

FACT SUPPRESSION AND THE SUBVERSION OF CAPITAL PUNISHMENT:

**WHAT DEATH PENALTY FOES ON THE SUPREME COURT AND IN THE MEDIA
DO NOT WANT THE PUBLIC TO KNOW**

by

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INTRODUCTION	1
I	
DON'T MENTION THE CRIME OR THE VICTIM IN POLITE COMPANY.....	1
<i>Litigation War to Impose Unpopular Moral Values</i>	3
<i>Throw the Victims Out of Court</i>	5
<i>How Can Anyone Under 18 Be Expected to Know Murder Is Wrong?</i>	7
<i>Don't Execute a Young Murderer Who "Only" Preys on Old Ladies</i>	9
<i>He Didn't Mean It</i>	11
<i>"Retardation" as a Free Pass</i>	11
<i>Sanitizing a Grown Man Ripping an 8-Year-Old Girl's Insides</i>	13
<i>The Insufficient Moral Depravity of Dignified Child Rapists Deserving of Respect</i>	15
<i>Fact Suppression: Juries Can't Handle the Truth</i>	16
<i>Anyone Who Inflicts Lengthy Major Pain Should Not Suffer Even Short Minor Pain</i>	16
<i>Fact Suppression Has Its Limits</i>	19
II	
"INNOCENCE" CLAIMS AND THE MEDIA: <i>Roger Keith Coleman</i>	20
<i>The Narrative: Courts Hurry Execution, Refusing to Consider Evidence of Innocence Due to Minor</i>	
<i>Attorney Mistake</i>	21
<i>Greenhouse on Coleman</i>	22
<i>Cracking the Greenhouse Code</i>	24
<i>Constitutional Claims</i>	29
III	
DEFYING THE PEOPLE	32
<i>Public Support for the Death Penalty Remains</i>	33
<i>The Judicially Asserted Irrelevance of the People's Moral Values</i>	36
IV	
FACTS vs. FAIRNESS: THE TUNNEL VISION OF "ABOLITIONIST" MORALITY.....	38
<i>A Love Affair with Murderers</i>	40
<i>One-Sided "Compassion" and the 0.16% Execution Rate</i>	42
V	
NO ARGUMENT TOO PREPOSTEROUS – IF ONLY THE PUBLIC KNEW.....	47
<i>Media Blackout: Justice Breyer's Obsession</i>	47
<i>More Absurdity</i>	50
<i>"Superior Judgment"</i>	51
<i>Guilty But Innocent</i>	53
CONCLUSION	56

INTRODUCTION

What they lack in popular support, death penalty opponents more than make up in tenacity, skill, passion – and success. When a 36-year 707,000 homicide holocaust results in 1,136 executions, capital punishment has been all but abolished, with a token few murderers served up to fool the public.

The United States Supreme Court and other courts have played a major role in this evisceration. A critical prerequisite has been the suppression of information. Death penalty opponents in the media and on the Supreme Court have done all they could to hide from the public facts about murders, murderers and murder victims; and about how, in turn, these facts have been addressed by the courts.

While proclaiming their moral superiority, dishonesty, especially half-truth, is central to those who deem themselves merciful by bestowing mercy upon the merciless. Focusing upon the alleged plight of brutal murderers, they maximally and callously withhold compassion, information and even thought about the massive suffering of innocent law-abiding victims. Yet, the public still supports the death penalty with little understanding of the true reasons why it is so rarely enforced.

If the public were well informed of case facts and arrogantly imposed disingenuous legal absurdities, abolition would fail. What follows is a partial review of what the public is not, but should be, told.

I

DON'T MENTION THE CRIME OR THE VICTIM IN POLITE COMPANY

A footnote in little-noticed *Uttecht v. Brown*¹ clearly unmask the basic abolitionist attitude and stratagem of suppressing public knowledge of what murderers do, i.e., why exactly we have a death penalty. Justice John Paul Stevens objected to the Court's opening "graphic description of the underlying facts of [Brown's] crime, perhaps in an attempt to startle the reader or muster moral support for its decision. ..."²

The whole "graphic description" is this: "Cal Coburn Brown robbed, raped, tortured, and murdered one woman in Washington. Two days later, he robbed, raped, tortured, and attempted to murder a second

¹ 551 U. S. 1; 127 S. Ct. 2218 (2007).

² *Id.*, at 2239.

woman in California.”³ Far from being “graphic,” this was virtually antiseptic. If Stevens opposes revealing so little, he opposes disclosing any crime facts at all. This epitomizes the anti-death penalty movement. In a 1996 documentary,⁴ Sister Helen Prejean responded to criticism that she should have talked to the surviving victim of a convicted murderer: “I didn't feel it was my place or my role ... to know the mean, vicious Robert Willie.”⁵ Frontline reported: “The families of victims and others say she pays too much attention to the criminals and too little to their crimes.”⁶

This is understandable. Heeding the brutalities of those championed by the likes of Prejean and Stevens would undermine their claim to a moral superiority entitling them to impose their unpopular values. If Stevens accuses the *Uttecht* majority of seeking to “startle the reader” or “muster moral support,” he must realize facts must be suppressed if he is to have any moral support outside the abolitionist community.

This is made clear by the really “startling,” and “graphic” facts not mentioned by the *Uttecht* majority – or the media. Linda Greenhouse disclosed even less than the Court: “Brown...was charged with the murder of a woman whose car he had hijacked. He was convicted in 1991....”⁷ Compare her “facts” with the Washington Supreme Court’s account:⁸

[Brown]...forced his way into [Holly Washa’s] automobile, stuck a knife in her face, and grabbed her by the hair. He demanded that she “drive or die,”and rummage[ed] through her purse for money... [He] tied [her] hands behind her back [and took her] to his room ... demanded that she remove all her clothing, after which he tied her to the bed ... engaged in sexual intercourse with [her] for about two hours, ... decided it was time “to have a little control, . . .make her a little more scared of me” He then tied her in a face up, spread eagle position, with her hands behind her back and her mouth gagged, and whipped her “maybe half a dozen times” ... again forced her to undress and tied her to the bed ... face down, spread eagle ... hands

³ *Id.*, at 2221.

⁴ *Angel on Death Row*, FRONTLINE, Show 1414, April 9, 1996, available at <http://www.pbs.org/wgbh/pages/frontline/angel/angelscript.html>. See HELEN PREJEAN, *DEAD MAN WALKING: AN EYEWITNESS ACCOUNT OF THE DEATH PENALTY IN THE UNITED STATES* (1993); exalted as film, *DEAD MAN WALKING* (Grammercy 1995).

⁵ *Angel*, *supra*.

⁶ *Id.*

⁷ Linda Greenhouse, *Ruling Helps Prosecutors in Death Penalty Cases*, N.Y. TIMES, June 5, 2007, A 16. This suppression of facts was no accident. Greenhouse’s attitude was well reflected in *Supreme Court to Hear Appeal of Mexican Death Row Inmate*, N.Y. TIMES, May 1, 2007, A 16: “Medellín ... was convicted in 1993 of participating in the gang rape and murder of two teenage girls. In urging the Supreme Court not to hear the case, the Texas solicitor general, R. Ted Cruz, recounted the crime in vivid detail....” Apparently, what Ms. Greenhouse found newsworthy was not the details of the barbaric rape-murder-robberies, which she barely mentioned, but that Mr. Cruz had the effrontery to focus upon them. The clear implication: this was improper. See also *infra* 51-52, 14-15.

⁸ *State v. Brown*, 940 P.2d 546, 555-559; (Wash. 1997) (en banc). Justice Stevens seems far more disturbed by possible widespread public disclosure of these details than the crimes themselves. He even read his dissent from the bench. GEO. U. L. CTR., SUP. CT. INST., SUP. CT. OF THE U.S., OCT. TERM 2006 OVERVIEW (2007) 3, available at <http://lsr.nellco.org/cgi/viewcontent.cgi?article=1005&context=georgetown/cpr>.

tied behind her back. He then had sexual intercourse with her again. ... The next day [he] forced [her] to drive him to her apartment where he hoped to find checks ... he could forge. ... [He] became irritated. ... again tied [her] to the bed face down ... spread eagle ... hands handcuffed behind her back and her mouth gagged... He penetrated her vaginally and anally *with an aftershave lotion bottle. He shaved her pubic hair and held a hot hair dryer close to her vagina, breasts and stomach. He also shocked her by using an electric extension cord with the end cut off. He described these acts as "torture" and acknowledged that the electric shock was particularly painful.* ... He forced Ms. Washa into the trunk of her ... automobile ... and cut her throat with "three swipes" and stabbed her several times in the chest and abdominal areas. ... [He said] he killed Ms. Washa because *he did not want to leave any witnesses alive.*

... an autopsy... concluded her death was caused by an extensive incised wound to her neck and strangulation by a ligature with a very rigid knot. ... Her face was severely bruised. Both the inside and outside of her vaginal area were bruised. There was also bruising around her anus. The vaginal and anal injuries indicated forcible penetration with a hard object ... Her nipples showed abrasions and ... bruising consistent with being whipped by a belt or cord. Similar bruising was found on her inner thigh, which also indicated whipping. Her feet and ankles were covered with bruises consistent with having been restrained. Her chest and abdomen had multiple stab and slicing wounds. An "irregular blemish-like area of red drying" on her inner thigh indicated burning. ... [Emphasis added.]

Even this description does not fully portray the magnitude of what prompted the Ninth Circuit majority's parody of understatement, that Brown was "not a nice man."⁹ The full Washington Supreme Court opinion also details the rape, torture and attempted murder of his second victim.¹⁰

Abolitionists have campaigned to convince the public that numerous innocents have been executed, a contention vigorously debated.¹¹ Be that as it may, the Supreme Court routinely seeks and finds new ways to rescue murderers without overturning their *convictions* as opposed to their *sentences*.¹² For example, Brown "had confessed to these [Washington] crimes and pleaded guilty to the California offenses."¹³

Litigation War to Impose Unpopular Moral Values. How could Brown's case still continue when his unspeakable sadism occurred in 1991 and the decision quoted was in 1997? There has been a 40-year "all-

⁹ Brown v. Lambert, 451 F. 3d 946, 947 (9th Cir. 2006).

¹⁰ State v. Brown, at 546-547.

¹¹ See, e.g., Kansas v. Marsh, 548 U.S. 163, 451-457, 463-465 (2006) (Scalia, J., concurring), (Souter, J., dissenting); U.S. v. Quinones, 313 F.3d 49, 55, 63-67 (2d Cir. 2002); Stephen J. Markman and Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121 (1988); Michael L. Radelet and Hugo Adam Bedau, *The Execution of the Innocent*, 61 LAW & CONTEMP. PROBS. 105 (1998); Joshua Marquis, *The Myth of Innocence*, 95 J. CRIM. L. & CRIMINOLOGY 501 (2005); D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761 (2007); Stephen J. Markman, *Innocents on Death Row*, 46 NAT. REV. 72 (Sept. 12, 1994); Paul G. Cassell, *We're Not Executing the Innocent*, WALL ST. J., June 16, 2000, A 14; *Symposium: Innocence in Capital Sentencing*, 95 J. CRIM. L. & CRIMINOLOGY 371 (2005).

¹² See, e.g., *infra* 7; notes 17, 52, 109, 177, 178, 182, 288, 333.

¹³ *Supra* note 1, 127 S. Ct. at 2221.

out strategy of litigation against the death penalty.”¹⁴ Justice Scalia wrote of the “heavily outnumbered opponents of capital punishment [who] have successfully opened ... front[s] in their guerilla war to make this unquestionably constitutional sentence a practical impossibility.”¹⁵ Legitimate claims of innocence do not drag out cases for up to 36 years.¹⁶ Concealment by pretenders to moral superiority is essential. The public must not be “startled” by the true nature of the murderers and their murders.

In his *Uttecht* footnote, Justice Stevens quotes a Justice Brennan dissent: “However heinous Witt’s crime, the majority’s vivid portrait of its gruesome details has no bearing on the issue before us. It is not for this Court to decide whether Witt deserves to die. That decision must first be made by a jury”¹⁷ This is disingenuous. For decades, Brennan asserted precisely that it *was* his court’s prerogative to say which murderers deserved to die; his view: none.¹⁸ He voted to overturn every death sentence before him, plainly based on his own moral values, rejected by both the Constitution’s framers and a substantial majority his contemporaries.¹⁹ He declared:

This Court inescapably has the duty, as the ultimate arbiter of ... our Constitution, to say whether ... "moral concepts" require us to...declare...the punishment of death ... is ***no longer morally tolerable***... the State... must treat its citizens in a manner consistent with their ***intrinsic worth as human beings*** – a punishment must not ... be degrading to ***human dignity***. A judicial determination whether the punishment of death comports with human dignity is ... not only permitted, but compelled²⁰

Brennan thus claimed power to impose his morality in the name of a Constitution that explicitly permits the death penalty (e.g., deprivation of life permitted with due process – two clauses; indictment for

¹⁴ *Graham v. Collins*, 506 U.S. 461, 481 (1993) (Thomas, J., concurring). For a case similar to *Uttecht*, involving rape murders over 32 years ago, see *infra* 48-49, esp. notes 315, 316. According to abolitionist Hugo Bedau, until 1960, few thought the death penalty could be ended via the Supreme Court. *Baze v. Rees*, 128 S. Ct. 1520, 1552 (2008) (Scalia, J., concurring). A comprehensive review of the litigation war, from the perspective of a committed abolitionist, *infra* 55 and note 283, is James S. Liebman, *Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963-2006*, 107 COLUM. L. REV. 1 (2007).

¹⁵ *Simmons v. S. Car.*, 512 U.S. 154, 185 (1994) (Scalia, J., concurring). On public support, see *infra* 32-37.

¹⁶ E.g., *Smith v. Arizona*, 128 S. Ct. 466 (2007) (Breyer, J., dissenting), *infra* 48ff.; George F. Will, *Circuit Breaker*, Wash. Post, Nov 16, 2006, A.27 (“cases live longer than ... murder victims”); *Longest-Serving Death Row Inmate Executed*, UPI, Sept. 17, 2008 (34 years); CAL. DEPT. OF CORRECTIONS AND REHAB., CONDEMNED INMATE LIST, available at http://www.cdcr.ca.gov/Reports_Research/docs/CondemnedInmateListSecure.pdf (e.g., Kraft (1972 murder!), Catlin, Jackson, Moore, Phillips, Bell) (as of Sept. 16, 2008); FLA. DEPT. OF CORRECTIONS, DEATH ROW ROSTER, available at <http://www.dc.state.fl.us/activeinmates/deathrowroster.asp> (visited Jan. 15, 2009) (e.g., Meeks, Alvord, Rose, Knight, Foster).

¹⁷ *Wainwright v. Witt*, 469 U. S. 412, 440 n 1 (1985) (Brennan, J., dissenting). Brennan added, “as in every case of a violation of *Witherspoon* ..., only the defendant's death sentence and not his conviction was vacated.” *Id.* (Emphasis added; citation omitted.)

¹⁸ See, e.g.: “[T]he death penalty is in all circumstances ... prohibited” by the Constitution. *Tison v. Arizona*, 481 U.S. 137, 185 (1987) (Brennan, dissenting); *Saffle v. Parks*, 494 U.S. 484, 515 (1990) (Brennan, dissenting) (same).

¹⁹ *Infra* 37.

²⁰ *Gregg v. Ga.*, 428 U.S. 153, 229-230 (1976) (Brennan, J., dissenting). (Emphasis added.) Brennan was not alone. *Infra* 5-8, 36-37, 53; *Woodson*, *infra* note 32, 428 U.S. at 304 (Stewart, Powell and Stevens, JJ., plurality) (“all persons convicted of a designated offense” must be treated as “uniquely individual human beings”).

capital crime by grand jury permitted; only *double* jeopardy of life barred).²¹

“At bottom, the [death penalty] battle has been waged on *moral* grounds,” wrote Brennan.²² How can such a battle be fairly fought without disclosing the facts to which moral values are going to be applied? This “battle” is not about pickpockets but the most depraved. Do the latter have “intrinsic worth as human beings” and “human dignity” but not their victims? For abolitionists, it is morally mandatory to dehumanize victims, rendering them faceless and worthless.

Throw the Victims Out of Court. In 1987, the Brennan stance reached a high point in *Booth v. Maryland*,²³ when the Supreme Court ruled victim impact statements (VIS) unconstitutional. The Court held that, although any murderer’s friends or family members could testify about how wonderful he is and/or about all his suffering and travails, the victims’ friends and families were to have the courthouse doors slammed in their faces. Just two years after Brennan insincerely wrote that death is a jury decision, the jury was barred from learning all facts pertinent to what he said was a moral assessment.²⁴

While the full range of *foreseeable* consequences of a defendant's actions may be relevant in other criminal and civil contexts, ... in ... capital sentencing. ...the jury is required to focus on the defendant as a "uniquely individual human bein[g]." ... The focus of a VIS, however, is not on the defendant, but on the ... the victim and the effect on his family. ... This ... could divert the jury's attention away from the defendant's background and record, and the circumstances of the crime...

Justice White, in dissent, made clear why this was not required:

The affront to humanity ... is not limited to ... victims; a ... community is... injured, and ... the victim's family suffers shock and grief ...difficult even to imagine. ... The Court's ...[premise is] the harm... a [brutal] murderer causes a victim's family does not ...reflect on his blameworthiness ... Many if not most jurors, however, will look less favorably on a capital defendant when they appreciate the full extent of the harm he caused ... [S]omeone who drove his car recklessly through a stoplight and unintentionally killed a pedestrian merits significantly more punishment than someone who drove his car recklessly through the same stoplight ... when no pedestrian was there to be hit...if punishment can be enhanced in noncapital cases on the basis of the harm caused,... I fail to see why [this] is unconstitutional in death cases... just as the murderer should be considered as an individual, so too the victim is [a unique] individual²⁵

²¹ U.S. CONST. amend. V; amend XIV, § 1.

²² *Furman v. Georgia*, 408 U.S. 238, 257 (1972) (Brennan, J., concurring); *see also infra* note 297.

²³ 482 U.S. 496.

²⁴ *Id.*, at 504, 506. Emphasis added.

²⁵ *Id.*, at 515-516.

Four years after *Booth*, it was reversed by *Payne v. Tennessee*,²⁶ over Justice Stevens' vehement dissent.²⁷ But despite this small victory for victims, for years and for reasons unrelated to guilt or innocence, and contrary to Brennan's insincere claim that the "decision must first be made by a jury," the Supreme Court, repeatedly asserting its moral superiority and a right to impose it,²⁸ has increasingly usurped jury powers and the people's democratic right to decide the moral criteria for the death penalty.

