The "Moderate Republican" Death Penalty Values of Justice Stevens

Do tormented victims matter?

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THE VITAL IMPORTANCE OF A JUSTICE'S VALUES

Retiring Justice John Paul Stevens has long been the object of adulation. In 2005, President Ford said he was prepared for his presidency to be judged "exclusively" upon Stevens' 30-year record. In the dominant media narrative, Stevens is just an old-fashioned and modest conventional Midwestern Republican, as was Ford. If he moved left at all, he is still "in the mainstream." Jeffrey Toobin reverentially suggests he is "the last" moderate Republican on the Court and in the tradition of Harding and Coolidge.

But how many moderate Republicans and, indeed, how many Democrats would agree with his values if the media revealed them? This would be unimportant if judges merely applied the law to case facts. Those familiar with the courts know this carefully cultivated image is a myth. In the guise of applying the law, not all but very many judges impose their personal morality upon society.

Stevens (14) and his colleagues repeatedly have substituted their death penalty values for those duly enacted [36]. In their view, these judicial high priests are morally superior to the rest of democracy's mere mortals. (By contrast, Justice Scalia, often caricatured as undemocratic and the Court's "bad boy," avers (1000-01) that judges do not have (1, 5) superior moral values and should not undemocratically foist them on the rest of us.)

THE CORE VALUE: "COMPASSION" FOR VIOLENT CRIMINALS -- CONTEMPT FOR VICTIMS

Despite the claim that Stevens, selected over Robert Bork, was a conservative who "evolved" on capital punishment, his death penalty values were clear from the outset: murderers and rapists are much more important and deserving of sympathy than their victims, who should not be heard or even noticed. Save the lives of guilty murderers and rapists, even if this assures new and avoidable rapes and murders of innocent victims.

Are those the prevailing values of our society?

Stevens did not always side with violent criminals or join Brennan and Marshall in voting to overturn every death sentence [4, 36]. Appointed after a 35-state reaction against the Court's unpopular 5-4 epiphany that previously upheld existing capital punishment was unconstitutional [29, 37], he employed a more politic - and successful - strategy: patiently pursuing "boil the frog" abolition [37, 43; n283], seizing every chance to achieve his stated "narrowing" goal [n250]. If capital punishment could not be *completely* abolished, *almost completely* would suffice [43].

Just six months after assuming office, Stevens co-authored joint opinions upholding three watered down death penalty laws while striking down two strong mandatory versions. Contrary to a Stevens acolyte, it is false that his vote was "essential" to restoring capital punishment. The upholding judgments were 7-2 votes and those nullifying were 5-4. One can only speculate if Stevens would have voted to uphold the three had he two more votes. By often voting with a

majority where his vote would make no difference, this recognized master strategist could appear open minded while making his votes count when they mattered. There are very few, if any, 5-4 decisions where Stevens voted to uphold or proceed with a death sentence (i.e., where his vote was decisive). Also, he asserted (173, 182) power to inflict five justices' death penalty values upon everyone else (acceptability to contemporary society not enough; public's standards of decency "not conclusive" [36; n243]). Ever since, whenever at least four other justices joined him (or he them), he has been "narrowing." (That he had their support does not make his values or theirs "moderate.")

Stealthily [43], these justices have virtually abolished capital punishment in two broad ways:

- (A) Entire categories of barbarity and barbarians have been declared "death ineligible," e,g.,: "adult" rape [nn98, 265], "child" rape [13-16], recidivists who commit new violence while under life sentence [42; n265], supposedly routine murder [nn32, 288], felony murder [11], alleged retardees [11-13], 17-year-olds who proudly commit premeditated torture and murder [7-8].

- (B) The system has been tied in knots [29-31, 48; nn187, 313], making the process costly and lengthy [26], often decades-long [47-50; n16], with repetitive and endless appeals where guilt is not in doubt [3; nn12, 109]; e.g.: (1) it took 8 years to execute Paul Powell after he sent the prosecutor a detailed letter boasting of rape-murder; (2) 36 years after sending his murder victim's mother a tape voicing his enjoyment, Jacob Dougan is *still* on death row.

DON'T SUGGEST THAT A MURDERED GIRL DESERVES A "CHRISTIAN BURIAL" AT CHRISTMAS!

15 months on the court, Stevens regurgitated a favorite banality of murderers' advocates. He joined a 5-4 majority to possibly ***free*** Robert Williams, about whose guilt of murdering 10-year-old Pamela Powers there was *no* doubt. But he separately objected to the dissenters' "strong language" and endorsement of State "dishonor," adding:

> **Nothing that we write, no matter how well reasoned or forcefully expressed, can bring back the victim ...The emotional aspects of the case make it difficult to decide dispassionately.** [Emphasis added.]

