The New York Times Again Cries Wolf

The Anatomy of Anti-Death Penalty Propaganda

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NOTE: Bracketed page numbers and footnotes refer to documentation in the detailed paper downloadable here.

"The State of California may be about to execute an innocent man."
— Judge William A. Fletcher, quoted with approval, NY Times, Aug. 14, 2009

"This Man Might Be Innocent. This Man Is Due to Die."
— Time cover, May 18, 1992

"Virginia Executes Inmate Despite Claim of Innocence"
— New York Times headline, May 21, 1992

"The execution of a person who can show that he is innocent comes perilously close to simple murder."
— Justice Harry Blackmun, Jan. 1993, citing Virginia execution as example

Death penalty supporters have long been frustrated by the brazen deceit of opponents on the courts and in the media. An Aug. 14 *New York Times* front-page putative news report featuring a May 11 decision provides what nowadays would be termed an illustrative "teaching moment." This 1,117-word story uses just 40 perfunctory words contrary to its agenda after complaining that an order upholding Kevin Cooper's death sentence was only 80 words. Save this token "balance," only anti-death penalty material is cited in advancing two motifs: execution of the innocent and a bandwagon of federal appellate dissents against this supposed prospect.

From this account, one would not learn crucial relevant facts, including: (a) last minute bogus innocence claims being a stock-in-trade of death penalty opponents; (b) contrary *Cooper* opinions; (c) many if not more dissents by judges objecting to judicial negation of a democratic people's right to determine punishment for convicted brutal murderers; (d) the quoted judges being among the most blatant liberal judicial activists usurping the right of self-government.

Crying Wolf

A striking aspect of the Cooper story is its use of language almost identical to that of the notorious coverage of the 1992 Roger Coleman execution [20-32]. The frenzied media circus [n324] allegation of judicial refusal to consider evidence of "innocence" was known *at the time* to be false. Actual detailed and repeated judicial consideration was available to flagrantly dishonest advocacy journalists [22-24]. 14 years later, a DNA test conclusively demonstrated what anti-death penalty judges and journalists knew when Coleman was executed proclaiming his innocence [nn166, 324].

Now comes a tired replay of the meme that callous judges refuse to hear innocence evidence. The implication of the above-quoted 1992 *Times* headline is that any murderer should be able to avoid execution simply by claiming innocence, a backdoor prescription for abolishing capital punishment.

Abolitionists, who express no genuine concern for the hundreds of thousands of innocent law-

abiding homicide victims executed without due process and multiple appeals [42-43], know wrongful execution is the only argument that might create doubt in a public that otherwise strongly supports capital punishment [34; n11]. So the allegation keeps coming. But what media downplay or do not report at all is substantial research showing exoneration claims have been vastly inflated.

Cooper's "Innocence" Claims

Cooper was convicted of hacking five people with an axe and knife more than 141 times. Four died, including parents and two children; one child survived. Critical here is the *Times*' failure, surely intentional, to report *why* the May 11 dissent was not a majority opinion. Emphasizing a Reagan appointee was among the 11 of 27 judges who dissented, it fails to note the other 10 were Carter or Clinton appointees in the Ninth Circuit, the most frequently reversed in the country, with a history of defying the Supreme Court [27-28]; or explain why 16 judges did not dissent. The Times also omits that the dissenting Reagan appointee joined a one sentence dissent and not Judge Fletcher's 101 pages, actually joined by only four others. Unmentioned is a detailed panel decision upholding the district judge or Judge Rymer's strong exception to Fletcher's implication that 16 judges approved executing a "probably innocent" man. A *Times* reader would never know Rymer averred that "the dissent neglects to acknowledge the evidence tying Cooper to the murders, or the fact that, after all the testing that has been done post-conviction, no forensic evidence suggests that anyone else was at the scene of the crime or was the killer." The *Times* quotes Fletcher:

> *"There is no way to say this politely. The district court failed to provide Cooper a fair hearing and flouted our direction to perform the two tests."*