Charging his colleagues with having appropriated a right to impose their own personal moral value judgments upon the death penalty, Justice Scalia has lamented: "The arrogance of this assumption of power takes one's breath away."²⁹ He has asked: "By what conceivable warrant can nine lawyers presume to be the authoritative conscience of the Nation?"³⁰ (Obviously, "nine" is really "five.") Finally, Scalia urges "the judge who believes the death penalty to be immoral [to resign] rather than simply ignoring duly enacted constitutional laws and sabotaging the death penalty."³¹

If the saboteurs could not abolish capital punishment outright, they have done the next best thing by making it very costly, almost impossible to enforce, and ordering the citizenry not even to dare apply it to certain crimes and murderers at all.³² Having imposed their own moral values with no more than "raw

²⁶ 501 U.S. 808 (1991).

²⁷ *Id.*, at 856. After 17 years, Stevens, was still not reconciled to *Payne*. *Kelly v. Cal.*, *infra* note 305; *Baze v. Rees*, *supra* note 14, 128 S. Ct. at 1551. Objecting "facts are often so disturbing," he asserted "the fact" that a victim's personal characteristics (i.e., individuality) and impact on his family "sheds no light on ... moral culpability of the defendant, and thus serves no purpose other than to encourage jurors to make life or death decisions on the basis of emotion rather than reason." *Id.*, at 1550-51.

²⁸ *E.g.*, *Roper v. Simmons*, 543 U.S. 551, 563 (2005); *Atkins v. Virginia*, 536 U.S. 304, 312 (2002); *Enmund v. Florida*, 458 U.S. 782, 788-789 (1982); *Coker v. Georgia*, 433 U.S. 584, 597 (1977); *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2658; *reh. den.*, 129 S. Ct. 1 (2008).

²⁹ *Atkins*, 304 U.S. at 348 (Scalia, J., dissenting).

³⁰ *Roper*, 543 U.S. at 616 (Scalia, J., dissenting).

³¹ Remarks, *Religion, Politics, and the Death Penalty*, PEW FORUM ON RELIGION AND PUBLIC LIFE CONFERENCE: CALL FOR RECKONING: RELIGION AND THE DEATH PENALTY, (Jan. 25, 2002, session three), transcript available at <http://pewforum.org/deathpenalty/resources/transcript3.php>.

³² See also *infra* 29-31, 36-37; note 283. At the time execution of the mentally retarded was banned, Justice Scalia summarized "the long list of substantive and procedural requirements impeding ... the death penalty ... under this Court's assumed power to invent a death-is-different jurisprudence. None ... existed when the Eighth Amendment was adopted, and some of them were not even supported by current moral consensus. They include prohibition of the death penalty for 'ordinary' murder, *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980), for rape of an adult woman, *Coker*, [*supra* note 28,] at 592, and for felony murder absent a showing that the defendant possessed a sufficiently culpable state of mind, *Enmund*, [*supra* note 28,] at 801; prohibition of the death penalty for any person under the age of 16 at the time of the crime, *Thompson v. Okla.*, 487 U.S. [815,] 838 [(1988)] (plurality opinion); prohibition of the death penalty as the mandatory punishment for any crime, *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion), *Sumner v. Shuman*, 483 U.S. 66, 77-78 (1987); a requirement that the sentencer not be given unguided discretion, *Furman*, [*supra* note 22] (*per curiam*), a requirement that the sentencer be empowered to take into account all mitigating circumstances, *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion), *Eddings v. Oklahoma*, [455 U.S. 104, 110 (1982)]; and a requirement that the accused receive a judicial evaluation of his claim of insanity before the sentence can be executed, *Ford v. Wainwright*, 477 U.S. [399,] 410-411 [(1986)] (plurality opinion)." *Atkins*, *supra* note 28, 536 U.S. at 352-53 (Scalia, J., dissenting).

judicial power,”³³ Justice Stevens and his anti-death penalty collaborators (Ginsburg, Breyer, Souter) are in no position to chide other justices for “attempt[ing] to...muster moral support” by revealing minimal facts.

How Can Anyone Under 18 Be Expected to Know Murder Is Wrong? In vitiating jury death sentences, five justices have often relied upon their own value judgments of “moral culpability” or “moral reprehensibility”. Thus, in *Roper v. Simmons*,³⁴ a bare majority reversed the death sentence of Christopher Simmons. Immaturity means that teenagers’ “irresponsible conduct is not as morally reprehensible as that of an adult.”³⁵ They added: “Once the diminished [moral] culpability of juveniles is recognized ... penological justifications for the death penalty apply to them with lesser force than to adults.”³⁶

Justice Kennedy, for the court, did give some details of the murder. In sum, Simmons meticulously planned it, with the fully rational belief that his youth would spare him serious punishment. He boasted about his “accomplishment,” specifically indicating further full awareness and rational calculation by saying he killed his victim because “the bitch seen my face.” Simmons had broken into Shirley Crook’s home, tied her up, wrapped her face in duct tape, drove to and threw her off a bridge.

But Kennedy omitted two key points. Simmons was not just seventeen, he was seventeen and five months, only seven months shy of eighteen. Also, when he threw Crook into the water, she was not only alive but conscious.³⁷ Only Justice O’Connor, in dissent, fully captured Simmons’ cold-blooded, rationally premeditated barbarity: “One can scarcely imagine the terror that this woman must have suffered throughout the ordeal leading to her death.”³⁸ O’Connor said 17-year-old murderers can be “sufficiently mature and act with sufficient depravity to warrant the death penalty” and “can act with sufficient moral culpability, and can be sufficiently deterred by the threat of execution, that capital punishment may be warranted in an appropriate case.”³⁹ Moreover, one would think it a gross insult to young people to say they cannot be expected to know that murder is wrong and brutal murder is even worse. This does not require the wisdom

³³ Doe v. Bolton, 410 U.S. 179, 222 (1973) (White, J., dissenting).

³⁴ *Supra* note 28.

³⁵ 543 U.S. at 570. quoting *Thompson*, *supra* note 32, at 835.

³⁶ 543 U.S. at 571. *See also infra* 53; note 334.

³⁷ *State v. Simmons*, 944 S.W.2d 165, 170 (Mo. 1997) (*en banc*).

³⁸ *Roper v. Simmons*, at 600-601 (O’Connor, J., dissenting).

³⁹ *Id.*, at 599, 600.

of the Seven Sages. Immaturity is one thing; calculated depravity is something else.⁴⁰

Justice O'Connor has not been consistent regarding "moral culpability." While finding death could be "morally proportionate" for the deeds of 17-year-old Simmons, she claimed "the Court has *a constitutional obligation to judge [this] for itself*...."⁴¹ Hence, she opposed 19-year-old Dorsie Lee Johnson's death sentence precisely because of *his* youth. Although his troubled youth was stressed to the jury,⁴² O'Connor was not satisfied; in *her* view, the jury could or did not give youth full mitigating weight since it was not specifically instructed that youth could diminish "moral culpability." She opined:

It is possible that the jury thought Johnson might outgrow his temper and violent behavior as he matured, but it is more likely that the jury considered the pattern of escalating violence to be an indication that Johnson would become even more dangerous as he grew older... there is a reasonable likelihood [Johnson's youth] was an aggravating factor... the Constitution ... require[s] an additional instruction ... [to allow] a jury to give effect to the most relevant mitigating aspect of youth: its relation to a defendant's "culpability for the crime he committed." ... *what happens in the future is unrelated to the culpability* of the defendant at the time he committed the crime. *A jury could conclude that a young person acted "deliberately," ... and that he will be dangerous in the future... yet still believe that he was less culpable because of his youth than an adult.*⁴³ [Emphasis added.]

In an ironic role reversal, it was Justice Kennedy, who, accepting the trial judge's commonsense reasoning, pointed out for the 5-4 *Johnson* majority that upheld the death sentence: "[i]f a juror believed that [Johnson's] violent actions were a result of his youth, that same juror would naturally believe that [Johnson] would cease to behave violently as he grew older."⁴⁴

This shows that abolitionist justices can successfully thwart public values if most people are unaware of how bizarre their values can be. So O'Connor, unembarrassed, can aver future dangerousness and moral culpability are separable, and we must guard against jurors finding a young murderer posed future danger, without being instructed they could simultaneously find him less morally culpable than an adult. Because he was dangerous but less culpable, he should be kept alive and given another chance to murder.⁴⁵

⁴⁰ Justice Scalia wrote that it is "absurd to think that one must be mature enough to drive carefully, to drink responsibly, or to vote intelligently, in order to be mature enough to understand that murdering another human being is profoundly wrong...." and "we have recognized that at least some minors will be mature enough to make difficult decisions that involve moral considerations Whether to obtain an abortion is surely a much more complex decision for a young person than whether to kill an innocent person in cold blood.", *Id.*, at 619, 620 (Scalia, J., dissenting) (citations omitted).

⁴¹ O'Connor, J., dissenting, *Id.*, at 592. Emphasis added.

⁴² *Johnson v. Texas* 509 U.S. 350, 356-357, 368-369 (1993).

⁴³ *Id.*, at 375-376 (1993) (O'Connor, J., dissenting). Emphasis added, except where underlined.

⁴⁴ *Id.*, 509 U.S. at 359, 369-370.

⁴⁵ *Cf.*, e.g., McDuff, Biegenwald, Lemuel Smith, Shuman and Tison cases, *infra* 41-42, 52 and notes 49-50, 52, 55.

Don't Execute a Young Murderer Who "Only" Preys on Old Ladies. To top that, O'Connor helped reverse a death sentence for another young Simmons, for failure of the trial judge to advise the jury that life without parole was the only available alternative to death. O'Connor "reasoned":

[Simmons] physically and sexually assaulted three elderly women--one of them his own grandmother--before killing a fourth... the State sought to show [he] is a vicious predator who would pose a continuing threat to the community ... ***[Simmons'] response was that he only preyed on elderly women, a class of victims he would not encounter behind bars*** ... This argument stood a chance of succeeding, if at all, only if the jury were convinced that petitioner would *stay* in prison ... the trial court precluded the jury from learning that [Simmons] would never be released from prison.⁴⁶

This is significant in several respects. First, although Justice O'Connor thought that Simmons should have had a "chance of succeeding" with the argument that he would not be dangerous in prison because he "only preyed on elderly women," it is highly doubtful that, even if true, most Americans would find this in accord with *their* moral values – if only the media had well publicized the point.⁴⁷

Second, O'Connor's position is premised on the ivory tower assumption that life without parole can be guaranteed,⁴⁸ which is extremely improbable for reasons including executive commutation or pardon,⁴⁹ parole,⁵⁰ endless appeals having nothing to do with innocence,⁵¹ escape⁵² or, lacking "elderly women,"

⁴⁶ Simmons v. S. Car., *supra* note 15, 512 U.S. at 175-176 (O'Connor, J., concurring in the judgment). First emphasis added; second in original. Justice Blackmun's plurality opinion took much the same position. See *id.*, at 157 and *infra* note 57.

⁴⁷ Linda Greenhouse's buried report omitted the "only preyed on elderly women" argument and that Simmons had attacked more than one. *High Court Overturns a Death Sentence, Signaling a Turn Away From Conservatives*, N.Y. TIMES, June 18, 1994, 13.

⁴⁸ Life without parole is only a tactic for abolitionists, who seek vitiation of that putative alternative if the political climate changes. Marquis, *supra* note 11, at 520. Long ago, California showed "mandatory" LWOP laws can always be repealed. *Infra* note 50. For numerous examples of the vacuity of this "option," see: PRO-DEATH PENALTY.COM, LIFE WITHOUT PAROLE, available at <http://www.prodeathpenalty.com/LWOP.htm>.

⁴⁹ On commutation causing new murders, see, e.g., Charlie Frago, *DuMond Found Dead in His Cell*, ARKANSAS DEMOCRAT-GAZETTE, Sept. 1, 2005; Geary v. State, 930 P.2d 719 (Nev. 1996). See also Jeffrey Schmalz, *Prosecutor Trying to Raise Outcry on Clemency by Cuomo in Murder Case*, N.Y. TIMES, Jan. 4, 1986, 25 (on "Gary" McGivern, convicted of murdering deputy sheriff during escape attempt); *infra* note 278, studies by Cloninger and Marchesini, and Mocan and Gittings.

⁵⁰ Commutation, *supra* note 49, may precede parole. Thomas Trantino murdered two policemen, had his death sentence reduced to life, and successfully fought for parole. Iver Peterson, *New Jersey Court Orders Parole for Man Who Killed Two Officers in 1963*, N.Y. TIMES, Jan. 19, 200, B 1; State v. Trantino, 209 A.2d 117 (1965); Trantino v. State Parole Board, 764 A.2d 940 (2001). See especially, *id.*, at 991, 1000-1002 (Baime, J., dissenting); Page *infra* note 268. After the Supreme Court overturned the death penalty, *Furman v. Ga.*, *supra* note 22, *infra* 29, 44, Furman's sentence was commuted and he was later paroled. Brannan, *infra* note 103, at n. 14. Years later, he received a 20-year sentence for new crime. GA. DEPT. OF CORRECTIONS, OFFENDER QUERY, available at <http://www.dcor.state.ga.us/GDC/OffenderQuery/jsp/OffQryRedirector.jsp> (visited Jan. 10, 2009).

Killer Jack Abbott, a talented published writer, was helped to gain parole and feted by such *literati* as Norman Mailer and Robert Silvers. Abbott promptly murdered again. Michiko Kakutani, *The Strange Case of the Writer and the Criminal*, N.Y. TIMES, Sept. 20, 1981, BR 1. Edgar Smith, another talented and published writer, convinced William F. Buckley, Jr. he was innocent of an initial brutal murder. After Buckley helped his ceaseless parole requests succeed, Smith committed new crimes, including kidnapping and attempted murder, and admitted he was guilty of the initial murder. After his supposedly mandatory life sentence, California ***amended its "mandatory" law***, he became eligible for parole and again made repeatedly sought parole. See Lona Manning, *The Great Prevaricator*, CRIME MAGAZINE, August 25, 2003 (updated May 29, 2007), available at <http://www.crimemagazine.com/03/edgarsmith,0825.htm>.

M. A. Farber details multiple murders resulting from Richard Biegenwald's parole. *Five Killings: A Fearful Silence Is*

turning to prison guards,⁵³ fellow inmates⁵⁴ or even past and potential witnesses outside prison.⁵⁵

Third, O'Connor was fully aware of the last point. In 1987, *she wrote the opinion* for the court in *Tison v. Arizona*, described *infra* 52, a case involving a prison escape by convicted murderers who proceeded to murder again, one of whom had committed murder during a prior escape. Also in 1987, she voted to spare an inmate from mandatory death for murdering another inmate while serving life without parole for a prior murder. *Infra* 42. Did O'Connor really believe there could be a guarantee that a prisoner would *stay* in prison or commit no new violent acts even in prison?⁵⁶

Fourth, it follows that to require a trial judge to instruct a jury that a defendant would “stay in prison” and “never be released” is a Supreme Court mandate to mislead the jury.⁵⁷ Fifth, accuracy requires acknowledgment that Chief Justice Rehnquist and Justice Kennedy joined O'Connor's *Simmons* opinion.⁵⁸ Sixth, again, *Simmons* had confessed; guilt vs. innocence was not an issue. Finally, O'Connor did not mention the age of *Simmons*' murder victim, 79, or other key facts.⁵⁹ Again and again, dissents

Broken, N.Y. TIMES, May 9 1983, B1. Farber notes: “Biegenwald, who could have been executed [for a 1958 murder], was sentenced to life imprisonment.” Others eventually paid with their lives for this “mercy.”

⁵¹ See, e.g., on Wilbert Rideau: Adam Liptak, *Freed After 44 Years, A Prison Journalist Looks Back and Ahead*, N.Y. TIMES, Jan. 17, 2005, A 11; *infra* 51 and note 324. Smith appealed his first conviction, for murder – 19 times. Manning, *supra*.

⁵² Escape resulting in murder is as easy as bribing a prison guard. *Fields v. U.S.*, 483 F.3d 313, 323 (5th Cir. 2007), *cert. den.*, 128 S. Ct. 1065 (2008). See also *Schriro v. Landrigan*, 127 S. Ct. 1933, 1944 (2007) (“before he was 30 . . . , Landrigan had murdered one man, repeatedly stabbed another one, escaped from prison, and within two months murdered still another man. . . . [he] ‘not only failed to show remorse . . . he flaunted his menacing behavior.’”). Four justices sought to save Landrigan. *Id.*

In late September, 2007, two sets of convicted murderers escaped in Texas and Utah, causing the death of at least one prison guard. Michael Graczyk, *Two Inmates Working in Garden Take Guns from Guards, Kill One in Texas Prison Escape*, ASSOCIATED PRESS, Sept. 25, 2007; Erin Alberty, *Killers Escape: Victims' Families Angry They Weren't Told Until Day After Pair Fled*, SALT LAKE TRIBUNE, Sept. 25, 2007. See also *Life Without Parole*, *supra* note 48.

The case that shielded brutal rapists from the death penalty involved an escapee with a history of rape-murder and rape-attempted murder. *Infra* note 265. Four years after landmark *Gregg v. Ga.*, *supra* note 20, *infra* 36-37, *Gregg* and three fellow murderers escaped not just from prison but from death row! Brannan, *infra* note 103, at n. 15.

⁵³ See previous note; *infra* 42; Muhammad [aka Knight] v. State, 603 So. 2d 488, 488 (Fla. 1992); N.Y. CORRECTION HISTORY SOCIETY, CLINTON PRISON STAFF MURDERED BY INMATES, available at <http://www.correctionhistory.org/northcountry/html/crimes/clintonstaffmurdered3.htm>.

⁵⁴ When Abbott was paroled, *supra* note 50, he had been serving a sentence for the murder of a fellow inmate. See also Newton case, *infra* 18-19; *Sumner v. Shuman* *supra* note 32, *infra* 42; Ronald J. Allen & Amy Shavell, *Further Reflections on the Guillotine*, 95 J. CRIM. L. & CRIMINOLOGY 625, 630, *esp.* note 9 (2005).

⁵⁵ Clarence Ray Allen, serving life for a 1974 murder, plotted and ordered, from *within* prison, in 1980, murders of three more innocent citizens *outside* prison. This was both revenge for testimony he blamed for the 1974-murder conviction and to silence these witnesses should a new trial result from an appeal. *Allen v. Woodford*, 395 F.3d 979 (9th Cir. 2005). Nothing could better demonstrate the utter speciousness of the “stay in prison” fantasy. See also *infra* note 362.

⁵⁶ O'Connor did ambiguously say the prosecution could argue the contrary, *supra* note 15, 512 U.S. at 177, but this does not square with her categorical assertion of “the fact that he will never be released from prison,” *id.*, and insistence upon a judicial instruction to enable *Simmons* to convince the jury he would “stay” in prison.

⁵⁷ The *Simmons* plurality rejected this very point, belittling it as mere “hypothetical future developments.” *Id.*, at 166.