So if we can't help the victim, the least we can do is help the murderer. "Dispassion" means ignore the dead victim (and still living family) and, if a fig leaf can be found, free the murderer to potentially create new victims.

Away from Williams' lawyer, a detective engaged in what five justices labeled an "interrogation (410)," which, upon inspection, turns out to be a statement without a single question mark (392-393). He urged Williams to think about enabling the parents to give their little girl a "Christian burial" at Christmas time. Williams produced the body. When a mere suggestion appealing to a miscreant's conscience is deemed coercion requiring exclusion of critical evidence, we can appreciate the mockery made of protections intended against the rack-and-screw, rubber hose and Star Chamber. Chief Justice Burger objected (417) to this 5-4 "sporting theory of criminal justice."

When the Court later reversed itself, Stevens wrote an angry 2,611-word "concurrence," complaining of "an unusually clear violation of constitutional rights" and excoriating the detective. Justice White responded with 200 words. Rarely has bloviating verbosity been punctured with such trenchant brevity:

> *... Stevens' remarks are beside the point ... four [justices] ... were of the view*

that Detective Leaming had done nothing wrong at all, let alone anything unconstitutional. Three of us observed: "... the result in this case seems utterly senseless ..." ... It is ... unjustified ... to say [Leaming] "dispense[d] with the requirements of law," ... He was no doubt acting as many competent police officers would have acted ... in light of the then-existing law. That five Justices later thought he was mistaken does not call for making him out to be a villain or for a lecture on deliberate police misconduct ....

VICTIMS? WHAT VICTIMS?

The Unmentionables. In a 2007 dissent (n1) he took the rare step of reading (36) from the bench, Stevens objected to the court opinion's "irrelevant ... graphic description of the underlying facts" of brutal crimes, "perhaps ... to startle the reader or muster moral support." The whole "graphic description" was 28 words saying Cal Brown had "robbed, raped [and] tortured" two women, with one attempted and one successful murder [1-2]. Clearly, Stevens wanted no *mention* of the crime at all - there was no "graphic description" of *any* of the truly horrific "underlying" facts [2-3]. He wanted no reader to suspect the case involved terrified victims who endured excruciating lengthy agony.

Throw the Victims Out of Court. In 1978 and 1982, with Stevens' full support, the court declared that a convicted murderer could introduce any "mitigating" evidence whatsoever to show why he should be kept alive. This included not only the expectable (e.g., unhappy and impoverished childhood), but evidence that a murderer not only had bad parents but even that his mother (2) imbibed alcohol while pregnant (16) with him, he allegedly "got religion"(3) or won a dance contest (n5). (It does not matter that almost no one with a bad childhood commits murder.)

To redress the court-created imbalance in favor of convicted murderers, laws were enacted allowing "victim impact" evidence at sentencing hearings, to "humanize" victims as well as their murderers. In 1987, the court declared these laws unconstitutional, but reversed that decision four years later, to Stevens' vehement consternation.

A major distinction between the "moderate" justice and one who is not is that the former thinks it moral, just and fair to allow, indeed mandate, introduction of any and all evidence to create sympathy for a murderer as a unique individual while at the same time turning the victim into a "faceless stranger (825)." Stevens has never accepted, as valid for sentencing convicted murderers, evidence about victims and all the harm done to them [n27]. Having objected to bare mention of the crime even in Supreme Court opinions, his view (856) is that victim impact evidence "sheds no light on the defendant's ... moral culpability." The "immoderate" disagrees (825). Stevens later declared (7) it "troubling ... to rouse sympathy for the victims and increase jurors' antipathy" for convicted murderers.

Stevens was also "troubled" by the 1943 "targeted assassination," "with so little apparent deliberation or humanitarian consideration," of Admiral Yamamoto, architect of the Pearl Harbor massacre and head of a navy still killing Americans. Stevens says his resolve to "narrow" capital punishment was prompted by thinking of this "particular individual... a highly intelligent officer who had lived in the United States and become friends with American officers...." Nary a word that this "particular individual" had himself "targeted" myriad dead and maimed Pearl Harbor victims "with so little ... humanitarian consideration."

That, then, is the media's idea of a "moderate" Republican: "humanizing" for a very smart man with American friends but not for the thousands whose deaths he meticulously planned; sympathy for vicious murderers with resistance to whatever might create sympathy for their victims.

Victims Who Aren't Victims. Stevens does not consider as victims traumatized, suffering and ruined people. He refers (1) to "so called 'victim impact evidence'" - a "misnomer" since impact is only on "third parties, usually members of the victim's family." Of course, the death is known to a jury that convicts a murderer. But beyond that, there should be no mention of the "particular individual" lost lest there be sympathy for the victim; and the loss suffered by the living doesn't count because they are mere "third parties," not victims too. Stevens was oblivious to the agony of, e.g., the loved ones of Sherry Byrne, whose slaughter "ruined the lives of everyone close to her."