Rymer's direct response is omitted: "the dissent starts with the false premise that the district court 'flouted' this court's 'direction' ... The district court did no such thing; it did precisely" what was suggested. Also, the *Times* conceals this: "Following an evidentiary hearing the district court found that, to the extent there was new evidence, it was incredible, unreliable or unpersuasive with respect to all claims in the petition, that neither ... tests showed innocence or undermined evidence of Cooper's guilt.... The evidence supports these findings..." The *Times* repeats Fletcher's assertion that evidence had been tampered with but omits Rymer's conclusion: "there is no reliable evidence of tampering." The *Times* reports with approval Fletcher's charges of wrongdoing at all levels, but omits Rymer's response that Fletcher himself was guilty of "manipulating data."

The *Times* also uncritically accepts the complaint that, in the interest of curtailing abusive appeals, the Antiterrorism and Effective Death Penalty Act of 1996 and the Supreme Court have imposed "daunting barriers," but does not explain why Cooper's case is still dragging on 26 years after the murders and 13 after this "Effective" Act became law, or why there are ongoing cases over two and three decades old [47-49]. If the *Times* and those it cites had their way, no execution would ever take place because new objections should always be allowed and old ones relitigated [26-27]. Death penalty opponents will always find executions to be "rushed," "impatient" and "immediate," even when 11, 14 or 21 years after the murders and often in the absence of any innocence claim [28-29]. Indeed, just three days after the *Times* advocacy piece, Justice Scalia suggested the Court should resolve if it "thinks it possible that capital convictions obtained in full compliance with law can never be final, but are always subject to being set aside by federal courts for the reason of 'actual innocence.'"

Finally, the *Times* quotes Fletcher's claimed concern that "[i]f [Cooper] is innocent, the real killers have escaped." Of course, the *Times* did not report on the progress of O. J. Simpson's search for "the real killer." Would the *Times*, which often has made clear its opposition to capital punishment,

approve of a death sentence for any "real killer"? [n267]

Dissents

Presumably, what suddenly made the *Cooper* dissents newsworthy after 95 days was that the *Times* decided to do its own "review" of death penalty dissents by federal circuit judges and seek out "experts" to confirm the findings. Like the media reporting on their own polls, the paper created its own story. As with any custom creation, the desired results were produced. Even so, the best that the *Times* could come up with was that there had been a "noticeabl[e]" increase ("dozens") in dissents from decisions sustaining death sentences. There is no indication of how many such dissents there were in prior years and just how much of an increase there was.

More importantly, a *Times* reader would believe only death penalty opponents were unhappy. In reality, there have been many dissents complaining about judicial sophistry used to rescue clearly guilty brutal murderers [3]. The *Times* did not compare the dissents on behalf of convicted murderers with those against sparing the clearly guilty. At the very least, some hard numbers should have been provided. Instead, lay persons are left to believe that dissent is a one-way street. There is not a word about dissents by appellate judges who care about victims and fealty to the law.

Most important of all, there is no mention of the numerous Supreme Court dissents from fiats by abolitionist justices who, *absent any constitutional amendment*, almost completely abolished capital punishment [3-4, 29-30, 43]. Lest there be any doubt about what they have perpetrated, death penalty opponents themselves have observed: "For [its] first 175 years ..., the Constitution was not construed to place any limits on ... capital punishment." Thereafter, in countless cases, the death penalty was slowly but methodically dismembered [29-31; n283]. This did not occur without understandably vehement protest. In case after case, as recently as 2008, there have been vigorous dissents. Examples abound [nn32, 313]: abolition of the death penalty for adult rape [nn98, 265], child rape (2008) [13-16], supposedly routine murder [nn32, 288], felony murder, alleged mental retardation (2002) [11-13], 17-year-olds who proudly commit premeditated torture and murder (2005) [7-8], and many more (e.g., here, here, here, here and here (2007), here (2007), here (2007), here [9-10], and here).