⁵⁸ Rehnquist, after many years of criticizing *Miranda v. Arizona*, 384 U.S. 436 (1966), wrote the opinion upholding *Miranda* when he had the chance to reverse it. *Dickerson v. U.S.*, 530 U.S. 428, 444 (2000) (Scalia, J., dissenting).

⁵⁹ “The opinions paint a picture of a prosecutor who repeatedly stressed that [*Simmons*] would pose a threat to society

must reveal facts ignored by bare majorities in saving clearly guilty murderers.⁶⁰

He Didn't Mean It. In *Enmund v. Florida*,⁶¹ a 5-4 majority came to the rescue of Earl Enmund, driver of the getaway car in the murder of an elderly couple (ages 86 and 74) during a robbery.⁶² Justice White's majority opinion grafted on to the constitution the value judgment that the death penalty could not be imposed for felony murder on the ground that Enmund "***somehow participated*** in a robbery in the course of which a murder was committed" but "did not take life, attempt to take it, or intend to take life".⁶³ It took Justice O'Connor, in dissent, to point out the "disingenuous" meaning of "somehow participated": not only did Enmund help the actual murderers escape, but "[m]ost notably... [he clearly] was an accomplice to the capital felony [which, he aided and abetted] and ... his participation had not been 'relatively minor,' but had been major in that ***he 'planned the capital felony and actively participated in an attempt to avoid detection***"⁶⁴

In *Parker v. Dugger*,⁶⁵ another 5-4 decision, Justices White and O'Connor switched good cop-bad cop roles. In saving murderer Robert Parker, Justice O'Connor noted "none of Parker's accomplices received a death sentence for the Sheppard murder."⁶⁶ But she ignored critical facts revealed by Justice White: "***On Parker's orders***, William Long shot [Nancy] Sheppard in the head." Parker then "screamed 'shoot her again, shoot her again.'" Also, "***Parker had threatened to kill Long if he did not shoot Sheppard***,... a threat driven home by the fact that Parker had previously been convicted and imprisoned for shooting Long." Finally, "Parker himself slit Sheppard's throat to insure that the job was done.... 'and took her ring and necklace,'"⁶⁷

"Retardation" as a Free Pass. In *Atkins v. Virginia*, dissenting Justice Scalia started out: "I begin with a brief restatement of facts that are abridged by the Court but important to understanding this case."⁶⁸ This included not only an account of the brutal murder for which Atkins was sentenced to death, but also

upon his release. The record tells a different story. Rather than emphasizing future dangerousness ..., the prosecutor stressed sheer depravity of [the] crimes. ...Not only ... was future dangerousness not emphasized, but future dangerousness *outside of prison* was not even mentioned." *Supra* note 15, 512 U.S. at 180-181 (Scalia, J., dissenting) (emphasis in original).

⁶⁰ Cf. A. Raymond Randolph, *Before Roe v. Wade: Judge Friendly's Draft Abortion Opinion*, 29 HARV. J.L. & PUB. POL'Y 1035, 1054 (2006) (Supreme Court majority "ignoring the dissent, a practice which – unfortunately – is becoming more common").

⁶¹ *Supra* note 28.

⁶² *Id.*, 458 U.S. at 783.

⁶³ *Id.*, at 792-793, 799. Emphasis added.

⁶⁴ *Id.*, at 806, 824 (O'Connor, J., dissenting) emphasis added).

⁶⁵ 498 U.S. 308 (1991).

⁶⁶ *Id.*, at 314.

⁶⁷ *Id.*, at 330,331 (White, J., dissenting) (emphasis added).

⁶⁸ *Supra* note 28, 536 U.S. at 338.

that he had “16 prior felony convictions for robbery, attempted robbery, abduction, use of a firearm, and maiming... The victims of these offenses provided graphic depictions of [his] violent tendencies.”⁶⁹ But the Court majority set aside the death sentence on the new ground that it was unconstitutional to execute the mentally retarded. Of course, retardation could easily be feigned, Justice Scalia complained.

Johnny Paul Penry exemplifies the use of purported retardation as a pretext to keep brutal murderers alive. It was uncontested that, in 1979, he tortured, raped and murdered Pamela Carpenter. Thanks to clever judicial erosion of capital punishment, Texas surrendered with his fourth trial imminent.⁷⁰ Compounding the rape-murder, Carpenter’s family suffered 28 years’ unspeakable agony due to Supreme Court 1989⁷¹ and 2001⁷² death sentence reversals alleging possible insufficient weight given Penry’s alleged retardation. (This was before *Atkins* transmogrified retardation from a mitigating factor to an absolute death penalty bar.)

The Court extensively detailed expert testimony about Penry’s “retardation” and “organic brain damage.”⁷³ Remarkably – or perhaps predictably – the Court had no room for the most important facts. In 1985, the Texas Court of Criminal Appeals found that Penry

forced his way into [Carpenter’s] house,...and held his ... knife to her throat. After ... [Penry] hit [her], knocked her to the floor, and shoved her against a stove causing her face to bleed, [she] stabbed [Penry] with some scissors. [He] knocked the scissors out of [her] hands. He dragged her into the bedroom. After kicking and hitting her repeatedly and "stomping" her once, [Penry] had intercourse with [Carpenter] for thirty minutes. [He] next ...stabbed her in the chest...

[Penry confessed]: "I ... f ed her ... and then ... picked [the scissors] up. ... *I sat down on her stomach and I told her that I loved her and hated to kill her but I had to so she wouldn't squeal on me.* ... I thought about the Chick [deceased] a lot. ... I also wanted ... [her] money. ... *I knew that if I ... raped her that I would have to kill her because she would tell who I was to the police and I didn't want to go back to the pen.*"... "⁷⁴

In addition to his undisputed brutal terror, what stands out is that Penry made a premeditated, calculated, well-reasoned, intentional decision (1) to rape Carpenter in the first place and (2) to murder her to avoid being identified and sent “back to the pen.” Judicial abolitionists and an army of experts can rant

⁶⁹ *Id.*, at 339.

⁷⁰ Elizabeth White, *State Won't Seek Death Penalty Against Convicted Killer*, ASSOCIATED PRESS, Feb. 16, 2008; Mike Tolson, *An End to a Legal Saga; Deal Keeps Penry Imprisoned for Life; Inmate Who Had Death Sentence Overturned Three Times Apologizes*, HOUSTON CHRONICLE, Feb.16, 2008, B 1

⁷¹ *Penry v. Lynaugh*, 492 U.S. 302 (1989).

⁷² *Penry v. Johnson*, 532 U.S. 782 (2001).

⁷³ *Penry v. Lynaugh*, 492 U.S. at 307-310, 322-329; *Penry v. Johnson*, 532 U.S. at 788, 791, 804.

⁷⁴ *Penry v. State*, 691 S.W.2d 636,641 (1985) Emphasis added.

about retardation, but all that shows is how far from reality, common sense and integrity they have departed. Penry clearly and fully appreciated his crime.⁷⁵ If that is “retardation,” it is a sham mitigating factor.

For decades, advocates, to justify placing group homes in residential areas, have argued the retarded are not dangerous and “were just regular people who had some difficulties and needed some assistance.”⁷⁶ Even Justice Stevens conceded: “There is no evidence that they are more likely to engage in criminal conduct than others....”⁷⁷

Which is it? Does being retarded make one less culpable because less able to understand what is wrong – and hence more of a threat to the community – or not? Retarded people do not *plan* rape and rationally motivated murder. It is subterfuge to use retardation as pretext to subvert the death penalty. Its transparently bogus use to stretch out Penry’s case for 28 years until Texas gave up was all but admitted by his protectors in *Atkins*: “there is abundant evidence that [the retarded] often act on impulse rather than pursuant to a premeditated plan....”⁷⁸ Penry’s crime was premeditated, he himself said.

“Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its members,” protested Justice Scalia in *Atkins*.⁷⁹ Could it possibly be that three juries rejected these justices’ “personal views” and voted for Penry’s execution because they knew the facts? Could that explain resistance to *Atkins*?⁸⁰

Sanitizing a Grown Man Ripping an 8-Year-Old Girl’s Insides. Six years after *Atkins* and three after *Roper*, a morally imperious Supreme Court 5-4 majority struck again, finding unconstitutional the death penalty for “child rape.”⁸¹ Yet again asserting superiority of its “own independent judgment,”⁸² it decreed a 300-pound stepfather⁸³ did not deserve execution for brutally raping an 8-year-old girl.⁸⁴

⁷⁵ Cf. Justice Powell’s observation about rape. *Infra* note 98.

⁷⁶ Claire Andre and Manuel Velasquez, *Not in My Backyard*, MARKULA CENTER FOR APPLIED ETHICS, SANTA CLARA UNIVERSITY, no date, available at <http://www.scu.edu/ethics/publications/iie/v2n1/nimby.html>; Charlotte Libov, *Group Homes for Retarded Gaining Success and Goodwill*, N.Y. TIMES, Jan. 7, 1988, Sec. 11CN, p. 1.

⁷⁷ *Atkins v. Va.*, *supra* note 28, 536 U.S. at 318.

⁷⁸ *Id.*

⁷⁹ *Id.*, at 338 (Scalia, J., dissenting).

⁸⁰ David G. Savage, *IQ Debate Unsettled in Death Penalty Cases; The Supreme Court Ruled Against Executing the Mentally Retarded, but Defining that Group Has Proved Difficult*, LOS ANGELES TIMES, June 11, 2007, A1.

⁸¹ *Kennedy v. La.*, *supra* note 28.

⁸² *Id.*, 128 S. Ct. at 2650, 2658.

⁸³ Joint Appendix 149, *Id.*, available at <http://www.thejusticecenter.org/cap/pdfs/JAfinal.pdf>.

⁸⁴ *Supra*, at 2650-51, 2660, 2662.

This case is a striking illustration of court fact suppression despite giving this limited graphic detail:

An expert in pediatric forensic medicine testified that L. H.'s injuries were the most severe he had seen from a sexual assault in his four years of practice. A laceration to the left wall of the vagina had separated her cervix from the back of her vagina, causing her rectum to protrude into the vaginal structure. Her entire perineum was torn from the posterior fourchette to the anus. The injuries required emergency surgery.⁸⁵

Despite these 73 words, 40 devoted to the actual injuries,⁸⁶ much was omitted by the court, and the media concealed the rest. First, the court's words were not as plain as the district attorney's.⁸⁷ Second, the court conceded the rapist's crime "cannot be recounted in these pages in a way sufficient to capture in full the hurt and horror inflicted on his victim or to convey the revulsion society, and the jury that represents it, sought to express by sentencing petitioner to death."⁸⁸ Third, accordingly, the court elided critical details, e.g.: rapist's 300-pound weight; "as a result of pain, the victim had to be fed gallons of stool softener through a tube to permit her to begin defecating again"; upon returning home, she cried "as her mother had never seen her cry before";⁸⁹ healing that was "fairly traumatic" and an injury "that may never heal."⁹⁰

Fourth, based on popular reporting, the public could not know of this "horror." Instead, the anodyne term "child rape" was repeatedly used, with, at most, reference to undescribed "emergency surgery."⁹¹ For the abolitionist media, public ignorance is bliss. Linda Greenhouse displayed this attitude in her oral argument "memo." Preferring no rape details at all,⁹² she mocked the state lawyer's "vivid ... recounting in grisly anatomic detail the injuries inflicted on an 8-year-old girl." Without revealing the actual injuries, she trivialized them with sarcastic and callous contempt: "the girl's physical injuries had healed in two weeks.

⁸⁵ *Id.*, at 2646.

⁸⁶ Compare this brief account to multi-thousand word opinions accentuating murderers' putative suffering. *Infra* 19-20.

⁸⁷ *Cf.*: The rapist "tore her entire perineal opening from her vaginal opening ... to her anal opening. He tore her vagina on the interior such that it separated partially from her cervix and allowed her rectum to protrude into her vagina." *Id.*, Transcript of Oral Argument 28, available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-343.pdf.

⁸⁸ *Kennedy*, at 2646.

⁸⁹ *Louisiana v. Kennedy*, 957 So. 757, 761, 767 (La. 2007).

⁹⁰ *Jt. App.*, *supra* note 83, at 49.

⁹¹ Representative media accounts are: Mark Sherman, *Court Bans Death Penalty for Child Rape*, ASSOCIATED PRESS, June 26, 2008 (surgery not noted); Linda Greenhouse, *Justices Bar Death Penalty for the Rape of a Child*, N.Y. TIMES, June 26, 2008, A 1; Robert Barnes, *High Court Rejects Death for Child Rape*, WASH. POST, June 26, 2008, A 1 ("brutal" assault; "surgery"); Joan Biskupic, *Justices Reject Death Penalty for Child Rapists*, USA TODAY, June 26, 2008, 4A; Mark H. Anderson, *Justices Overturn the Death Penalty for Child Rape in Louisiana*, WALL ST. J., June 26, 2008 A 12; Warren Richey, *Supreme Court Sharply Limits Use of Death Penalty*, Christian Sci. Mon., June 26, 2008, 1 (injuries "extensive and severe"; surgery merely to "stop the bleeding"); James Oliphant, *Death Penalty for Child Rape Banned*, LOS ANGELES TIMES, June 26, 2008, A 19 (girl "badly injured"; "surgery"); Michael Doyle, *High Court Rejects Death Penalty for Child Rape*, ST. L. POST-DISPATCH, June 26, 2008, A 1 (injuries "most severe").

⁹² See also *supra* note 7 and Liebman, *infra* note 288.

[Justice Stevens'] point was to bring the *anatomy lesson* to an end. [The] lawyer ... reluctantly conceded that the injuries had healed...."⁹³ With overt admiration for Stevens as a "master strategist...fully in command," she swooned that he "pounced" on the district attorney's "anatomy lesson." But Greenhouse, in aid of Stevens' minimizing the injuries as "not permanent," did not reveal the details in the third point above, as well as the fact that the attorney stressed psychological and mental injuries.⁹⁴ Also, she failed to report that, in noting *physical* but not *psychological* injuries, Stevens evinced the huge gap in abolitionist concern for brutal criminals vis-à-vis their victims.⁹⁵ For he has lamented the "horrible feelings," and hence alleged mental cruelty, suffered by murderers because they have delayed their own executions.⁹⁶

Fifth, worse than largely hiding from the public the court's bare mention of facts, the media did not spotlight what surely would have provoked public outrage if the public only knew.

The Insufficient Moral Depravity of Dignified Child Rapists Deserving of Respect. Five justices asserted that, no matter how brutal or how much suffering inflicted, rape can never be as morally depraved as murder. On the contrary, the Constitution mandates "respect for the dignity" of the rapist and he must be treated with "decency."⁹⁷ Justice Alito, for four justices, disputed that murder is always more morally depraved than child rape: "I have little doubt that, *in the eyes of ordinary Americans*...predators who seek out and inflict serious physical and emotional injury on defenseless young children [] are the epitome of moral depravity."⁹⁸ The problem is that few ordinary Americans know of the five justices'

⁹³ *Justice Stevens Renounces Capital Punishment*, N.Y. TIMES, April 18, 2008, A 22 (emphasis added). Later, without describing them, Greenhouse, conceded the injuries were "severe enough...to require emergency surgery." *Supra* note 91.

⁹⁴ *Tr.*, *supra* note 87, at 29. In the end, the court agreed. *Kennedy, supra*, at 2658 ("We cannot dismiss the years of long anguish that must be endured by the victim of child rape." But the court did just that – as in *Roper*: "we cannot deny or overlook the brutal crimes too many juvenile offenders have committed." *Supra* note 28, 543 U.S. at 572. *See also infra* note 322.)

⁹⁵ *See, eg., infra* 19-20, 41, 43-46; note 305.

⁹⁶ *Lackey v. Tex.*, *infra* note 305.

⁹⁷ *Supra*, at 2659-61, 2649, 2658. As for "respect for the dignity" of the little girl, let's not be silly.

⁹⁸ *Id.*, at 2676. Emphasis added. Such depravity is not confined to *child* rapes. "The deliberate viciousness of the rapist may be greater than that of the murderer. Rape is never an act committed accidentally. Rarely can it be said to be unpremeditated. There also is wide variation in the effect on the victim." *Coker v. Ga.*, *supra* note 28, 433 U.S. at 603 (Powell, J., dissenting).

Ironically, *Kennedy* was decided the day after Robert Williams was convicted of *adult* rape. What punishment would "ordinary Americans" think proper if, instead of "mere rape," they realized he held a graduate student captive 19 hours, raped her seven times, sodomized her, slashed her face, threw bleach on it (causing lung damage), scalded her twice with boiling water (the second time on open wounds), forced her to take excessive pain pills (causing liver damage), sealed her lips with super glue, ordered her to gouge out her own eyes (she managed not to), gagged her with duct tape, and set her apartment on fire leaving her to burn to death (she put her wrists in the fire to burn her bonds to free herself, with unspeakable pain)? Staff, *Courageous Victim Recounts 19 Hours Of Rape And Torture In Stunning Courtroom Testimony*, CITYNEWS, June 10, 2008, available at http://www.citynews.ca/news/news_23643.aspx; Samuel Maull, *In Chilling Detail, NYC Student Recounts Torture*, ASSOCIATED PRESS, June 10, 2008; Samuel Maull, *Ex-con Found Guilty of Torturing NYC Grad Student*, ASSOCIATED PRESS, June 24, 2008.

“morality” and their fiat that it is in the Constitution – or that the five consider *them* morally depraved. All (including four colleagues), who object to the five’s solicitude for criminals ordinary Americans would view as brutal and uncivilized, are themselves implicitly indecent, brutal and uncivilized.⁹⁹

A bizarre twist to their morality is the five justices’ view that child rapists should be rewarded because there are so many of them. If the number committing a particular type of barbaric crime rises, this is a reason for a lesser rather than harsher penalty.¹⁰⁰ If only the public knew. But it gets worse.

Fact Suppression: Juries Can’t Handle the Truth. Like Captain Jessep in *A Few Good Men*, the *Kennedy* five declared juries can’t handle the truth, i.e., the facts, the very assessment of which is a core function of juries. What prior cases had implied, often strongly, was made explicit in *Kennedy*: because child rape is “a crime that in many cases will overwhelm a decent person’s judgment, ***we have no confidence*** that the imposition of the death penalty would not be ... ‘freakis[h].’”¹⁰¹

That’s it. No confidence in the judgment of the decent jury person!¹⁰² A fiat that trial by jury is unconstitutional whenever five justices fear possible jury findings! Again, this went virtually unreported.

Fact suppression thus has two aspects. Facts must be hidden from (a) the public, to avert a revolt against the Court’s abolitionism; and (b) juries, which must be barred from making decisions based on them.

Anyone Who Inflicts Lengthy Major Pain Should Not Suffer Even Short Minor Pain. Facts regarding challenges to execution methods are also often hidden.¹⁰³ Once there was hanging. Well over a century ago, the Supreme Court upheld the firing squad.¹⁰⁴ Then the electric chair was upheld as humane.¹⁰⁵ Then came the gas chamber, *infra* 19. Then lethal injection. The ultimate goal may well be to find that no

And such conduct is ***never*** depraved enough to justify execution?!