Creating Future Victims. Finally, Stevens (and death penalty subverting colleagues) also appears unconcerned that rescuing convicted murderers causes new and avoidable murders of innocent victims [42-44].

ANY PORT IN A STORM TO SAVE A CAPITAL CONVICT

Solicitude for Suffering Orphans Who Kill Their Parents. Stevens may not fret about torture and terror of rape and murder victims, but he gets positively apoplectic about discomforting condemned murderers. A victim Stevens dismisses as a "third party" noted "the pain [homicide] causes to those left behind. Dealing with the justice system ... is even worse." Thanks to Stevens, *et al.,* this means agonizing multiple trials and appeals, lasting decades. But for Stevens (and Breyer [47-50]) the suffering of "those left behind" [n319] is immaterial - unworthy of minimal lip service or mention [n315]. Instead, the true objects of sympathy must be convicted murderers who, like parent killers seeking mercy as orphans, ask to be spared because they have suffered "most horrible feelings" from the delays they themselves have sought. Stevens conceded the claim was "novel." Unprecedented would be more accurate. Last December, he bemoaned (3) the "dehumanizing ... frightful toll" and "underlying evils of intolerable delay" suffered by Cecil Johnson. Stevens did not divulge that Johnson, who caused a 29-year delay, had brutally murdered three victims, including a 12-year-old. Revealingly, 23 days earlier, Stevens complained of an execution taking place too fast. Justice Thomas observed (2): "the State can never get the timing just right" to satisfy Stevens.

Murderers: the Ones Who Really Suffer. If Stevens objected to any inference of victim suffering drawn from bare mention of a brutal crime, he had no qualms about providing "graphic description" of minimal alleged suffering by condemned brutal killers. In objecting to a 28-word reference to victims, he omitted that he had devoted 1,700 words (61 x 28) to vivid details about execution while saying nothing about the brutality and agony imposed upon victims [19, 18, 2-3, 54; n178]. He anguished about any execution pain, protesting a murderer took "ten minutes and thirty-one seconds to die." But he did not compare this to the hours, days and even months of death by torture inflicted by those whose cause he championed.

"Constitutional Right" to Commit Punishment-Free Brutality. In 1974, serving a life term for rape, murder and attempted murder, Erlich Anthony Coker, escaped. He then raped 16-year-old Elnita Carver, under threat of death, three weeks after giving birth. In 1977, the death penalty for rape was suddenly held unconstitutional. In a plurality opinion, joined by Stevens 18 months into his tenure, the Court asserted: (1) contrary to normally expected harsher sentences for those with worse records, the worst repeat offenders had a constitutional right to commit punishment-free brutality because, for new crimes, the death penalty could not be imposed on those already serving life sentences [n265; 42]; (2) "Mrs. Carver was unharmed" (i.e., rape can be unharmful); (3) the values of a democratic people are rejected if "unacceptable" to five justices; (4) Carver was an "adult woman." 28 years later Stevens joined another opinion holding (14, 9), a victim need be only 16 to be an adult but a vicious premeditated murderer must be 18 to be considered an adult for the purpose of punishment [n265] and reiterating the "acceptability" requirement.

TO RESPECT OR NOT TO RESPECT?
Stevens is an ardent proponent of respect for and deference to state court judges. He is also an equally ardent practitioner of the opposite. At first glance, this might appear inconsistent. It is not. The overarching value is what is best for the convict, however overwhelming the proof of guilt. Any argument will do if it advances that value.

One of his most famous dissents (7), resounding with "confidence in [state judges] that is the true backbone of the rule of law," lambasted the court for alleged "lack of confidence in the impartiality and capacity" of state judges who make "critical decisions." Stevens purports to advocate (16) "minimizing federal intrusion into state criminal proceedings." Just five months ago, he found it (3) "hard to see how the Court is justified in micromanaging the day-to-day business of state tribunals making fact-intensive decisions...."

Based on these statements alone, one would never know just ***how little confidence*** Stevens has shown in state judges ***when opposed*** to their results. Virtually all decisions he authored or joined slowly abolishing capital punishment rejected state judges' "critical decisions." And he had no trouble "micromanaging" to "narrow" capital punishment with "fact-intensive" decisions.

For four dissenters, Justice White protested: "The Court long ago gave up second-guessing state supreme courts in [such] situations ... [Its] opinion rests on a [dubious] reconstruction of the record the likes of which has rarely, if ever, been performed before in this Court." In another 5-4 case, the dissenters objected: "today's opinion - which considers a fact bound claim of error rejected by every court, state and federal, that previously heard it - is ... wholly unprecedented." To which Stevens replied: "Our duty ... occasionally requires ... a detailed review of the particular facts of a case ...The current popularity of capital punishment makes this ... especially important. ..."

