist wrongful images. Although at some level he knew they were wrong, he felt internally compelled to commit these acts. He experienced uncontrollable rage and subsequent amnesia for detail. These actions were caused by extreme emotional and mental duress with which he was incapable of coping.
>
> Mr. Washington experienced a syndrome similar to battle fatigue, commonly called shell shock. Sufficient stress can produce this abberant [sic] behavior in otherwise normal people. There is an extreme vulnerability to psychotic acting out during which time there is a temporary absence of usual human sensitivities.[63]

Dr. Amin also commented that "these crimes were stupid and senseless, totally inconsistent with his prior or subsequent conduct. . . . during which his normal consciousness was displaced by the stresses which themselves became manifest. The stupidity of [the] crimes is consistent with his being totally out of control and wanting to be stopped."[64]

Might that testimony have moved the trial judge to sentence Washington to life rather than death? We will never know. What we do know is that the habeas corpus judge realized that this testimony

62. *Id.* at *300–01.
63. *Id.* at *301.
64. *Id.* at *302.

was important. In his order denying the motion for a new trial, the judge concluded that Dr. Amin's report was significant because

> it provides the first indication that evidence may exist which shows that at the time of the offenses, defendant was under the influence of extreme mental or emotional disturbance or that he was unable to conform his conduct to the requirements of law. These factors are within . . . the mitigating circumstances set forth in the death penalty statute.[65]

But Washington's problem was that this testimony came years later, when the only issue was whether the report justified finding prejudice from "counsel's failure to require psychiatric investigation of Mr. Washington prior to sentencing."[66] This is a far harder standard to meet than persuading the trial judge in the first instance to find mitigating circumstances. To be sure, whether Washington was acting under extreme mental or emotional disturbance or was unable to conform his conduct to the requirements of law is a legal question, not a medical one. But the medical opinion of Dr. Amin would have given Washington his best chance to avoid the death penalty. That chance was lost when counsel failed to obtain a psychiatrist's evaluation.

When the Court justified a deferential standard for evaluating the performance of a defense lawyer, it told reviewing courts that they should indulge a "presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'"[67] But what trial strategy could it possibly be to fail to obtain a psychiatric evaluation? When I raise this point in class, students anxious to defend the Court's opinion—and most of my students seem to agree with the Court—rush in to say that the report might be damning. So what? It need not be introduced at the sentencing phase, and it is not discoverable under the Court's constitutional discovery cases.[68]

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65. *Id.* at *304.

66. *Id.*

67. Strickland v. Washington, 466 U.S. 668, 689 (1984) (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)).

68. The Court has never created a reciprocal discovery doctrine along the lines of the requirement that prosecutors disclose to the defense evidence material to guilt or punishment. *See, e.g.*, Brady v. Maryland, 373 U.S. 83 (1963). To be sure, some states do have reciprocal discovery requirements, *see, e.g.*, N.J. Ct. R. 3:13-3(b), and defense counsel must of course check state law. I am no expert on reciprocal discovery in Florida, but I do not believe it includes psychiatric reports. *See* FLA. R. CRIM. P. 3.220. In any event, I am still at a loss to see how an unfavorable psychiatric evaluation would cause significant harm to Washington's case. The trial court already had one evaluation that said Washington "had the substantial capacity to appreciate the wrongfulness of his

And notice something peculiar about the Court's approach to the Monday morning quarterback problem. In stressing its deferential approach to the performance inquiry, the Court writes: "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."[69] But how did we know during the habeas proceedings in 1981[70] the reason Turnkey did not seek a psychiatric evaluation in 1976? What we think we know is based on his testimony at the evidentiary hearing the federal district court held five years later.[71]

If the Court is going to insist that courts evaluate counsel's performance at the time of the representation, why take the lawyer's after-the-fact justification for a nonstrategic decision that diminished Washington's chance to avoid the death penalty? In fact, we do not know why Tunkey chose not to obtain a psychiatric evaluation. We are not privy to the conversations he had with Washington. All we know is his testimony five years later when his performance had been challenged. How easy it would be to offer that justification.

I do not claim that Tunkey is making up his explanation. It is, however, human nature to put the best light we can on decisions that, in retrospect, seem questionable. I am sure that Tunkey's testimony is how he remembers making the decision. But we can never know for sure, and the Court accepts his story without a trace of skepticism.