⁹⁹ See *infra* note 363.

¹⁰⁰ *Supra*, at 2660 (too many child rapes to permit death penalty; talk about safety in numbers – for the rapists!).

¹⁰¹ *Id.*, at 2661 (emphasis added). See also *supra* 4-6. The point was implied but not expressly stated in *Roper*, *supra* note 28, at 572-573. Justice Scalia objected to the Court’s “startling conclusion...that juries cannot be trusted” *Id.*, at 620.

¹⁰² As to the judgment of these self-proclaimed morally superior justices with no faith in juror judgment, see *infra* 51-53. There is one exception: they have confidence in and cite jurors who share their values. *Infra* note 238.

¹⁰³ On methods, see Mark Essig, *This Is Going to Hurt*, N.Y. TIMES, November 4, 2007, Sec. 4, 15; *Baze v. Rees*, *supra* note 14, 128 S. Ct. at 1526-27, 1530 (Roberts, C.J., plurality); Rebecca Brannan, *Sentence and Punishment: Change Method of Executing Individuals Convicted of Capital Crimes from Electrocutation to Lethal Injection*, 17 GA. ST. U. L. REV. 116 (Fall 2000), available at http://law.gsu.edu/lawreview/index/archives/show/?art=17-1/17-1_CriminalProcedure_Brannan.htm#N_15_.

¹⁰⁴ *Wilkerson v. Utah*, 99 U.S. 130 (1879).

¹⁰⁵ In *Re Kemmler*, 136 U.S. 436 (1890). As recently as 22 and 15 years ago, the Supreme Court refused to hear challenges to electrocution. *Glass v. Louisiana*, 471 U.S. 1080 (1985); *Poyner v. Murray*, 508 U.S. 931 (1993).

method of execution is humane and finish capital punishment abolition through the back door.¹⁰⁶ The Supreme Court has taken up lethal injection three times,¹⁰⁷ delaying executions¹⁰⁸ for reasons having nothing to do with guilt or innocence.¹⁰⁹ One or two justices have indicated the state should “have been more respectful of this man's *right to have a painless death*” and provided a “*safer*, less painful” execution.¹¹⁰ Capital punishment has surely been turned into a “farce”¹¹¹ when a justice refers to a “safer” execution. Anyone not immersed in Supreme Court values would doubtless think “safe killing” is an

¹⁰⁶ Advocates are too clever to admit this. Instead, they challenge one specific procedure at a time. For example:

JUSTICE ALITO: Do you know of any method that ... is not a violation of the Eighth Amendment?

MR. DOSS: ... this particular protocol ... we're challenging is unconstitutional....

Transcript of Oral Argument 12, *Hill v. McDonough*, 547 U.S. 573, (2006), available at http://supremecourtus.gov/oral_arguments/argument_transcripts/05-8794.pdf. Chief Justice Roberts, *id.*, at 37, observed: “it's plausible ... to suspect ... the action is as a challenge to the execution itself rather than the particular method.” Justice Scalia predicted, *id.*, at 4: “... we say ... this procedure is no good. The State comes up with another procedure, and you challenge that one. Right? ... another few years go by.” Larry Nelson won a lethal injection challenge in 2004. *Nelson v. Campbell*, 541 U.S. 637. A 2006 *Hill* brief stated: “Nelson’s lawyers (i) reneged on ... representations they had made to this Court, (ii) challenged as ‘cruel and unusual’ the very ... procedure they had suggested ... as a viable alternative, and (iii) to this point ... seem to have gotten away with it.” Brief of the States of Alabama ... Wyoming as Amici Curiae in Support of Respondents, 6-7, available at http://www.jenner.com/files/tbl_s69NewsDocumentOrder/FileUpload500/689/Brief_Amici_Curiae_States_for_Respondent.pdf.

Years earlier, in *Gomez*, *infra* 19 and note 120, 503 U.S. at 656, alleging gas chamber cruelty, Justice Stevens cited lethal injection as the humane alternative. Once the alternative was adopted, that too predictably was attacked as inhumane.

¹⁰⁷ *Nelson, Hill and Baze v. Rees*, *supra* notes 106, 14.

¹⁰⁸ Linda Greenhouse, *Justices Stay Execution, A Signal to Lower Courts*, N.Y. TIMES, October 31, 2007, A 1; *Justices Chilly to Bid to Alter Death Penalty*, N.Y. TIMES, January 8, 2008, A 1 (“the Supreme Court has routinely granted stays of execution to inmates challenging lethal injection. State and lower federal courts have also granted stays, leading to a de facto national moratorium that brought executions last year to the lowest level since 1994.”); *infra* 34.

When *Baze* was argued, two years after *Hill* and four after *Nelson*, delay concerns were voiced by two opposing justices. Scalia: “we can have a nationwide cessation of all executions ... and ultimately ... it could take years.” Souter: “another case is going to come along and we are going to be right back here a year ... or 18 months from now...” In a vein similar to *Nelson*, *supra* note 106, Chief Justice Roberts worried that, were the court to accept the alternative suggested by murderer Baze, there would be another case objecting to that very alternative. Transcript of Oral Argument 17, 51, 11, *Baze*, available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-5439.pdf.

After *Baze* upheld Kentucky’s injection protocol, executions resumed. Shannon McCaffrey, *Ga. Man Executed, Ending 7-month Moratorium*, ASSOCIATED PRESS, May 7, 2008. Nevertheless, the *Baze* justices disagreed about its meaning, e.g.: “sure to engender more [abusive] litigation,” 128 S. Ct. at 1562 (Thomas, J., concurring); “will not” enable “those seeking to abolish the death penalty ... to embroil the States in never-ending litigation,” *id.*, at 1538 (Alito, J., concurring). This encouraged opponents to continue seeking delay via challenges to execution method. Adam Liptak, *Moratorium May Be Over, But Hardly the Challenges*, N.Y. TIMES, April 17, 2008, A 26; Darryl Fears, *After Court Ruling, States to Proceed With Executions*, WASH. POST, April 23, 2008; A 2 (“nothing has changed”). Undaunted by *Baze*, Richard Cooley, 22 years after raping and murdering two college girls, unsuccessfully argued he was too fat to execute. His long delayed execution was called “murder.” Matt Reed, *Ohio Executes Inmate Who Argued Was Too Fat to Die*, ASSOCIATED PRESS, Oct. 15, 2008; Andrew Welsh-Huggins, *Ohio Inmate Says He's Too Fat for Execution*, ASSOCIATED PRESS, Aug. 5, 2008. See also *infra* note 362 (“undue stress”).

The name of the game was and is delay and more delay. Any and all arguments are used, repeatedly and however absurd. For an unapologetic account of the abolitionist “strategy of delay,” see Anthony V. Alfieri, *Mitigation, Mercy, and Delay: The Moral Politics of Death Penalty Abolitionists*, 31 HARV. C.R.-C.L. L. REV. 325, 334-37 (1996).

¹⁰⁹ Abolitionists, with Supreme Court aid, have obstructed the death penalty two steps beyond appealing guilty verdicts. The first is challenging the sentence. The second is to oppose execution *methods*. When the Court stayed the lethal injection of Earl Berry, *infra* note 319, Linda Greenhouse noted: “In the current cases ... constitutionality of the death penalty is not at issue, and the inmates are not challenging the validity of their death sentences.” *Justices Stay*, *supra* note 108. But she opined: “Delays of some months in carrying out executions may seem relatively minor given the many years that most of the inmates have already spent on death row.” In other words, successful delay justifies further delay for the sake of delay.

¹¹⁰ Transcript of Oral Argument 44, 16, *Nelson*, *supra* note 106, available at http://supremecourtus.gov/oral_arguments/argument_transcripts/03-6821.pdf. Emphasis added.

¹¹¹ *Alabama Brief*, *supra* note 106, at 7.

oxymoron. As for a “right” to a *painless* death, for most, contemplating one’s nearing execution cannot possibly be psychologically painless¹¹² and, physically, we all have experienced some pain from needles and other medical instruments. One may be skeptical whether a convicted heinous murderer is entitled to less discomfort than patients undergoing routine medical procedures every day.

Beyond that is the time it takes for the murderer to die. Death penalty opponents complain Christopher Newton did not die fast enough! It was reported that the 16 minutes it took Newton to die on May 24, 2007 “was the longest stretch that any of [Ohio’s] inmates executed since 1999 has endured...” This was “more than twice as long as usual, and 5 minutes longer than the state’s previous longest on record.” “Too long ... agonizing,” remonstrated death penalty opponent Jonathan Groner.¹¹³ The American Civil Liberties Union got into the act¹¹⁴ and then a mother sued Ohio because it also took her murderer son too long to die (ignoring that he lived 22 years after *his* victim).¹¹⁵

Completely obscured by this one-sided attempt to drum up sympathy for murderers are *the facts* regarding what they have done. Journalists reporting on “botched” executions ignored Newton’s deeds. In prison due to a history of violence, he weighed between 195 and 225 pounds; his cellmate-victim, Brewer, weighed 130 pounds. The Ohio Supreme Court continued:

... around 5:10 a.m., ... Brewer was lying still on the floor in a puddle of blood ... Newton was laughing and had blood smeared all over his face...[He] had "painted himself with [and ingested] the victim's blood...."while medical personnel were trying to save Brewer's life, Newton was laughing and yelling, "***Let him die. I killed him.'... 'Fuck that bitch [Brewer]. You might as well not even work on him. He is already dead.***" ... "Stop, let the fucker die." ... Newton ... had hit Brewer earlier ... and had seen the fear in his eyes and knew he was going to kill Brewer ... After the assault, Newton... ***allowed Brewer to lie dead for an hour ...because Newton knew that paramedics would try to save his life...***Newton ...seemed very happy and...repeatedly asked, "Did I kill him? Is he dead?" [and] also said, "***If he is not dead, I hope he is going to be a vegetable.***"...

Around 3:30 a.m....Newton pulled Brewer out of bed and hit his head against the floor and stomped on his head twice. Newton then strangled Brewer... Newton punched Brewer in the face a few times and then cut a strip off a prison jumpsuit and strangled Brewer with it. Then Newton stomped on Brewer's head again.

Although Brewer begged, "Please don't kill me," Newton estimates that he

¹¹² Justices once recognized there was "necessary suffering involved in any method employed to extinguish life humanely." Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 464 (1947). This was accepted in *Baze v. Rees*, supra note 14, at 1529 (Roberts, C.J., plurality), 1559 (Thomas, J., concurring).

¹¹³ Julie Carr Smyth and Andrew Welsh-Huggins, *Ohio Inmate Took Twice as Long to Die*, ASSOCIATED PRESS, May 26, 2007.

¹¹⁴ Julie Carr Smyth, *Ohio Drawn Into Executioner ID Debate*, ASSOCIATED PRESS, June 5, 2007.

¹¹⁵ John Seewer, *Family Sues Over Delayed Execution*, ASSOCIATED PRESS, July 2, 2007.

stomped Brewer's head with his foot between five and ten times. He also stomped on his throat and chest a few times.¹¹⁶

Brewer died eleven hours after the brutal, terrifying and painful murder began. One who is not a capital punishment opponent might want to consider the agony and length of time it took for Brewer to die when assessing complaints that Newton's execution took 16 rather than 8 or 11 minutes.¹¹⁷

Fact Suppression Has Its Limits. Justice Stevens objects to a two-sentence “graphic description,” viz., the victim-suffering inflicted by rapist-murderer Cal Coburn Brown, lest the reader be “startled” into “moral support” for deciding against him.¹¹⁸ But neither Stevens, nor Justice Brennan, upon whom he relied,¹¹⁹ had any qualms about providing vastly more extensive “graphic descriptions” of suffering by condemned brutal killers. In *Gomez v. District Court*,¹²⁰ Stevens (joined by Justice Blackmun) expressed concern in great detail about the alleged suffering caused by the gas chamber. In particular, he agonized about a murderer taking “ten minutes and thirty-one seconds to die.”¹²¹ Far from the mere two sentences devoted to victim suffering, about which he remonstrated in *Uttecht*, Stevens devoted 1,700 words in six pages to graphic details about murderer suffering in *Gomez*.¹²² As with Judge Noonan, Stevens said nothing about the brutality and suffering inflicted by the killer, Robert Alton Harris.¹²³

On January 21, 1985, Justice Brennan protested a “vivid portrait of...gruesome details” of a murder.¹²⁴ The “portrait” was 166 words.¹²⁵ However, on April 29, 1985, Brennan provided far more

¹¹⁶ State v. Newton 840 N.E.2d 593, 599-600 (2006) (emphasis added).

¹¹⁷ Cf. *Sparing Berry Would Be Cruel, Unusual*, HATTIESBURG AMERICAN, Oct. 30, 2007, available at <http://mentalthopenews.blogspot.com/2007/10/sparing-berry-would-be-cruel-unusual.html> (“ironic that a man who beat and stomped to death a woman now hopes the justice system will save him from a death he believes is ‘cruel and inhumane’”).

¹¹⁸ *Supra* 1.

¹¹⁹ *Supra* 4.

¹²⁰ 503 U.S. 653 (1992) (Stevens, J., dissenting from vacatur of execution stay).

¹²¹ *Id.*, at 656. Compare that to the prolonged torture of Newton's victim; or the suffering of Frances Arwood, *infra* 54.

¹²² *Id.*, 653-659. Justice Marshall also went into great detail alleging gas chamber “cruelty.” *Gray v. Lucas*, 463 U.S. 1237, 1240-1247 (1983) (Marshall, J., dissenting). He even included that a killer had urinated during an execution. *Id.*, at 1242. Presumably, millions of law-abiding citizens who use Depends or are incontinent from routine medical procedures suffer torture. See also *infra* note 288 on Stevens' wish to save a murderer by examining facts of “numerous” *unrelated* cases, at the same time he would, if contrary to the murderer's interest, bar minimal mention of relevant facts of case actually before the court.

¹²³ *Infra* note 178. Also, Justice Marshall said nothing about Gray's cruelty. Chief Justice Burger complained: “The facts and procedural history have not been referred to in the dissent.” *Gray, supra*, at 1237 (Burger, C.J., concurring) (noting, *inter alia, id.*, at 1238, 1239: Gray “abducted a 3-year-old girl ... and after sexually molesting her, suffocated her in a muddy ditch and threw her body into a stream” and “judicial action reviewing this case has been taken 82 times by 26 state and federal judges”).

¹²⁴ *Supra* 4.

¹²⁵ These were the details and this was the murderer about whom Justice Brennan was concerned. “Respondent Johnny Paul Witt was convicted of first-degree murder in Florida and sentenced to death. The murder was committed while respondent and a friend were bow-and-arrow hunting. The evidence at trial showed that the two had spoken together on other occasions about

“gruesome details” about the electric chair. His 14-page dissent was nearly 7,000 words.¹²⁶ Compare what Stevens and Brennan objected to with this sample of *Brennan’s* capacity for “gruesome details”:

...death by electrical current is extremely violentwhen the switch is thrown, the condemned prisoner "cringes," "leaps," and "'fights the straps with amazing strength.'" ... "The hands turn red, then white, and the cords of the neck stand out like steel bands." ... The prisoner's limbs, fingers, toes, and face are severely contorted. ... [his] eyeballs sometimes pop out and "rest on [his] cheeks." ... [He] often defecates, urinates, and vomits blood and drool.¹²⁷

In sum, abolitionists do not seek fact suppression, *per se*. Their *modus operandi* is to hide from the public facts that will make heinous murderers unsympathetic, while ardently revealing facts they hope will generate compassion for murderers.¹²⁸ Opponents shout from the rooftops any facts about suffering of murderers, all the while ignoring and suppressing facts about the vastly greater suffering they inflict.

And what can evoke greater sympathy than portraying a murderer as facing execution because cold-hearted judges, who can’t wait to kill him, refuse to hear evidence showing he is really innocent?¹²⁹

II

“INNOCENCE” CLAIMS AND THE MEDIA: *Roger Keith Coleman*

This article focuses upon efforts to save murderers whose guilt is unchallenged. Of course, many criminals do deny guilt despite overwhelming evidence. Sometimes, they are aided by media death penalty opponents seeking a cause célèbre. A graphic illustration is the case of Roger Keith Coleman, which shows

killing a human, and had even stalked persons as they would stalk animal prey. On the day in question, respondent, then aged 30, and his younger accomplice were hunting in a wooded area near a trail often used by children. When the victim, an 11-year-old boy, rode by on his bicycle, respondent's accomplice hit the child on the head with a star bit from a drill. Respondent and his accomplice then gagged the stunned victim, placed him in the trunk of respondent's car, and drove to a deserted grove. Upon opening the trunk, the conspirators discovered that the victim had died by suffocating from the gag. The two committed various sexual and violent acts on the body, then dug a grave and buried it.” *Wainwright v. Witt*, *supra* note 17, 469 U.S. at 414.

¹²⁶ *Glass v. La.*, *supra* note 105, 471 U.S. at 1080-1094 (Brennan, J., dissenting from denial of certiorari). See especially *id.*, Part II, at 1086ff. Just three months after objecting to a 166-word account of a “gruesome” murder,” Brennan complained: “Details concerning the actual process of electrocution are not widely known, primarily because ‘executions are carried out in private; there are few witnesses; pictures are not allowed; and newspaper accounts are, because of ‘family newspaper’ requirements of taste, sparing in detail.” *Id.*, n. 12. Did it ever occur to Brennan that these exact same words apply to murders by the condemned he so worried about?

Brennan’s “morality” could not be clearer! Details about the immense suffering intentionally inflicted by clearly guilty murderers upon innocent victims should be completely suppressed; details about the far lesser incidental suffering lawfully imposed upon murderers should be voluminosely and widely publicized. That epitomizes Brennan’s “moral battle,” *supra* 5.

¹²⁷ *Id.*, at 1086-1087. Internal citations omitted.

¹²⁸ They even seek to televise executions, hoping to produce revulsion. Associated Press, *Killer Executed After Losing Videotape Request*, N.Y. TIMES, June 16, 1994, A 23 (seeking execution on Phil Donahue show). Justices also seek to evoke sympathy by detailing the alleged agony vicious murderers endure from long delays due to their own multiple appeals, expressing no concern for victim family ordeal caused by the interminable obstruction. See *infra* 47-50. Cf. *infra* note 358.

¹²⁹ Uninterested in consistency, abolitionist concern for murderers’ suffering includes not only the pain of execution and alleged rush to inflict it, but also waiting for the execution because judges have not been in enough of a hurry. See *infra* 47ff.

the egregiously dishonest lengths to which these “abolitionists” will go on behalf of vicious murderers.