For him, "duty" boils down to this: save the lives of convicted murderers. That is the touchstone for deciding whether to "micromanage," or to "respect" state judges and/or community values.

Stevens has no confidence in state judges who impose death sentences contrary to jury recommendations. Having so often proclaimed superiority of justices' values over the community's in order to overturn and prevent this penalty, he also protests the "absence of any rudder on a judge's free floating power to negate the community's will." Conveniently posing as a community values defender, Stevens says the "most credible justification for the death penalty is its expression of the community's outrage." Yet when the community expresses outrage with a jury death sentence, that should be ignored and disrespected, especially given the "popularity of capital punishment." But when the community (i.e., jury) does not recommend death, the "community's will" must not be negated by judges.

In sum, anything goes to reject the people's values - except when Stevens accepts them.

WHOSE THUMB ON THE SCALES OF JUSTICE?
When he declared capital punishment violated (17) the very constitution that repeatedly authorized it (2), Stevens complained (15-16) of "decisions placing a thumb on the prosecutor's side of the scales." One such decision admitted victim impact evidence. For Stevens, the scales are balanced by allowing any and all sympathy for a convicted murderer but none at all for his victims. Just who seeks to have a thumb on the scales of justice?

Lest there be any doubt, when state judges wrongly interpret federal law, Stevens wants U.S. Supreme Court corrections to be limited to errors benefitting the prosecution, barring review of those aiding guilty defendants. As Justice O'Connor put it, he takes a "the novel view" (n8): his court should "respect" only state court federal law interpretations favoring defendants. Four years ago, he objected (2) to reviewing a state high court ruling that "had granted [a convicted murderer] more protection ... than the Federal Constitution required. A policy of judicial restraint

would allow the highest court of the State to be the final decisionmaker in a case of this kind." However, to rescue a brutal convicted murderer (3), Stevens insisted upon (14) "federal courts' [responsibility] ... to interpret federal law ... independent from the ... States...." Let there be no restraint in the "narrowing" of capital punishment.

Justice Scalia says it is Stevens who wants a "thumb on the scales" (4): "When a criminal defendant loses a questionable constitutional point, we may grant review; when the State loses, we must deny it."

A "MODEST" JUSTICE

It should surprise no one that a justice, whose "modesty" presumes a right to review the "acceptability" of his fellow citizens' values, is not bashful about proclaiming, without evidence, that deceased luminaries would support his "conservative" Coolidge-Harding positions. For example, he has claimed the backing of late Chief Justices Burger and Rehnquist, as well as Alexander Hamilton.

In 2007 (6), Stevens expressed his "firm conviction" that Burger and Rehnquist would have agreed with him. But when they were alive and shortly after joining the court, he implicitly accused them of unfairness to child murderer Williams by endorsing "dishonor," "an unusually clear [lawless] violation of constitutional rights" and failing to decide "dispassionately." Years later, Stevens also implicitly accused (7) Rehnquist of encouraging cynicism about and undermining confidence in the rule of law and judicial impartiality, as well as authoring a "sad day for a great institution."

Stevens confidently asserted that Hamilton would have agreed with a bare majority [7-8] that a 17½ year-old, who planned, enjoyed and boasted of the barbaric torture and murder of an innocent woman, could not possibly be mature enough to understand his crime and that the Constitution Hamilton defended required that such a creature be allowed to "attain a mature understanding of his humanity" [53]. Stevens conveniently omitted that, before age 17, Hamilton ran (31-33) a complex export-import business and published poems, articles and essays - and when just 14, he avowed (30-31) a willingness to "risk my life tho' not my character"!

Stevens has provided repeated illustrations of attorney Mark Pulliam's observation that "no argument is too preposterous for a lawyer to make with a straight face" [47].

CONCLUSION: THE REPLACEMENT

It is critical to be clear about what the dominant media and posturing politicians mean when they tout Stevens' replacement as "moderate" and "in the mainstream." That nominee should be closely questioned, not in arcane legalistic terms of interest only to lawyers, but using concrete examples likely to attract the public's attention.

A justice labeled "moderate" by the media is one who protects murderers whose guilt is not in question, and gives the back of his/her hand to victims - torturing them with endless litigation to save such murderers. At the very least, any alleged moderate should be asked whether the Constitution proscribes criminal penalties approved by the people but "unacceptable" to the values of five justices [n 243].

Senator Leahy wants a Stevens clone "who approaches every case with an open mind and a commitment to fairness." This can only be greeted with astonishment by the millions who care about barbaric crime and its victims, who Stevens, to protect their tormenters, would exclude from bare mention in Supreme Court opinions and consideration at sentencing trials.

Does our society need or favor more "open minded" justices for whom victims should be out-of-sight-out-of-mind while convicted murderers touch the very depths of their souls?