So there have been myriad dissents by judges and justices "frustrated" by decisions saving the clearly guilty. In concealing this fact, the *Times* engages in yet another media attempt to create an illusory bandwagon to convince a people who overwhelmingly support the death penalty that they are out of step and should get with the elitists' program [33].

"Conservatives" and "Moderates"

A common abolitionist artifice is to pretend not to oppose capital punishment and to be, in fact, "moderate" or even "conservative" [n177]. Some dissenters have "ruled in favor of the death penalty many times," says the *Times*, omitting that only Justices Brennan and Marshall took the position that the death penalty was unconstitutional period. (By the time Blackmun so opined, his retirement was imminent.) Hence, almost all members of the Supreme Court, as well as lower court judges bound by the Supreme Court, have sustained many death sentences. That did not stop them from, as noted, slowly but surely sabotaging the death penalty over nearly four decades.

In making its case, the *Times* relies upon three appellate judges, Stephen Reinhardt, Rosemary Barkett and Fletcher. Using Barkett and Reinhardt as authorities on the death penalty is like relying

on Mahmoud Ahmadinejad as an authority on religious tolerance or pacifism.

The *Times* does not tell us that, years before President Obama made "empathy" famous, Reinhardt indicated he used his own values and life experience to decide cases. He was considered at the Supreme Court to be a "renegade judge," becoming "one of the most overturned judges in history" while defiantly boasting that, because the high court takes so few cases, "[t]hey can't catch 'em all." As for the *Times*' implication that Barkett is a death penalty supporter, she joined the dissent showing great sympathy for Jacob Dougan. Far from any doubt about his guilt, he sent a tape to the victim's mother boasting: "it was beautiful. ... I enjoyed every minute of it. I loved watching the blood gush from his eyes." Because Dougan said his intent was to call attention to racial discrimination, the dissenters asserted this was "a social awareness case. Wrongly, but rightly in the eyes of Dougan, this killing was effectuated to focus attention .... The victim was a symbolic representation of the class causing the perceived injustices." So concern for social justice mitigates the enjoyed murder of a randomly chosen innocent 18-year-old begging for his life! Also, Dougan's "impatience for change ... matured to taking the illogical and drastic action of murder." Here, then, maturing mitigates murder. But, long before a 5-4 Supreme Court held a 17-year-old could not be expected to fully appreciate the wrongfulness of torture-murder [7-8], Barkett filed a sole dissent to save a 17-year-old repeat premeditated murderer based on his immaturity and, also, because it was not entirely his fault - family, schools and society having failed him. She did not explain why almost all teenagers confronting societal and family shortcomings do not commit brutal murder.

Does it concern the *Times* that Dougan, his guilt of brutal murder 34 years ago uncontested, is still on death row?

Turning to Fletcher, the *Times* seeks to show he is moderate because he is "hardly a fierce opponent of capital punishment," meaning that he may be an opponent but not a "fierce" one. Fletcher himself snatches a well-used artifice from the abolitionist bag of tricks. Feigning concern for the additional torture they themselves have used the legal system to inflict upon the victims' families, disingenuous death penalty opponents propose to relieve that torture by protecting guilty murderers [49-50]. Fletcher writes that the crime survivors, their families and the murder victims' families have "been traumatized for life. The criminal justice system has made their nightmare even worse. ...We owe it to the victims of this horrible crime ... to get this one right." The *Times* quotes the last sentence but fails to mention the ploy. *Cooper* is not only a reprise of the Coleman case; it is also one more example in a long list where those who care about murderers at the expense of victims pretend to do so for the benefit of the victims. The families saw through and rejected Fletcher's pretended solicitude.

Conclusion

The August 14 Times article was not a legitimate news story. It did not fairly report relevant facts concerning an event that had just occurred. Nor was it even an opinion piece, which states what it disagrees with and why. Hence, this is not a responding opinion piece. In the end, the *Times* produced one-sided anti-capital punishment propaganda. The purpose here has been to present the anatomy of such propaganda.