The Narrative: Courts Hurry Execution, Refusing to Consider Evidence of Innocence Due to Minor Attorney Mistake. Concealing facts is bad enough, but in Coleman’s case, the media engaged in affirmative deceit, writing and broadcasting what reporters had to know was absolutely untrue. They blared Coleman was executed without consideration of the merits of his appeals. What could be more contrary to American values than executing an innocent man without allowing him to be heard in court because his lawyer made a minor technical filing error? That was the media’s “narrative” or “story line.”¹³⁰

After Coleman’s May 20, 1992 execution, eleven years after raping, stabbing, cutting the throat of, almost beheading and murdering his own sister-in-law, a *New York Times* headline shouted: “Virginia Executes Inmate Despite Claim of Innocence,”¹³¹ implying any murderer should be able to avoid execution simply by claiming innocence. But this was a mild version of the media theme that an innocent man was executed due to callous judges more interested in making the trains run on time than in whether a condemned man is truly guilty. Consider the May 18 *Time* magazine cover. Over Coleman’s almost angelic baby-faced but forlorn picture appeared: “This Man Might Be Innocent. This Man Is Due to Die ... ***The courts have refused to hear the evidence that could save him ...***”¹³² *Time* asked: “what’s the big rush?”¹³³

In words calculated to get attention Coleman asserted: “An innocent man is going to be murdered tonight. When my innocence is proven I hope Americans will recognize the injustice of the death penalty ...”¹³⁴ This was echoed just eight months later, when, citing Coleman, Justice Blackmun wrote: “The execution of a person who can show that he is innocent comes perilously close to simple murder.”¹³⁵ For years, death penalty opponents used Coleman as the Holy Grail to show execution of an innocent man.¹³⁶

¹³⁰ As Evan Thomas of *Newsweek* said of the infamous reporting on the Duke rape case: “The narrative was right, but the facts were wrong.” Rachel Smolkin, *Justice Delayed*, 29 AM. JOURNALISM REV. 18, 29 (August/September, 2007). This was bluntly translated: “*Our reporting was guided by our prejudices, and even though the story turned out to be false, we stand behind our prejudices.*” James Taranto, *Best of the Web Today*, OPINIONJOURNAL.COM, July 18, 2007 (italics in original).

¹³¹ Peter Applebome, *Virginia Executes Inmate Despite Claim of Innocence*, N.Y. Times, May 21, 1992, A 20. For a brief but vivid description of the crime see Jill Smolowe, *Must This Man Die? Roger Keith Coleman Says He Didn’t Kill Anybody, But the Courts Are Tired of Listening. That Could Be a Tragic Mistake*, 139 TIME 40, 41 (May 18, 1992).

¹³² Available at <http://www.time.com/time/covers/0,16641,19920518,00.html>. Emphasis added.

¹³³ *Supra* note 131, at 44. Also, Coleman was executed because “the courts were tired of listening.” *Id.*, at 41. See also Cohen, *infra* note 166.

¹³⁴ Applebome, *supra* note 131.

¹³⁵ *Herrera v. Collins*, 506 U.S. 390, 446 (1993).

¹³⁶ Frankel, *infra* note 166.

Nearly a year before his execution, *Coleman v. Thompson*¹³⁷ was decided. *The New York Times* editorialized: “Because his lawyers filed a piece of paper one day late in a Virginia court, the Supreme Court holds . . . a death row inmate[] is not entitled to challenge the fairness of his murder trial in Federal court.”¹³⁸ If this statement were true, we could all surely agree with the *Times*’ further characterization of it as a “bizarre conclusion.”¹³⁹ But this was based on a misleading Linda Greenhouse report.¹⁴⁰

Greenhouse on Coleman. According to her, *Coleman* was the “most sweeping” of decisions “sharply constricting” Federal habeas corpus petitions by state prisoners. “[A]lmost” any state procedural failure would forfeit that right, even if a lawyer’s error prevented raising any “constitutional” arguments in state court. Also, *Coleman* followed *McCleskey v. Zant*,¹⁴¹ a “ruling that essentially limited” inmates to one petition by erecting “almost insurmountable barriers . . .” *Coleman*’s “petition to the Virginia Supreme Court had been dismissed because his lawyer filed it three days” late; a Federal petition would be allowed if good “cause” could be shown, but that would not include “attorney ignorance or inadvertence.” The only mention of *Coleman*’s crime was that he “was convicted and sentenced to death in 1982 for the rape and murder of his sister-in-law. He maintained his innocence, relying on physical evidence. . . .” Lastly, after noting that “nearly 40 percent of all state death sentences in recent years have been set aside by Federal courts” on habeas petitions, Greenhouse suggested the limitations in cases such as *McCleskey* and *Coleman* would preclude Federal courts from “continu[ing] in their historic role as constitutional overseers of the quality of justice meted out by the states.”

This news story is a paradigm of media misreporting on behalf of murderers. First and most glaring is the complete failure to even mention let alone address the three-page first part of Justice O’Connor’s opinion for the court, which detailed the history of *extensive* judicial review of *Coleman*’s claims *on the merits*.¹⁴² (1) The Virginia Supreme Court provided a full review of every argument made on direct

¹³⁷ 501 U.S. 722 (1991).

¹³⁸ Editorial, *Federalism, Despoiled*, N.Y. TIMES, June 27, 1991, A 28. The late filing was actually three days.

¹³⁹ *Id.*

¹⁴⁰ Linda Greenhouse, *Court Again Curbs Federal Appeals by State Inmates*, N.Y. TIMES, June 25, 1991, A 1. Emphasis added.

¹⁴¹ 499 U.S. 467 (1991).

¹⁴² *Supra* note 137, 501 U.S. at 726-729.

appeal.¹⁴³ The opinion, which was cited by Justice O'Connor and available to Greenhouse, was nearly 9,000 words! (2) Thereafter, Coleman filed a petition for a writ of habeas corpus in the local state circuit court raising numerous federal constitutional claims. Not mentioned by Greenhouse is that the circuit court denied all of Coleman's claims *only after conducting a two-day evidentiary hearing*.¹⁴⁴ (3) It is from that ruling that Coleman's lawyers filed a 3-day-late notice of appeal to the Virginia Supreme Court, which granted a motion to dismiss based on the late filing. Nevertheless, the motion was granted only after briefs were submitted and apparently considered.¹⁴⁵ (4) Coleman then sought a writ of habeas corpus in federal district court, which denied the petition. Unreported by Greenhouse was O'Connor's statement that: "The District Court concluded that, by virtue of the dismissal of his appeal by the Virginia Supreme Court in state habeas, Coleman had procedurally defaulted [but] *nonetheless went on to address the merits of all 11 of Coleman's claims*. The court ruled against Coleman on all of the claims."¹⁴⁶ In doing so, the court emphasized that it had "laid aside all technical and legal arguments, [and] found the evidence presented at trial sufficient to find Coleman guilty beyond a reasonable doubt."¹⁴⁷ (5) O'Connor then noted that the Fourth Circuit reviewed and upheld the district court's decision¹⁴⁸

After eleven more months' legal wrangling Coleman was executed, amid a media circus proclaiming his innocence.¹⁴⁹ Contemporaneously with *Time's* cover story that he was going to be executed because the courts "refused to hear the evidence that could save him," U.S. District Judge Glen M. Williams was very carefully considering precisely that evidence, upon which, he issued a 6,200 word opinion.¹⁵⁰ It was barely

¹⁴³ Coleman v. Commonwealth, 307 S.E.2d 864 (1983).

¹⁴⁴ *Supra* note 137, at 727.

¹⁴⁵ *Id.*, at 727-728. Ironically, had the Virginia Supreme Court clearly specified that it had considered the merits of Coleman's appeal, the United States Supreme Court might have ruled in his favor on the procedural question that so concerned the media. *See Id.*, at 757 (White, J., concurring). However, the main point here is that the Virginia Court did not act immediately but considered Coleman's briefs, and this was barely reported if at all. Moreover, because, contrary to the manifestly dishonest reporting by the media, the merits already had actually been considered notwithstanding the procedural default, Coleman could not have prevailed even if he had won the procedural appeal. The media "story line" was absolutely false.

¹⁴⁶ *Id.*, at 728. Emphasis added.

¹⁴⁷ Coleman v. Thompson, 798 F. Supp. 1209, 1218 (WD Va. 1992).

¹⁴⁸ *Supra* note 146, referring to Coleman v. Thompson, 895 F.2d 139 (1990). The Fourth Circuit also noted that the district court, while sustaining the procedural default, nevertheless ruled on the merits of the Coleman's claims: "The district court found that the evidence was sufficient to show Coleman's guilt beyond a reasonable doubt." *Id.*, at 144.

¹⁴⁹ *See, e.g.*, Peter Applebome, *Death Case Goes to Court and TV*, N.Y. TIMES, May 20, 1992, A 14; Applebome, *supra* note 131; *infra* note 324.

¹⁵⁰ *Supra* note 147.

mentioned by reporters¹⁵¹ and surely not with the repetition and detail of Coleman’s version. Two points made by Judge Williams merit special attention. (1) Detailing the history of the case, he observed: “this is the *twelfth round* of a murder case that began eleven years ago.”¹⁵² (2) After again reviewing the evidence, expressly to ensure there was no “miscarriage of justice,”¹⁵³ he pointed out: “Coleman has not made a colorable showing of ‘actual innocence’ After a review of the alleged ‘new evidence,’ this court finds the case against Coleman *as strong or stronger* than the evidence adduced at trial. Most of the ‘new evidence’ is either irrelevant, of no probative value, or hearsay and thus not admissible in a court of law.”¹⁵⁴ New genetic testing, at Coleman’s request by his own designated expert, narrowed him down to 0.2 percent of the population whose semen matched that found in the victim.¹⁵⁵ Finally, the Supreme Court issued a second opinion on the day of Coleman’s execution, reiterating “this is now the 12th round of judicial review in a murder case which began 11 years ago” and referring to “an expert's genetic analysis that further implicated him in the crime -- an analysis conducted after trial at *Coleman's* request....”¹⁵⁶

Cracking the Greenhouse Code. Judge Williams’ reference to “actual innocence” breaks what may be termed the “Greenhouse Code,” language masking as much as it reveals. The key code terms are “sharply constricting,” “constitutional,” “essentially,” “almost insurmountable” and “quality of justice.” In sum, the Supreme Court had issued “sweeping” decisions “sharply constricting” the ability of state inmates to raise “constitutional” arguments in federal courts. In particular, *McCleskey v. Zant*,¹⁵⁷ decided two months before *Coleman*, had “essentially” barred more than one federal habeas corpus petition by erecting “almost insurmountable barriers” The implied result was a diminution of the “quality of justice” in state courts.¹⁵⁸

Only careful parsing can reveal that the Greenhouse code is designed to convey to unsuspecting

¹⁵¹ See, e.g., Applebome, *supra* note 131; Richard Lacayo, *You Don't Always Get Perry Mason*, 139 Time 38 (June 1, 1992).

¹⁵² *Supra* note 147, at 1212. Emphasis added.

¹⁵³ “It is not appropriate that these claims ... would be thrust upon the courts and opposing counsel at the last minute. *Nonetheless, any capital case is a matter of the utmost gravity and, even at the eleventh hour, a court must once again assure itself that no fundamental miscarriage of justice is taking place.*’ ... no ‘fundamental miscarriage of justice’ is occurring. Coleman is neither ‘actually innocent’ of the rape and murder nor of the sentences he received.” *Id.*, at 1218 (italics added; citation omitted).

¹⁵⁴ *Id.*, at 1216, 1218-1219. Emphasis added.

¹⁵⁵ *Id.*, at 1213-1214.

¹⁵⁶ *Coleman v. Thompson*, 504 U.S. 188 (1992) (per curiam). Italics in original.

¹⁵⁷ *Supra* note 141.

¹⁵⁸ *Greenhouse*, *supra* note 140.

readers meanings greater than actually stated. Words like “sweeping,” “essentially,” and “almost,” are all less than “complete” or “total.” If inmates were “sharply constricted,” they clearly were not completely constricted; if barriers were “almost insurmountable,” they could be surmounted. Limiting “constitutional” arguments is no bar to other arguments. “Sweeping” is a pure value judgment and surely not total.

The whole point of this carefully chosen language, using every iteration but the one that counted, was manifestly to avoid telling a busy lay public that *Coleman* held exactly the opposite of what seemed to be reported, viz., that Coleman would have been spared had his carefully reviewed evidence even come close to indicating he was innocent. The Supreme Court has never ruled otherwise.¹⁵⁹

Of paramount significance, the Supreme Court unmistakably specified that actual innocence trumps any procedural default barrier, a point Greenhouse repeatedly omitted.¹⁶⁰ To be very clear, *McCleskey* stated that, ***notwithstanding any unexcused procedural default, a federal court could intervene*** in “extraordinary instances ***when*** a constitutional violation probably has caused the conviction of one innocent of the crime a fundamental miscarriage of justice.... ***a ‘colorable showing of factual innocence.’*”¹⁶¹**

For all the agitation about executing an innocent man without considering exculpatory evidence, the overwhelming truth, known in 1991 and 1992, is that courts on all levels diligently and repetitively considered Coleman’s claims and found them utterly wanting. Also, the courts were restricted to admissible evidence, including blood, semen and pubic hair matches.¹⁶² But what makes the media support of Coleman’s public relations campaign so blatantly dishonest is the deliberate choice not to report available information that, while inadmissible in court, was surely admissible in the court of public opinion, especially in the face of such propaganda. And the media sanitized what they did report.

For example, in *Time*’s airbrushed version, Coleman had had the “*misfortune*” to have “served time

¹⁵⁹ “[E]xecuting the innocent is inconsistent with the Constitution. ... the execution of a legally and factually innocent person would be a constitutionally intolerable event. ... Nowhere does the Court state that the Constitution permits the execution of an actually innocent person.” *Herrera v. Collins*, *supra* note 135, 506 U.S., at 419, 427 (O’Connor, J., concurring).

¹⁶⁰ *Supra* note 140; Linda Greenhouse, *Supreme Court Puts Sharp Curbs On Repeated Death-Row Appeals*, N.Y. TIMES, Apr. 17, 1991, A 1.

¹⁶¹ *Supra* note 141, at 495. Emphasis added. The April 17 Greenhouse story, *supra* note 160, referred to “extraordinary instances” and “fundamental miscarriage of justice,” but did not explain that these terms meant a showing of “factual innocence.”

¹⁶² *See supra* note 143, 307 S.E.2d at 866, 868; note 147, 798 F. Supp at 1217.

... for attempted rape.¹⁶³ What a perfect manifestation of the abolitionist mindset! It was not his victim but the convicted attempted rapist who suffered “misfortune.” *The New York Times* referred to a “prior record of indecent exposure and sexual assault.”¹⁶⁴ So it is worth quoting how, a full month before his execution, *The Roanoke Times* reported Coleman’s record, including the “attempted rape” and “indecent exposure”:

Coleman was convicted of making two obscene telephone calls and was given a three-year suspended sentence....

In 1977, a schoolteacher ... accused Coleman, then 18, of entering her home on false pretenses, forcing her at gunpoint to tie up her 6-year-old daughter, and attempting to rape her. She escaped. Coleman denied the charge, but was convicted

The most chilling assessment comes from library Director Pat Hatfield and Jean Gilbert, a clerk-typist there. On Jan. 12, 1981, two months before McCoy's murder, Hatfield and Gilbert were alone at the library just before its 8 p.m. closing.

A man, openly masturbating, walked through the door, approached the desk, ejaculated, turned and left. ... Hatfield [said] "... there was a look of hatred in his face that scared me to death." Both amateur artists, the women drew a composite sketch independently, they picked Coleman out of a basketball team picture

"There are a few of us alive who are witnesses to his perversion," said Hatfield last week. "We need to be pretty vocal. It's not mistaken identity."¹⁶⁵

If, in 1992, a local newspaper knew of this violent history of looks of hate, perversions and sex offenses, only dishonesty in pursuit of an agenda can explain why it was not reported by the national media.¹⁶⁶

With the Greenhouse code broken, it is clear that all the fulminations about restrictions on the right of appeal are really about attempts to curtail frivolous, repetitive and abusive petitions having nothing to do with innocence and everything to do with delay, making the death penalty as costly as possible¹⁶⁷ and almost impossible to carry out.¹⁶⁸ If a murderer sentenced to death can appeal again and again, he will die

¹⁶³ *Supra* note 131, at 42.

¹⁶⁴ Sabra Chartrand, *Few in Coal Area Mourn Native Son Put to Death*, N.Y. TIMES, May 22, 1992, A 14; Tamar Lewin, *Lawyer Relives Sorrow of Execution*, N.Y. TIMES May 25, 1992, 7.

¹⁶⁵ Margaret Edds, *Pending Execution Grips Uncertain Town*, ROANOKE TIMES, Apr. 20 1992, available at <http://www.roanoke.com/news/roanoke/wb/48138>.

¹⁶⁶ Fourteen years later and only after a new DNA test further proved Coleman’s guilt, *The Washington Post* finally reported these facts. Glenn Frankel, *Burden of Proof; Jim McCloskey Desperately Wanted to Save Roger Coleman from the Electric Chair. Maybe a Little Too Desperately*, May 14, 2006, W 08. However, when it counted, the paper rigidly adhered to the narrative. See, e.g., Colman McCarthy, *Killing the 'Sort-of Guilty*, WASH. POST, May 23, 1992 A 31 (Supreme Court refused a hearing; had “maximum regard for procedure and minimum concern for evidence”); Richard Cohen, *Sentenced to Die Because He Is Poor*, May 19, 1992 WASH. POST, A19 (“unseemly impatience ... justices like their executions neat and, dammit, on time”). For abolitionists, Coleman was a vehicle to pursue a cause rather than the truth. “Many ... urged Jim McCloskey not to seek the truth....” Cynthia McFadden, *Nightline: Moment of Truth: the Verdict*, ABC NEWS, Jan. 12, 2006. One opponent said: “We already knew the odds were 49 out of 50 that he was guilty.” Frankel, *Burden of Proof*, *supra*, this note. See also *infra* note 324.

¹⁶⁷ Shaila Dewan and Brenda Goodman, *Capital Cases Stall as Costs Grow Daunting*, N.Y. TIMES, Nov. 4, 2007, A 1; Ed Stoddard, *Executions At 14-year Low As Costs Rise*, REUTERS, Dec. 11, 2008, available at <http://www.reuters.com/article/newsOne/idUSTRE4BA0UV20081211>; DEATH PENALTY INFORMATION CENTER, THE DEATH PENALTY IN 2008: YEAR END REPORT (2008) 4, available at <http://www.deathpenaltyinfo.org/2008YearEnd.pdf>.

¹⁶⁸ See *supra* 4, 6, note 32; *infra* 49-50.

only of old age because no case can ever come to an end. Given the protracted delays still going on,¹⁶⁹ the attempted restrictions of *Coleman* and *McCleskey* appear to have proven ineffectual. But, in 1991, the Supreme Court was at least trying to eliminate misuse of the federal courts for endless meritless appeals.