So now we come to the crux of my essay. What would the hypothetical Sam Pillsbury have done if he had been representing David Washington? I stress this is a hypothetical Sam Pillsbury. Like me, Sam makes no claim to be an expert trial practitioner. But some things are clear. The hypothetical Sam would focus his attention on David Washington, the human being. He would forget the horrific crimes Washington committed. He would forget Washington's failure to follow his advice. He would forget that his chance of winning in the guilt phase had been reduced to zero. There is only one moment in time for

conduct and to conform his conduct to the requirements of the law." App. to Pet. for Cert., *supra* note 9, at *8–9 (report of Sanford Jacobson, M.D.) Would two unfavorable evaluations have been that much more harmful than one? If a favorable report was his best chance to avoid the death penalty, would that not be worth the gamble?

69. *Strickland*, 466 U.S. at 689.

70. App. to Pet. for Cert., *supra* note 9, at *218 (date of habeas corpus hearing).

71. *Id.* at *245–46.

this Sam Pillsbury. What can he do to help Washington avoid the death penalty?

He can meet, in person, with Washington's wife and mother to assess whether they might offer helpful testimony about Washington's character and the names of other character witnesses. If Tunkey had done that, he could have found thirteen witnesses willing to testify that they knew Washington well and that violence was simply not part of his makeup. Washington's habeas corpus lawyers found those witnesses, and their affidavits were introduced in the hearing on the federal habeas corpus petition.[72] Here are some examples.

Norman Cox had been the band director at David Washington's high school; Washington played snare drum and was an "outstanding leader in the band."[73] Cox knew Washington well. His affidavit stated:

> I was shocked to learn recently that David was on death row on [sic] Florida, because the commission of murder is so totally out-of-character with what I knew about David Washington. He was always so peaceable and nonviolent, even though I always thought that his life was tragic. Yet David was obedient and seemed to be a religious youth, who was never involved in any fights with the other kids.[74]

In a similar vein was the testimony of Theron Carson, Washington's minister during the early part of 1976, before the murders. He said that "David was an active member of the church choir in 1976 and attended rehearsals regularly."[75] Carson continued:

> David was very helpful and cooperative and always appeared to be friendly, peacable [sic] and non-violent. I always viewed his [sic] as a respectful, helpful and caring person. I remember on one occasion we had an anniversary for the choir and David had eagerly volunteered his help in the cooking for the group.
>
> I was shocked when I read of David's participation in murder, since it seemed so completely out of character for

72. *See* App. to Pet. for Cert., *supra* note 9, at *203–18
73. *Id.* at *210.
74. *Id.* at *210–11.
75. *Id.* at *211.

> the David Washington I had known and had worked with[;] I couldn't believe it was the same individual.[76]

Judge Alexander, another church choir director, said he had known Washington for two or three years; he said Washington was a "mild and sweet boy."[77] Washington's grandmother, several siblings, neighbors, church members, and an employer made similar observations about Washington's quiet, nonviolent personality.[78] While this testimony, viewed in isolation, is probably not worth much, it would be worth a lot if a psychiatric report found evidence that when Washington committed the murders, he was suffering a "psychotic disturbance" and a "violent, dissociative hysteria." That evidence was also presumably available in 1976. Add those pieces of evidence together, and the judge could have found that Washington was acting under extreme emotional disturbance.

I do not have to rely only on my hypothetical Sam Pillsbury. I can also rely on my lifelong friend, Roy B. Herron, a lawyer in Dresden, Tennessee. While a law student, Roy was part of a team of lawyers representing the "Dawson Five," young black men charged with murder in Georgia in 1976.[79] The men claimed to be innocent, and after more than a year of legal skirmishing, the judge dismissed the charges.[80] Roy also helped lawyers who represented a Tennessee defendant in a capital case involving pretty gruesome facts.[81] Roy later wrote an article about defending life in death penalty cases.[82] One of the aspects of good defense work he stresses is the use of defense experts. He notes, as I argued earlier, that it is not enough to rely on the state's experts: "Even if the state plans to call its own expert, then an independent analysis can make mistakes less likely."[83]

But the most important point to Roy's article, in my opinion, is that the defense lawyer must seek to understand the client. He wrote:

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76. *Id.* at *212 (numbers before paragraphs omitted).

77. *Id.* at *213.

78. *Id.* at *203–04 (grandmother); *id.* at *206–08 (siblings); *id.* at *215–16 (neighbor); *id.* at *214 (church member); *id.* at *208–09 (employer).