Briefly, *Coleman* held state courts are important and must be given an opportunity to correct errors. An unexcused default in promptly raising issues would bar the federal court intervention.¹⁷⁰ In *McCleskey*, the issue was “abuse of the writ” of habeas corpus. If fifteen arguments can be made, a case will never end if allowed to be raised one at a time. Hence, the Court held that, absent good cause for not timely raising arguments and actual prejudice, successive petitions would not be allowed.¹⁷¹ Even so, an exception would be made for a colorable showing of actual innocence.¹⁷²

Nevertheless, *Coleman* was portrayed by the media as a horrible example of a man denied the right to have his case heard due to a minor attorney technical violation. In reality, the merits were considered and found lacking. That still further appeal was not allowed despite this was presented as a scandalous outrage.

Skillful attorneys can always raise new arguments or old ones disguised to seem new. A perfect case in point is *Gomez v. District Court*.¹⁷³ Robert Alton Harris sought to delay or even set aside his execution on the ground that the gas chamber was cruel and unusual, and thus “unconstitutional.” Lower court judges kept issuing stays and the Supreme Court finally had enough:

This ... is an obvious attempt to avoid the ... bar [to] this successive claim for relief. Harris has now filed four prior federal habeas petitions. He has made no convincing showing of cause for his failure to raise this claim in his prior petitions. ... This claim could have been brought more than a decade ago. There is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the judicial process.¹⁷⁴

Death penalty opponents on the Ninth Circuit refused to accept this, leading an exasperated

¹⁶⁹ *Supra* 3; *infra* 47-50. A comprehensive study indicates it now takes twice as long to finish capital habeas filings as before legislation to expedite them. NANCY J. KING, FRED L. CHEESMAN II, AND BRIAN J. OSTROM, FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS; AN EMPIRICAL STUDY OF HABEAS CORPUS CASES FILED BY STATE PRISONERS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 (2007) 8, 60, *available at* <http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf>. This is not surprising. In the same period, the Supreme Court created new capital punishment obstacles to benefit those concededly guilty of “horrendous” murders. Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 VA. L. REV. 283, 341-346, 353ff., 377-383 (2008).

¹⁷⁰ *Supra* note 137, 501 U.S. at 750.

¹⁷¹ *Supra* note 141, 499 U.S. at 477-496, esp. 491-496, expounding upon abuse of writ doctrine. *Cf.* Alfieri, *supra* note 108, at 335 (abolitionist “duty” to file “successive ... multiple ... repetitive, habeas petitions and appeals”).

¹⁷² *Supra* 25.

¹⁷³ *Supra* note 120.

¹⁷⁴ *Id.*, at 653-654.

Supreme Court to issue a rare and extraordinary order: “No further stays of Robert Alton Harris' execution shall be entered by the federal courts except upon order of this Court.”¹⁷⁵

Instead of showing the slightest recognition of abuse of the system and legitimacy of ever bringing cases to an end, death penalty opponents sharply castigated the Supreme Court. Without a trace of understanding the irony, *The New York Times* editorialized in 1992 about “The Court’s Rush to Kill...for two wanton 1978 murders.”¹⁷⁶ An execution after 14 years was a “rush to kill.” But it was worse than that, screeched a disgruntled Ninth Circuit judge, John T. Noonan, described in the media as a “conservative.”¹⁷⁷ In an article, arguing that state executions should not “run on schedule,” 14 years apparently being a much too hasty schedule, he actually accused the Supreme Court of “treason” for rejecting his view of the Harris case.¹⁷⁸ In *Coleman*, a wait of 11 years after 12 rounds of judicial review indicated “impatience” and a desire for the “trains to run on time.”¹⁷⁹

In 2007, ABC news unabashedly posted on its website this headline: “Judge: ‘We Close at 5’ Texas

¹⁷⁵ Vasquez v. Harris, 503 U.S. 1000 (1992) (two orders).

¹⁷⁶ Editorial, *The Court’s Rush to Kill*, N.Y. TIMES, Apr. 22, 1992, A 24.

¹⁷⁷ Despite accusing seven justices of “treason” and writing a book harshly critical of conservative Supreme Court decisions, Noonan was a “judicial conservative,” insisted Linda Greenhouse. *Beyond Original Intent*, N.Y. TIMES BOOK REV., Aug. 18, 2002, 8. Affixing the “conservative” label is apparently meant to legitimize judicial actions.

Florida ACLU Director Robyn Blumner called Parker Lee McDonald “one of the [Florida Supreme] court's most conservative justices.” *Dole's Slap at the 'Purist Jurist,'* ST. PETERSBURG TIMES, April 28, 1996, 1D. McDonald wrote a death dissent that must be read entirely to be fully appreciated. *Dougan v. State*, 595 So. 2d 1 (Fla. 1992). Deciding to murder white people to call attention to racial discrimination, Dougan brutally murdered an 18-year-old, bragged about it, and sent a recording to the victim’s mother saying, *inter alia*, “it was beautiful. ... I enjoyed every minute of it. I loved watching the blood gush from his eyes.” *Id.* (Emphasis added.) Yet McDonald mitigated it as “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” *Id.*

One of the most liberal judges of the 20th century, David L. Bazelon, disputed he was liberal. QUESTIONING AUTHORITY: JUSTICE AND CRIMINAL LAW (1988) 158. (Justice Brennan wrote the foreword.) Justice Stevens calls himself “a judicial conservative.” Jan Crawford Greenburg, *EXCLUSIVE: Supreme Court Justice Stevens Remembers President Ford*, ABCNEWS, Jan. 2, 2007, available at <http://abcnews.go.com/print?id=2765753>. But Greenburg says Stevens is “surprisingly liberal.” He is routinely placed at the left of the Court. See, e.g., Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. Times, July 1, 2007, A 1, 18; Lyle Denniston, *Analysis: Focus on the mechanics of execution*, SCOTUSBLOG, Jan. 7, 2008 (“most liberal” justice), available at <http://www.scotusblog.com/wp/uncategorized/analysis-focus-on-the-mechanics-of-execution/>.

Adjectives that sew confusion among the lay public cannot change the actual decisions of these jurists.

¹⁷⁸ John T. Noonan, *Should State Executions Run on Schedule?*, N.Y. TIMES, Apr. 27, 1992 A 17. Noonan actually used the term “treason to the Constitution,” a distinction lay readers are hardly likely to make. Noonan evidenced no concern that, while on parole for a conviction for beating a neighbor to death, Harris kidnapped and murdered two boys, 15 and 16, one of whom begged for his life, and “laughed and giggled about shooting the boys, saying he had blown ... Baker's arm off. [He] amused himself by imagining be[ing] a police officer ... report[ing] the boys' deaths to their families. ... [He] *laughed, commented he had really blown the boy's brains out, and then flicked the bits of flesh into the street.*” *People v. Harris*, 623 P.2d 240, 243-245 (1981) (emphasis added).

¹⁷⁹ *Supra* 21.

Judge's Decision [sic] To Close On Time Lead [sic] to Immediate Execution”¹⁸⁰ Imagine that! An execution 21 years after murder was “immediate” because yet another delaying tactic was forestalled by a court allegedly closing too early to receive papers containing no claim of innocence.

Constitutional Claims. The Greenhouse assertion that “constitutional” claims were “sharply constricted”¹⁸¹ is an artful way of saying that, after appeals had been drawn out and abused, defaulted claims failing to show actual innocence would be barred. In a symbiotic relationship, “constitutional” claims are brought by anti-death penalty lawyers (and favorably reported by media allies) as a vehicle for like-minded justices to force unpopular values upon an unaware public. The great irony of the sham media Coleman “narrative” was that the Court’s feeble attempt, to thwart frivolous constitutional claims not casting doubt upon guilt, *supra* 25-27, was presented to the public as lack of concern about the very question of guilt.

Nearly all the cases cited in this article involve “constitutional” claims not contesting guilt. They are the last refuge of the guilty and their champions’ long term, largely successful strategy of slow strangulation of capital punishment.¹⁸² Few subjects better illustrate the concerns of Thomas Jefferson and Abraham Lincoln: the constitution has become “a mere thing of wax in the hands of the judiciary, which they may twist, and shape into any form they please,”¹⁸³ with the people having “ceased to be their own rulers.”¹⁸⁴

To take a few examples, unfettered jury discretion in deciding both guilt and whether to impose a death sentence was held constitutional.¹⁸⁵ But a year later, the death penalty was held unconstitutional because juries had *too much* discretion.¹⁸⁶ Not long thereafter, the death penalty was held unconstitutional because juries had *too little* discretion; and states were required to determine how many discretion angels

¹⁸⁰ Charles Gibson, *World News Tonight*, ABC NEWS, Oct. 12, 2007, available at <http://www.abcnews.go.com/WN/story?id=3724883&page=1>.

¹⁸¹ *Supra* 22, 25.

¹⁸² See Smith, *supra* note 169, 94 VA. L. REV., at 377, 302 (lauding Supreme Court’s “new approach,” to keep more guilty murderers alive “in spite of the horrendous crimes” and “even in cases of brutal, senseless killings.” For abolitionist Austin Sarat, guilt is irrelevant; he rebukes governors who grant clemency only for possible innocence. *Governor Perry, Governor Ryan, and the Disappearance of Executive Clemency in Capital Cases: What Has Happened to Mercy in America?* FINDLAW WRIT, Dec. 29, 2004, available at http://writ.news.findlaw.com/commentary/20041229_sarat.html. See also *infra* note 283.

¹⁸³ Letter to Judge Spencer Roane (Sept. 6, 1819), in 15 THE WRITINGS OF THOMAS JEFFERSON 212, 213 (Andrew A. Lipscomb and Albert Ellery Bergh, eds., 1903).

¹⁸⁴ Abraham Lincoln, *First Inaugural Address* (March 4, 1861), in THE INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES, 1789-1985 (1985) 72, 75.

¹⁸⁵ *McGautha v. Cal.*, 402 U.S. 183 (1971).

¹⁸⁶ *Furman v. Ga.*, *supra* note 22, *passim*.

could dance on the head of a Supreme Court pin.¹⁸⁷ Mandatory death sentences for especially “grievous” crimes were *possibly* constitutional;¹⁸⁸ then they were not possibly constitutional.¹⁸⁹ It was constitutional for judges to impose the death penalty on facts not found by a jury;¹⁹⁰ then it wasn’t.¹⁹¹ It was constitutional to execute mentally retarded murderers¹⁹² and those under the age of 18;¹⁹³ then it wasn’t.¹⁹⁴ Methods of execution once held “constitutional” as humane were later challenged as inhumane.¹⁹⁵ Two justices want to reward murderers who long delay execution by declaring the delay itself unconstitutional.¹⁹⁶

In the face of such flip-flopping inconsistency, absent any duly adopted amendments, can the Constitution be seen as anything but a pretextual fig leaf rather than a legitimate basis for these decisions?¹⁹⁷ It is precisely “constitutional” claims with no showing of innocence that drag out cases of the clearly guilty for over 30 years.¹⁹⁸ As Supreme Court majorities relentlessly and miraculously “discovered” more and more of their unrepresentative values to be enshrined in the “constitution,” justices in the minority, on behalf of democracy, protested: “There is something to be said for popular abolition of the death penalty; there is nothing to be said for its incremental abolition by this Court.”¹⁹⁹ Chief Justice Burger complained:

¹⁸⁷ *Lockett v. Ohio*, *supra* note 32, 438 U.S. at 604-605; *Eddings v. Okla.*, *supra* note 32, 455 U.S. at 110-112; *McCleskey v. Kemp*, 481 U.S. 279, 304 (1987); *Cf. infra* note 313. Also, “the Court has gone from pillar to post, ... the sort of reasonable predictability upon which legislatures, trial courts, and appellate courts must of necessity rely has been all but completely sacrificed.” *Lockett*, at 629 (Rehnquist, J., concurring and dissenting).

See also *Woodson v. N. Car.*, *supra* note 32; *Roberts v. La.*, 428 U.S. 325 (1976). These cases, while leaving open the possibility that mandatory no-discretion death sentences might be allowed, *infra* note 188, held unconstitutional two states’ no-discretion mandatory laws partly on the paradoxical, if not confusing, ground that they really gave juries *still* too much discretion. *Woodson*, 428 U.S. at 302 (Stewart, J., plurality), 314 (Rehnquist, J., dissenting); *Roberts* 428 U.S. at 335 (Stewart, J., plurality), 346-347 (White, J., dissenting).

¹⁸⁸ “[T]he Court has expressly and repeatedly ... signal[ed] ... that the rationale underpinning the individualized sentencing requirement does not inexorably lead to a conclusion that mandatory death-sentencing schemes ... offend the Constitution.” *Sumner v. Shuman*, *supra* note 32, 483 U.S. at 86-87 (White, J., dissenting) (citations omitted). See also *Gregg v. Ga.*, *supra* note 20, 428 U.S. at 184 (Stewart, J., plurality) (“capital punishment ... an expression of the community’s belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.”)

¹⁸⁹ “Until today, the Court has never held that the Constitution prohibits a State from identifying an especially aggravated and exceedingly narrow category of first-degree murder ... and determining ... that no combination of mitigating factors ... could ever warrant reduction of a sentence of death.” Justice White, dissenting, *Sumner*, *supra*, at 87. See also *infra* 42.

¹⁹⁰ *Walton v. Ariz.*, 497 U.S. 639, 647-49 (1990).

¹⁹¹ *Ring v. Ariz.*, 536 U.S. 584, 609 (2002).

¹⁹² *Penry v. Lynaugh*, *supra* note 71, 492 U.S. at 335.

¹⁹³ *Stanford v. Ky.*, 492 U.S. 361 (1989).

¹⁹⁴ *Atkins v. Va.*, *supra* 11ff.; *Roper v. Simmons*, *supra* 7-8.

¹⁹⁵ *Supra* 16-20.

¹⁹⁶ See *infra* 47.

¹⁹⁷ U.S. CONST art V. Until 1960, few even considered using the court to misuse the Constitution to abolish the death penalty. *Supra* note 14. In *McCleskey*, *supra* note 187, at 305, the court’s language gave the game away: “we ... the Court ... “established ... prohibited ...” See also *infra* 38 (court “demanded”).

¹⁹⁸ *Infra* 47ff.; Cassell, *Not Executing*, *supra* note 11 (68% “error rate”: “deceptive ... nothing to do with ‘wrong man’ mistakes”; courts “find errors where none exist”; “glaringly one-sided national discussion”).

¹⁹⁹ *Atkins v. Va.*, *supra* note 28, 536 U.S., at 353 (Scalia, J., dissenting). See also *infra* 43.

“the Court regresses to playing a grisly game of ‘hide and seek,’ once more exalting the sporting theory of criminal justice....”²⁰⁰ Justice Rehnquist objected to the court’s “sport of fox and hound.”²⁰¹ Justice Scalia explained why “the Court can be so cavalier....It is just a game, after all.”²⁰² He objected to “turning the process of capital trial into a game.”²⁰³ It is a deadly game because judge-saved murderers have lived to murder another day, often multiple victims.²⁰⁴

Judge Learned Hand warned of abusive manipulative delaying tactics long ago. In a textbook example of deliberate quotation out of context to convey a meaning exactly the opposite of what was clearly intended, *Time* magazine commenced its report²⁰⁵ by quoting one of the twentieth century’s greatest judges: “Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream.”²⁰⁶ Here is what Hand really said, as *Time*’s reporter surely knew:

Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.²⁰⁷

Finally, Greenhouse lamented her alleged demise of the federal courts’ role as “constitutional overseers of the quality of justice meted out by state courts.” What is “quality of justice”? Given their view that capital punishment is a moral issue,²⁰⁸ for opponents, “quality of justice” is whatever subverts and

²⁰⁰ *Brewer v. Williams*, 430 U.S. 387, 417 (1977) (Burger, C.J., dissenting).

²⁰¹ *California v. Minjares*, 443 U.S. 916 (1979) (Rehnquist, J., dissenting).

²⁰² *Atkins v. Va.*, *supra* note 28, 536 U.S., at 348. Cf. *Bronson*, *infra* note 319

²⁰³ *Id.*, at 353.

²⁰⁴ *Supra* 9-10; *infra* 42, 45, 52.

²⁰⁵ *Supra* 21.

²⁰⁶ *Supra* note 131, at 41.

²⁰⁷ *United States v. Garsson*, 291 F. 646, 649 (SDNY 1923) (emphasis added). While, in context, *Time*’s second quoted sentence rejects the first, it is unlikely that *Time* intended to convey Hand’s meaning, given the narrative and such colloquial usages of “unreal” as “unbelievably ... awful; bizarre.” OXFORD ENGLISH DICTIONARY (added 1993), available at http://dictionary.oed.com/cgi/entry/50269931?single=1&query_type=word&queryword=unreal&first=1&max_to_show=. Little could Hand imagine in 1923 the obstructionism and delay that would subsequently be concocted by the Supreme Court.

Justice Black pinpointed the problem with “constitutional” claims: “I would always require that the convicted defendant raise the kind of constitutional claim that casts some shadow of a doubt on his guilt ... But it is quite a different thing to permit collateral attack on a conviction after a trial according to due process when the defendant clearly is ... guilty of the crime charged.... guilt being certain, surely [the defendant] does not have a constitutional right to get a new trial.” *Kaufman v. U.S.*, 394 U.S. 217, 241-242 (1969) (Black, J., dissenting).

By contrast, Carol S. Steiker and Jordan M. Steiker expressed concern that a focus upon seeking truth and accuracy regarding guilt is a “limit on litigation of constitutional claims,” because there are values more important than convicting the guilty (e.g., dignity, fairness, equality). *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587, 609, 612 (Winter 2005). The Steikers “worry that too much enthusiasm for and emphasis on innocence may play a supporting role in rendering other values apparently ‘irrelevant.’” *Id.*, at 618.

²⁰⁸ *Supra* 5.

makes it ineffective and almost impossible to carry out.

Justice Jackson famously stressed that “*reversal by a higher court is not proof that justice is thereby better done*. We are not final because we are infallible, but we are infallible only because we are final.”²⁰⁹ Also, Justice Scalia complained: “the peculiar state of current federal habeas practice is this: State courts routinely see their criminal convictions vacated by federal district judges, but federal courts see their criminal convictions afforded a substantial measure of finality and respect.”²¹⁰ If, in the past, some states have egregiously sullied “quality of justice,” is it *per se* inferior today? Moreover, recall such federal examples as *Dred Scott v. Sandford*,²¹¹ *Plessy v. Ferguson*²¹² and *Korematsu v. U.S.*²¹³ Finally, the Supreme Court’s death penalty handiwork renders dubious any argument that federal quality of justice is superior.