79. *The "Dawson Five": Crime, Race Relations in Georgia, and the Specter of Jim Crow*, GA. STATE UNIV. LIBR., https://exhibits.library.gsu.edu/current/exhibits/show/dawsonfive [https://perma.cc/B9GZ-FAEM].

80. *Id.*

81. State v. Coe, 655 S.W.2d 903 (Tenn. 1983).

82. Roy Brasfield Herron, *Defending Life in Tennessee Death Penalty Cases*, 51 TENN. L. REV. 681 (1984).

83. *Id.* at 694–95.

> Whether persons accused of capital crimes live or die often depends upon how much the defense counsel cares for them . . . . [I]t is important that the attorneys understand the reasons behind the defendant's actions. These reasons may include the fact that the defendant was desperate, outraged, mentally ill, or under the influence of alcohol or narcotics.[84]

Did William Tunkey ever ask Washington why he suddenly started killing people in most gruesome ways? There is no evidence I have found that he did. Perhaps he simply accepted this client as a murderer who killed for money. But that is Sam's point about why we should see those who have committed crimes as persons rather than categories—a person, not a murderer, not a rapist, not a robber. It might change how we represent them at trial.

I am no dewy-eyed optimist. I have no idea whether a defense by hypothetical Sam or real-life Roy would have changed anything. The same judge would be making the decision on life or death as long as Washington insisted on waiving an advisory jury. In all likelihood, the death penalty is the result in every variation of lawyer representation. But the point, my most important point, is that one has to try. Do not give up. Do not become "hopeless." The client, however awful his acts were, is a human being deserving of being treated as a human being. In the moment, he is a human being and nothing more. The past is the past. As Lord Brougham put it two centuries ago, an "advocate in the discharge of his duty, knows but one person in the world, and that person is his client."[85]

III. DAVID WASHINGTON: THE END

The night before David Washington's execution, he met with his wife, his twelve-year-old daughter Florence, and his then-minister Reverend Joe Engle.[86] He sat his daughter "on his lap, lifted her chin . . . . 'I want you to do better,' he told the sobbing child. 'I want you to set some goals for yourself and I want you to hit the books.'"[87]

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84. *Id.* at 692.

85. Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925, 928 n.23 (2000) (quoting from 2 TRIAL OF QUEEN CAROLINE 8 (London, Shackell & Arrowsmith 1820–21)).

86. Kenneth A. Soo, *David Leroy Washington, a Former Choirboy Who Stabbed Three. . .*, UPI ARCHIVES (July 13, 1984), https://www.upi.com/Archives/1984/07/13/David-Leroy-Washington-a-former-choirboy-who-stabbed-three/3676458539200 [https://perma.cc/2ZV4-HARL].

87. *Id.*

When prison officials awoke Washington the next morning at 4:30 A.M., "his spirits seem[ed] pretty good," and he "ate heartily of fried shrimp, fried oysters, french fries, hot rolls, vanilla ice cream and lemonade."[88]

He had a message for the 220 condemned men on Florida's death row before he entered the death chamber.

> He stumbled several times over the words and explained, "I'm kind of nervous, that's all."
>
> "To all the guys on death row, I'd like to say don't bow down to defeat . . . without a fight."
>
> Washington entered the death chamber with a small smile on his face and chuckled at the words of one of the guards who escorted him.[89]

After he was strapped into the electric chair, he said, "I'd like to say to the families of all my victims, I'm sorry for all the grief and heartache I brought to them . . . . If my death brings them any satisfaction, so be it."[90]

When his daughter left Washington the night before, the minister reported that the "little girl left in tears. 'Her heart was broken . . . . They were leading her daddy away to kill him.'"

And kill him Florida did. On July 14, 1984, "a state executioner sent a 2,000-volt charge of electricity through Mr. Washington's body that lasted one minute and 25 seconds. He was pronounced dead at 7:09 A.M."[91]

Did David Washington deserve to die in the electric chair? I do not know. Lawyers are neither God nor the sentencing judge. Could a lawyer applying Sam Pillsbury's defense-of-value ethic have saved Washington from the electric chair? Perhaps.

88. *Id.*
89. *Id.*
90. *Id.*
91. Jesus Rangel, *Confessed Murderer of 3 Executed in Florida*, N.Y. TIMES (July 14, 1984), https://www.nytimes.com/1984/07/14/us/confessed-murderer-of-3-executed-in-florida.html [https://perma.cc/3AUP-97RV].