From the other end of the moral spectrum, Justice Brennan agreed. He had no qualms about seeking to impose his moral values through the state courts when he could not get his brethren to go along, presumably because the state courts would “mete out” a “quality of justice” superior” to that of the federal courts.²¹⁴ In the end, for Brennan and his ideological soul mates, the particular forum does not matter any more than the actual words of the constitution and the law. What matters is what is best for criminals, which, in turn, is best achieved by pretending victims and the public do not exist, never did or are irrelevant.

III

DEFYING THE PEOPLE

If, as unelected judicial abolitionists preach, the issue involves morality, is it moral to force their unrepresentative values upon a representative democracy? Their moral weakness is betrayed not only by the openly conceded need to suppress case facts, but also by misrepresentation of their defiance of the people.

²⁰⁹ *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) (emphasis added). Jackson attributed reversals to “a difference in outlook ... between personnel comprising different courts” rather than to “better” justice. *Id.*

²¹⁰ *Withrow v. Williams*, 507 U.S. 680, 721 (1993) (Scalia, J., concurring and dissenting).

²¹¹ 60 U.S. 393 (1857).

²¹² 163 U.S. 537 (1896).

²¹³ 323 U.S. 214 (1944).

²¹⁴ William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977); Stuart Taylor, Jr., *Brennan Hails State Courts’ Record on Liberty*, N.Y. TIMES, April 12, 1987, 28; Mark S. Pulliam, *State Courts Take Brennan’s Revenge*, WALL ST. J., Jan. 4, 1999, A 11. See also *Kansas v. Marsh*, *supra* note 11, 548 U.S. at 449 (Scalia, J., concurring) (“thumb upon the scales ... dissent propos[al] avowedly favors one party When a criminal defendant loses a questionable constitutional point, we may grant review; when the State loses, we must deny it”); *Michigan v. Long*, 463 U.S. 1032, 1042 n.8 (1983) (Stevens dissent “proposes the novel view that this Court should never review a state court decision unless ... to vindicate a federal right that has been endangered even if the decision below rests exclusively on federal grounds”).

Public Support for the Death Penalty Remains. The death penalty has been nearly abolished by an unaccountable judiciary. *Infra* 43. Media and judicial opponents, while not acknowledging this, have suggested that whatever subversion has been reported accords with public opinion, perhaps as justification and to sway the unsuspecting to hop on a faux bandwagon. For example, in late 2007, according to a CNN headline: “Executions drop in '07 as states rethink death penalty.”²¹⁵ *The New York Times* claimed in a news story that “enthusiasm for executions outside of Texas has dropped sharply” and opined “the rest of the country is having serious doubts about the death penalty.”²¹⁶

Abolitionist media gloating was largely due to two events. First, New Jersey *legislatively* repealed its death penalty statute and, second, 2007 had the fewest executions in thirteen years.²¹⁷ This prompted wishful thinking non sequiturs. Neither the New Jersey repeal nor the execution decline showed the public had “rethought” the issue and lost its “enthusiasm” due to “serious doubts”; in fact, these events were in defiance of and not in response to public opinion.

The 2007 New Jersey repeal did not “end” executions, as *The Times* claimed, because none had taken place since 1963 despite a 1982 death penalty reinstatement, as the very same *Times* story conceded.²¹⁸ This was largely due to prior *judicial* repeal in all but name only and not public wishes.²¹⁹ The “repeal” required a “lame-duck Legislature, when some departing legislators might be more easily persuaded to support it,”²²⁰ suffering no political consequences “despite solid public support in the state for

²¹⁵ Available at <http://www.cnn.com/2007/US/12/18/death.penalty.decline/index.html>.

²¹⁶ Adam Liptak, *At 60% of Total, Texas is Bucking Execution Trend*, N.Y. TIMES, Dec. 26, 2007, A 1; Editorial, *State Without Pity*, N.Y. TIMES Dec. 27, 2007, A 28. This was neither the first nor the last public opinion distortion. For example, an abolitionist group reported 2000 poll results thusly: “Harris Poll Finds Support for the Death Penalty Declining” (64% actually still in favor); “Support for Death Penalty at 19-year Lo” (66%). NEW JERSEYANS FOR ALTERNATIVES TO THE DEATH PENALTY, RECENT POLL RESULTS FROM AROUND THE COUNTRY, available at <http://www.njadp.org/forms/guessagain.html>; Stoddard, *supra* note 167 (“a rethink of the death penalty” in 2008 (64%, *infra* note 222)).

²¹⁷ *Supra* note 215.

²¹⁸ Jeremy W. Peters, *In Ending Executions, Soul Searching*, N.Y. Times, Dec. 23, 2007, NJ 1.

²¹⁹ A sponsor of the repealed 1982 statute complained of judges “who have consistently disregarded the legislative will and refused to enforce the law as written.” *Minority View: Honorable John F. Russo*, NEW JERSEY DEATH PENALTY STUDY COMMISSION, REPORT (2007) 82, available at http://www.njleg.state.nj.us/committees/dpsc_final.pdf. A victims’ rights death penalty advocate acquiesced in “repeal” because it had been turned into a “joke”: “[T]he New Jersey Supreme Court will continue to ensure that no person, regardless of how horrendous the crime(s) committed, will ever be executed. ... Illogical rulings ... have resulted in victims/survivors losing all faith in our system of justice.” *Statement of Commissioner Kathleen M. Garcia, Id.*, at 94, 93. Refusing to flatly hold the law unconstitutional, *id.*, at 94, the court used obvious bad faith obstruction, e.g., overturning a death sentence on the purported ground that it was not clear that a rapist murderer really intended to kill his victim when he viciously stabbed her 53 times, including 18 in the genital area. *Id.*, 93-94; *State v. Jackson*, 572 A.2d 607, 608, 611 (N.J. 1990). See also *N.J. Rept.*, at 58.

²²⁰ *Id.*; Keith B. Richburg, *N.J. Approves Abolition of Death Penalty; Corzine to Sign*, WASH. POST, Dec. 14, 2007, A 3

capital punishment.”²²¹ In fact, “[p]ublic opinion across the United States still remains solidly in favor of capital punishment.”²²² Hence, the 2007 decline in executions was not because of any change of public “thinking” or lack of “enthusiasm”; it was directly due to moratoria ordered by unaccountable justices.²²³

Moreover, in trying to make their case, the opponents claimed support for the death penalty declined when those polled were given the option of “life without parole.”²²⁴ This is an example of poll manipulation; no such option exists because it can only be promised but never be guaranteed.²²⁵ Indeed, death penalty support remains strong even when the specter of executing the innocent is raised. Hence, for example, thanks to the contested but skillful campaign claiming many executions of the innocent, *supra* 3, in May 2003, an astonishing 93 percent of respondents agreed this had occurred, while at the same time 70 percent *still* favored the death penalty, with 28 percent opposed!²²⁶ This led Jane Eisner to admit, with candor rare for opponents, “to being out of touch with American public opinion,” while proudly declaring “I don’t mind being in the minority.”²²⁷ She lamented: “even when states ... have imposed moratoriums on executions, even when judges ... and lawmakers ... think the current system is flawed, Americans seem to have few qualms.”²²⁸ The implicit underlying question is: how can Americans flout their morally superior

(Sub. Ed.). The assemblywoman “representing” Megan Kanka’s family, strongly opposed to repeal, was allowed to vote against it and not chair hearings within her purview. *Id. Cf. Jacobi, infra* note 231, at 1115: use of “divergence between the opinions of elites, as represented in state legislation, with [those] of the populaces they represent, to [argue] existence of a national consensus.”

²²¹ *Id.* It was thus utterly disingenuous for Gov. Jon S. Corzine to claim that “because New Jersey has not executed anyone in 44 years, there is little collective will or appetite for our community to enforce this law.” Remarks - Elimination of the Death Penalty, Dec. 17, 2007, *available at* http://www.state.nj.us/governor/news/speeches/elimination_death_penalty.html. It was the judiciary and not the public that refused to enforce the law.

²²² *Id.*; Robert Ruby and Allison Pond, *An Enduring Majority: Americans Continue to Support the Death Penalty*, PEW FORUM ON RELIGION & PUBLIC LIFE, Dec. 19, 2007, *available at* <http://pewforum.org/docs/?DocID=272>. In October, 2007, 69% favored and 27% opposed the death penalty for convicted murderers. (Year later results were 64%-30%.) *Death Penalty*, GALLUP (1936-2008 polls), *available at* <http://www.gallup.com/poll/1606/Death-Penalty.aspx> (visited Dec. 30, 2008).

²²³ *Supra* 17; notes 108 (moratorium caused execution drop), 215, 216 (Liptak). When *Baze v. Rees* ended the moratorium (but not delays), *supra* note 108, opponents switched from exulting in an execution decline implying a public support decline to wailing about a coming “flood of executions.” Editorial, *The Death Penalty Returns*, N.Y. TIMES, May 7, 2008, A 26. This “flood” referred to *fifteen* murderers, as opposed to nearly 20,000 annual homicides, *infra* 42. But *cf. infra* note 283. The basic point stands: the death penalty has been virtually abolished in defiance of public opinion.

²²⁴ Richburg, *supra* note 220. .

²²⁵ *Supra* 9-10. Notwithstanding repeated media references to the “life without parole” option, the actual poll question is much stronger. For example: “which...is the better penalty for murder...: the death penalty or life imprisonment, with **absolutely no possibility** of parole?” *Death Penalty, supra* note 222 (emphasis added). This question, used by Gallup for over two decades, obviously contains a false assumption. As shown, there is, in fact, absolutely no possibility of “absolutely no possibility.”

²²⁶ *Id.*

²²⁷ Jane Eisner, *No Problem Supporting the Death Penalty?*, PHIL. INQUIRER, May 20, 2003, A 15.

²²⁸ *Id.*

leaders?²²⁹ Not asked: how can the leaders flout the people?

One way is to deny being out of step with the public at all, instead claiming declining support. Indeed, abolitionist justices often purport to apply public values in the very act of defying them. For example, in *Atkins v. Virginia*, *Roper v. Simmons* and *Kennedy v. Louisiana*, the justices abolished previously upheld capital punishment for “retarded” and under-18-year-old murderers, as well as child rapists, in part, on the basis of a newly discovered “consensus.”²³⁰ This was vigorously disputed.²³¹ Also, the abolitionist justices have repeatedly claimed to be simply applying the “evolving standards of decency that mark the progress of a maturing society.”²³² This, too, has been vigorously disputed.²³³ However, in other contexts, the very same justices, who used alleged “evolving standards” and a “consensus” to vitiate states’ democratic choices to the contrary, have also argued that the states should be permitted to act as laboratories to experiment with other social policies not widely accepted – including helping clearly guilty murderers evade execution.²³⁴ When *Roper*, *Atkins* and *Kennedy* were decided, not only was there strong denial of changed consensus and evolved standards, it was also questioned why they should govern only when in the direction of the abolitionist justices’ values but not vice versa.²³⁵ Is it only “a happy incident”²³⁶

²²⁹ Also, how can America act contrary to “the rest of the Western world”? Smith finds this “perplexing.” *Supra* note 169, 94 VA. L. REV. at 284. He suggests that it is “pathological” for elected officials in a democracy to act upon and reflect the values and interests of their constituents, and implies it is improper that “political forces ... have seriously undermined the [Supreme Court’s] vision.” *Id.*, at 300, 285. How “perplexing” indeed it is that the people, via their elected officials, should undermine the *Supreme Court’s* vision. How dare they?! “[T]he rest of the Western World” really refers to *elites* who have defied popular support for the death penalty. Joshua Micah Marshall, *Death in Venice, Europe’s Death-Penalty Elitism*, 223 NEW REP. 14 (July 31, 2000).

²³⁰ *Supra* note 28: *Atkins*, 536 U.S. at 313-16; *Roper*, 543 U.S. at 560-575; *Kennedy*, 128 S. Ct. at 2650-58.

²³¹ *Atkins*, at 321ff. (Rehnquist, C.J., dissenting), 337ff. (Scalia, J., dissenting); *Roper*, at 587ff. (O’Connor, J., dissenting), 607ff. (Scalia, J., dissenting); *Kennedy*, at 2665-73 (Alito, J., dissenting). A devastating critique of “consensus” misuse, raising doubts about the Court’s very integrity, is Tonja Jacobi, *The Subtle Unraveling of Federalism: the Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C.L. REV. 1089 (2006). See also *infra* note 238.

²³² *Atkins*, *supra*, at 311-12, 321; *Roper*, *supra*, at 561, 563; *Kennedy*, *supra*, at 2649, 2659-61, 2664; *Furman v. Ga.*, *supra* note 22, 408 U.S. at 242 (Douglas, J., concurring), 269 (Brennan, J., concurring), 327, 329 (Marshall, J., concurring).

²³³ *Atkins*, *supra*, at 341, 343, 346 (Scalia, J., dissenting); *Roper*, *supra*, at 608, 616 (Scalia, J., dissenting); *Kennedy*, *supra*, at 2672-73 (Alito, J., dissenting); *Furman*, *supra*, at 383-390 (Burger, C.J., dissenting), 409 (Blackmun, J., dissenting), 430, 442 (Powell, J., dissenting).

²³⁴ In *Lackey v. Texas*, *infra* note 305, Justice Stevens explicitly invited state and federal courts to “serve as laboratories” to allow condemned murderers to be relieved from the death penalty due to extended delay they themselves had caused. But when Chief Justice Rehnquist complained about Stevens’ “judicial fiat” contravening the “normal democratic processes in the laboratories of the States, Stevens did not answer. *Atkins v. Va.*, *supra*, at 326 (Rehnquist, C.J., dissenting), 306-321 (Stevens, J., for the court). See also, e.g., *Boy Scouts of America v. Dale*, 530 U.S. 640, 664 (2000) (Stevens, J., dissenting); *Arizona v. Evans*, 514 U.S. 1, 30 (1995) (Ginsburg, J., dissenting), quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“one of the happy incidents of the federal system that a single courageous State may ... serve as a laboratory”).

²³⁵ *Roper*, *supra*, at 612-13 (Scalia, J., dissenting), noting that, support for capital punishment has had periods of ascendancy following periods of decline; *Kennedy*, *supra*, at 2675, 2677 (Alito, J., dissenting) (rejecting “one-way ratchet”).

²³⁶ Brandeis, *supra* note 234.

when state laboratories adopt policies smiled upon by these justices? Finally, the advocates of New Jersey's death penalty repeal cited "evolving standards," but close examination reveals them to be no more than the standards of unaccountable judges and unrepresentative legislators, not the public.²³⁷

The Judicially Asserted Irrelevance of the People's Moral Values. Alone, it is highly misleading to equate elite defiance of prevailing moral values with reconsideration or change by the public. But worse, while dubiously purporting to apply these values, abolitionist justices have long made clear that they consider them secondary to theirs, surely not determinative, and actually downright irrelevant.²³⁸

Justice Marshall, who, with Justice Brennan,²³⁹ asserted the death penalty is unconstitutional, succinctly stated: "The mere fact that the community demands the murderer's life in return for the evil he has done cannot sustain the death penalty."²⁴⁰ To support his position, he pointedly quoted Justices Stewart, Powell and Stevens: "the Eighth Amendment demands more than that a challenged punishment be acceptable to contemporary society."²⁴¹ Dispelling all doubt, they added: "***public perceptions of standards of decency ... are not conclusive.***"²⁴²

Thirty-two years later, five justices bluntly decreed "***our*** own judgment" disallowing "the community as a whole ... to affirm ***its*** own judgment."²⁴³ So much for "evolving standards of decency"! Five justices' standards, not the people's, prevail.

²³⁷ *Corzine's Remarks*, *supra* note 221; *N.J. Rept*, *supra* note 219, at 39-40.

²³⁸ Justice Scalia voted to deny rehearing in *Kennedy* "because the views of the American people ... were, *to tell the truth*, irrelevant to the majority's decision. ... there is no reason to believe that absence of a national consensus would provoke second thoughts." However, "new evidence of American opinion ... utterly destroys the majority's claim to be discerning a national consensus and not just giving effect to the majority's own preference." *Supra* note 28. (Scalia, J., statement) (emphasis added). See also, e.g., *supra* 4-8; *Roper*, *supra*, at 608 (Scalia, J., dissenting); Jacobi, *supra* note 231, at 1099-1100 refers to "judicial manipulation and the pious elevation of the Justices' subjective judgments to the realm of objective observations." Two noteworthy examples, *id.*, at 1144, 1156: a) expressing "no confidence" that juries are capable of making capital sentencing decisions (see also *supra* 16), but using jury decisions to establish "consensus" against the death penalty; and b) declaring consensus against "adult" rape in *Coker v. Ga.*, *supra* note 28 and then contrasting the greater number of jury death sentences for rape prior to *Coker* with *Enmund v. Fla.*, *supra* note 28, to claim consensus against the death penalty for felony murder accomplices. Cf. *Ring v. Ariz.*, *supra* note 191 (juries, not judges, must determine sentencing facts; precedent reversed).

²³⁹ *Supra* note 18.

²⁴⁰ *Gregg*, *supra* note 20, at 240 (Marshall, J., dissenting). Ultimately, Justice Blackmun entirely rejected the death penalty "[a]lthough most of the public seems to desire, and the Constitution appears to permit" it. *Callins v. Collins*, 510 U.S. 1141, 47 (1994).

²⁴¹ *Gregg*, *supra*, at 240, 182.

²⁴² *Id.*, at 173. Emphasis added.

²⁴³ *Kennedy v. La.*, *supra* note 28, 128 S. Ct. at 2658, 2662. Emphasis added. Also: "[T]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty..." *Id.*, at 2658. Justice Scalia retorted: "the Constitution contemplates no such thing; the proposed Eighth Amendment would have been laughed to scorn if it had read 'no criminal penalty shall be imposed which the Supreme Court deems unacceptable.'" *Supra* note 238.

What separated Brennan and Marshall from Stewart, Powell and Stevens was not expansion of judicial prerogative but its use. The former declared death sentences always unconstitutional; the latter were content with the more politically astute course, viz., whittling away toward nearly complete, rather than complete, abolition.²⁴⁴ The latter three also sought to treat murderers in accordance with "the dignity of man."²⁴⁵ Moreover, Marshall conceded that 35 states had enacted new death penalty statutes in four years.²⁴⁶ To these justices, the word "unusual" in "cruel *and* unusual" could be disregarded, again showing to be a sham any appeals by them to "consensus" on behalf of murderers whose guilt is uncontested.²⁴⁷

All this has led Justice Scalia to complain that the Supreme Court had

decreed - by a sheer act of will, with no pretense of foundation in constitutional text or American tradition - that the People (as in *We, the People*) cannot decree the death penalty, absolutely and categorically, for any criminal act, even (presumably) genocide.... Today ... the Court strikes a further blow against the People in its campaign against the death penalty.²⁴⁸

The claim to apply evolving standards of decency suggests that the standards of those who wrote the Constitution were indecent and no longer apply. But current public standards do not control either.

Referring to Brennan, Judge Bork well summed up the have-your-cake-and-eat-it-too abolitionist position:

He would avoid, on the one hand, the mistake of adhering to the anachronistic views of past generations, the generations that gave us the Constitution, and also avoid, on the other hand, the majority vote of today's living generations. Having avoided both the original meaning of the Constitution and today's democratic choice, what is left? Only Justice Brennan's moral views on capital punishment.²⁴⁹

It is appropriate to further examine these views.

²⁴⁴ *Supra* 4, 6; *infra* note 283.

²⁴⁵ *Gregg, supra*, at 173. *See also McCleskey v. Kemp, supra* note 187, 481 U.S. at 303; *supra* 4, *infra* 53, 55.

²⁴⁶ *Gregg, supra*, at 232.

²⁴⁷ The sham is further shown by Justices Marshall's and Brennan's claims that the death penalty was invalid, *inter alia*, because "it is morally unacceptable to the people of the United States at this time in our history," and it "has been almost totally rejected by contemporary society," *id.*, at 295, *Furman, supra* note 22, 408 U.S. at 360, 295. When the prompt post-*Furman* 35-state response proved this untrue, Marshall and Brennan, and their cohorts, simply dismissed it as irrelevant. Later, although Marshall (joined by Brennan) rejected use of a 35-state consensus for the death penalty, he switched again, alleging consensus to argue that gas chamber execution by seven states showed "evolving consensus" against it. *Gray v. Lucas, supra* note 122, 463 U.S. at 1246-47.

²⁴⁸ *Morgan v. Ill.*, 504 U.S. 719, 751-52 (1992) (Scalia, J., dissenting); *See also Baze, supra* note 14, 128 S. Ct. at 1553-54 (Scalia, J., concurring); *supra* note 189.

²⁴⁹ ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990) 220.

IV

FACTS vs. FAIRNESS: THE TUNNEL VISION OF “ABOLITIONIST” MORALITY

In foisting their version of morality upon an unwilling citizenry, based upon allegedly insufficient moral “culpability,” “reprehensibility” or “depravity,” justices have “demanded” execution immunity for most murderers by concocting ever-narrowing “death eligibility.”²⁵⁰ This involves applying values to facts. Jurors voting for death have heard details. This explains why three Penry juries so voted, *supra* 13, in the face of moral values imposed by justices without deigning to mention the facts of his crime.

In the abolitionist moral universe, there is no room for information about the lives and suffering of victims – or their families and communities, also victims. Opponents would ban reference to impact on victims.²⁵¹ Acknowledging victims and *their* suffering would undermine pretensions to morally superior compassion. Viewing execution as beneath them – and our society – opponents focus almost exclusively on murderers. When investigators complained Sister Prejean did not see the brutality they saw, she replied: “I know that they see parts of it that I don't see. But I see some things they don't see, too.”²⁵²

The moral answer is “so what!” If one is an “angel” for 11,000 days but commits brutal rapes and murders, putting victims through torture on three days, are we supposed to look only at his good nature? Do good deeds confer a license to commit evil deeds?²⁵³

The attitude of justices who rescue clearly guilty murderers reflects disingenuous contradictions

²⁵⁰ “[T]he Court has demanded that the States narrow the class of individuals eligible for the death penalty.” *Graham v. Collins*, *supra* note 14, 506 U.S. at 501 (Stevens, J., dissenting). This was written in 1993. By 2008, the Court was boasting of the tiny percent of first-degree murderers even sentenced to death (forget actual executions, *infra* 43) as “*a result of its rules*,” and decreeing a “necessity to constrain” the death penalty. *Kennedy v. La.*, *supra* note 28, 128 S. Ct. at 2660 (emphasis added). *Cf. supra* 7-16; notes 14, 32; *infra* note 283.

²⁵¹ *Booth, Uttecht, supra* 5, 1ff.

²⁵² *Angel, supra* note 4.

²⁵³ Films show Adolph Hitler in a business suit, walking a dog, looking like an amiable country squire. If that were all we knew, we would view him very differently. Cf. KENNETH S. KEYES, JR., HOW TO DEVELOP YOUR THINKING ABILITY (1950) 11-12: “Mr. A. H. had an unhappy childhood and little formal education. His ambition to become an artist was bitterly opposed by his father. Although self-educated, he became the author of a book, the sales of which in his country ranked second only to the Bible. Obstacles did not discourage him. People would say, ‘Why, you can’t do that!’ but he hurdled one barrier after another. He placed a great deal of emphasis upon improving the health of young people, and he was known throughout the world as a dynamic speaker. One of his closest associates said of him: ‘[He] accomplishes great deeds out of the greatness of his heart, the passion of his will, and the goodness of his soul.’” Accurate. But, so what? It was still Adolph Hitler. This is why the term “half-truth” exists. *See also* Allan Hall, *Hitler? So Charming; Former Maid Breaks 70-year Silence to Tell How Fuhrer Was the 'Perfect Boss' and How She Heard Him Weeping Over Dead Love*, DAILY MAIL (London), Dec. 4, 2008, 35.

boiling down to “heads the murderer wins, tails the victim loses.”²⁵⁴ They want punishment determined by moral culpability but also to preclude the jury from hearing facts relevant to that issue, and even object to brief mention of facts in court opinions.²⁵⁵ Justices who ordinarily favor diversity²⁵⁶ oppose recognition of victim diversity. These say every *murderer* must be treated as a “uniquely individual human being” but reject *victim* individuality. Yet the murderer’s individuality is miraculously dispensed with if a category can be invented to excuse him from the death penalty regardless of all barbarity.²⁵⁷

Murderers’ “humanity,” “intrinsic worth” and “human dignity” are paramount, but victims are to be dehumanized and *their* intrinsic worth, dignity and individuality ignored – by justices and the media.

A critical ignored fact is that we are not all equal. We are born equal before the law but not with equal ability, and we do not live or behave equally. Hence, the law has always treated different *conduct* differently. That is the essence of criminal law, embodied in sentencing guidelines and penal codes, which specify and classify various acts of unlawful conduct. Has political correctness obliterated ability to appreciate differences in the conduct of Adolph Hitler and Albert Schweitzer?

President Kennedy famously said “life is unfair.”²⁵⁸ When he himself was assassinated, the impact was far greater than that of unknown murder victims.²⁵⁹ Given Sirhan Sirhan’s political motive, murdering the late President’s brother, Robert, during an election campaign, attacked the democratic process.²⁶⁰ The harm caused by President Lincoln’s assassination was incalculable. A distinct word is used for murdering a leader: assassination. It assaults his followers, what they stand for and the entire body politic. Moreover,

²⁵⁴ See also *infra* notes 327, 334.

²⁵⁵ *Supra* 1-2, 4-5, esp note 27.

²⁵⁶ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

²⁵⁷ E.g., nearly 18-year-old torture murderers, child rapists. *Supra* 7-8, 13-16, 5; *McCleskey*, *supra* note 187, at 303.

²⁵⁸ *News Conference of March 21, 1962*, PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: JOHN F. KENNEDY, JAN. 1 TO DEC. 31, 1962 (1963) 254, 259.

²⁵⁹ This very point was discussed during the oral argument of *Payne*, *supra* note 26:

QUESTION: You were saying ... it really is legitimate to value victims differently, depending upon the circumstances of the lives that they have chosen to lead Isn't the real problem a kind of ... equality before the law argument, that society is placing different values on ... on victims?...

MR. BURSON [Tennessee Attorney General]: [I]f we look at the President and we look at a homeless person, there is no doubt that the sanctity of their lives is equal and the society values them equally. ... there further can be no doubt that the taking of the life of the President creates much greater societal harm than the taking of the life of the homeless person. ... looking at that societal harm ... is legitimate for the jury to consider. Transcript of Oral Argument, *available at* http://www.oyez.org/cases/1990-1999/1990/1990_90_5721/argument/.

²⁶⁰ “Dean Laurie Levenson said Sirhan's chances of ever being paroled are ‘slim to none.... Kennedy was beloved Sirhan destroyed the dreams of an entire generation’” Brian Skoloff, *Sirhan Sirhan Faces 11th Parole Hearing*, ASSOCIATED PRESS, March 6, 2003.

there is far more grief and loss inflicted by slaying a church-going mother of eleven children who is also a valued community leader than a victim alone and friendless.²⁶¹

If some murders cause less grief and harm than others, should that benefit all murderers, by reducing culpability to the lowest common victim denominator? Why should those who wreak more harm benefit because others inflict less? If not every murderer causes the same amount of damage and suffering and if the Supreme Court demands that murderers be treated as individuals, shouldn't there also be accountability for the full magnitude of the harm done on a case-by-case basis?

Alan Dershowitz has complained: "we ... focus [too much] on victims....it is very important to focus on the defendant and ... away from the victim....We shouldn't evaluat[e] criminals by the fortuities of who they happen to kill....the defendant is the same; the act is the same; and the culpability is the same."²⁶² However, those who argue for murderers distinguish attempted from successful murder despite the act and intent being the same. If sincere, they would agree shooting with intent to kill should be a capital crime and not depend on the victim's luck, health, ingenuity and medical care.²⁶³

A Love Affair with Murderers. Alas, that will never happen because, for "abolitionists," the guiding principle is what is best for the murderer. If it serves his interest to ignore the victim, that will be done; not so if the victim's fate helps him. Also, if it maximizes sympathy for the murderer by taking into account his individual circumstances, that will be advocated; but if he is too unsympathetic, it will be demanded that his case be considered, not in isolation, but in comparison to other murderers treated less harshly.²⁶⁴ A vicious premeditated murderer slightly under 18 will be deemed still in childhood, but a 16 or 14-year-old victim is not a girl but a "woman."²⁶⁵ When DNA tests have cleared people convicted of murder, this has been used

²⁶¹ See Lena H. Sun, *Drunk Driver Guilty of Murder*, WASH. POST, Jan. 5, 1984, A1; Lena H. Sun, *Murder Charge In Drunk-Driving Death Upheld*, WASH. POST, July 19, 1984, A1; *Nightline: Scales of Injustice?*, ABC NEWS, Jan. 5, 1984 (transcript in author's possession).

²⁶² *Id.*, at 10.

²⁶³ "The Court's opinion does not explain why a defendant's *eligibility* for the death sentence can (*and always does*) turn upon considerations not relevant to his moral guilt. If a bank robber aims his gun at a guard, pulls the trigger, and kills his target, he may be put to death. If the gun unexpectedly misfires, he may not. His moral guilt in both cases is identical, but his responsibility in the former is greater." *Booth v. Md.*, *supra* note 23, 482 U.S. at 519 (Scalia, dissenting). See also *supra* 5 (White, J., dissenting).

In alleging full recovery in the "child rape" case, Justice Stevens sought to reward Patrick Kennedy because his victim physically survived his brutal assault, no thanks to Kennedy. *Supra* 15. See also *supra* note 98.

²⁶⁴ Cf. *infra* 46; note 288.

²⁶⁵ *Infra* note 334. To save the life of the rapist of a 16-year-old, it was stressed she was an "adult woman," implying that

to oppose the death penalty.²⁶⁶ So, would opponents allow the penalty when DNA conclusively establishes guilt? The answer is obvious.²⁶⁷

The reason for this is made clear by Bryan Stevenson. A leading abolitionist and advocate for guilty murderers, he declared his *love* (!) for them. While paying lip service to their “pure evil,” he declared: “It’s *spiritually gratifying*, contacting and connecting with the people on death row. It’s more meaningful than anything I do. *These are people I love and care about.*”²⁶⁸

Despite expectable denials, loving murderers requires a callous disregard for victims, future as well as past. Kenneth McDuff,²⁶⁹ Richard Biegenwald,²⁷⁰ Lemuel Smith²⁷¹ and other saved duly convicted

adult rape was *less serious than child rape*. *Coker v. Ga.*, *supra* note 28, 433 U.S. at 592ff. But, to save the life of a child rapist, it was argued that child rape was *less serious than adult rape* due to alleged superior child recuperative powers. *Jt. App., Kennedy*, *supra* note 83, at 48. *Coker* exemplifies portraying the criminal in the best light. The justices who rescued *Coker* did not once mention that the “adult woman” was just 16. *Coker*, at 605 (Burger, C.J., dissenting).

Justice White (joined by Stewart, Blackmun and Stevens) callously pronounced the *rape victim “unharmful”!!* *Id.*, at 587. Chief Justice Burger objected that she had been “threatened ... with death and serious bodily harm,” *Id.*, at 605; he disputed that rape “three weeks after giving birth” causes “[no] serious or lasting injury[.]” This bifurcation of rape into categories of harmful and non-harmful eludes my comprehension.” *Id.*, at 608n. Also, because *Coker* had a history of rape-murder and rape-attempted murder, resulting in prison escape and the rape for which he received the overturned death sentence, Burger protested: “The Court ... prevents ... any effective punishment ... for his latest rape ... assures [*Coker*] – as well as others in his position – will henceforth feel no compunction whatsoever about committing further rapes as frequently as he may be able to escape ... and ... even within...prison, ...” and bars the state from protecting its citizens. *Id.*, at 605-606.

²⁶⁶ See, e.g.: Sharon Cohen and Deborah Hastings, *For 110 Inmates Freed by DNA tests, True Freedom Remains Elusive*, ASSOCIATED PRESS, May 28, 2002, available at <http://www.truthinjustice.org/truefreedom.htm>; *N.J. Rept.*, *supra* note 219, at 51-55. Cohen and Hastings noted that seven DNA reversals involved men with “prior convictions for sex crimes. In addition, 11 who were freed have been convicted of new crimes Kerry Kotler was exonerated of rape in 1992 in New York. Five years later, he was convicted of sexual assault. This time, DNA helped convict him. Though genetic testing helped Albert Wesley Brown win release ..., he now admits he was guilty of the murder of a 67-year-old man.” See also Marquis, *supra* note 11, at 510n.58.

²⁶⁷ Lesley Stahl incredulously observed: “[Barry] Scheck and [Peter] Neufeld have used [DNA] to get eight people out of prison But wait a minute! Aren't they the same two guys O.J. Simpson hired to argue just the opposite, that the DNA tests are not definitive when they're used to nail someone?” She asked them: “Do you have a problem ... arguing that DNA ... has found someone innocent, ... and arguing that the prosecution can't use DNA to prove someone did it?” Lesley Stahl, *60 Minutes: Checking on the Reliability and Accuracy of DNA Testing in Crime Cases*, CBS NEWS, May 28, 1995, available at LexisNexis. Scheck and Neufeld claimed DNA was more reliable in confuting than proving guilt. *Id.* Yet, in seeking this test to disprove guilt, Scheck argued: “The most critical reason ... is that you can find the person who really committed the crime.” Lois Romano, *When DNA Meets Death Row, It's the System That's Tested*, WASH. POST, Dec. 12, 2003, A 1. If “the person who really committed the crime” were found, who would be surprised if Scheck about-faced to attack the test on his behalf?

Relentless death penalty opponents David R. Dow and Richard Dieter, having spared no effort to use DNA to convince the public of wrongful executions, explicitly reject the use of DNA to establish guilt. David R. Dow, *Innocent Until (Sort of) Proven Guilty*, CHRISTIAN SCI. MON. Oct. 7, 2003, 9; Doug Erickson, *Tying DNA to the Needle: Advisory Referendum Calls for DNA Proof to be Necessary for a Death Sentence in Wisconsin*, WISC. ST. J., Oct. 22, 2006, A 1. Steiker and Steiker, *supra* note 207, warn of “peril”: “salvage capital punishment by safeguarding it with required DNA testing.”

²⁶⁸ David G. Stout, *The Lawyers of Death Row*, N.Y. TIMES MAGAZINE, Feb. 14, 1988, p. 46, at 52-3. Emphasis added. See also *infra* notes 324 (Mailer’s “love”), 285; Jeffrey Page, *Help for a Cop Killer? What Are the Quakers Thinking?* THE RECORD (Bergen County, NJ), Nov. 14, 2003, L 1.

²⁶⁹ *Man Blamed for 14 Murders Executed in Texas*, CNN.COM, November 17, 1998, available at <http://www.cnn.com/US/9811/17/texas.execution/>. McDuff is a double example of what is wrong with life sentences, *supra* 9-10. His death sentence was commuted to life; later, he was paroled. Ultimately, he was executed for tragically avoidable murders.

²⁷⁰ For a detailed account of Biegenwald’s history, see Farber, *supra* note 50.

²⁷¹ *People v. Smith*, 479 N.Y.S. 2d 706 (1984).

murderers have been allowed to brutalize many new victims.²⁷²

Serving a murder sentence,²⁷³ Smith beat, strangled and bit off the nipples of a female prison guard, and threw her body in the garbage to be compacted.²⁷⁴ A 4-3 majority of New York State's highest court used this barbarity to impose its morality by declaring the state's death penalty law unconstitutional.²⁷⁵ Apparently, the majority placed a higher value on Smith's life than the guard's. Realizing an essentially punishment-free murder had been sanctioned, Smith boasted: "I got so much time they can't do nothing to me... **Think about it.** If I wanted some sex, I could rape, I could sodomize. They can't do nothing to me!"²⁷⁶

Three years later, not to be outdone, the United States Supreme Court made it possible for federal inmates to get away with punishment-free murders, holding unconstitutional "a statute that mandates the death penalty for a prison inmate ... convicted of murder while serving a life sentence without possibility of parole [for a prior first degree murder conviction]."²⁷⁷

One-Sided "Compassion" and the 0.16% Execution Rate. Do the justices ever think about faceless, nameless new innocent victims they have condemned to death with no rights whatsoever to indictment, trial or more than 25-30 years of myriad appeals? Do they care?

Do they even think about the three to eighteen lives of innocent victims saved by each execution, according to recent studies?²⁷⁸ Do they care about the over 707,000 victims murdered between 1972 and 2007,²⁷⁹ an average of nearly 20,000 per year, 54 per day or one every 27 minutes? Do they care that this is

²⁷² "Of the roughly 52,000 state prison inmates serving time for murder in 1984, an estimated 810 had previously been convicted of murder and had killed 821 persons following those convictions." Markman and Cassell, *supra* note 11, at 153. *See also* Bonin v. Calderon, 59 F.3d 815, 850 (9th Cir. 1995) (Kozinski, J., concurring) (citing numerous "shocking" capital cases: "Most distressing ... could have been averted").

²⁷³ So much for life without parole, *supra* 9ff.

²⁷⁴ *Id.*, at 712-715 (1984).

²⁷⁵ *Id.*, at 720-726. *See also* People v. Taylor, 878 N.E.2d 969 (NY 2007) (murderer protection reaffirmed, again 4-3); Alan Feuer, *State's Highest Court Tosses Out Death Sentence in Killings at a Queens Wendy's*, N.Y. Times, Oct. 24, 2007, B 3.

²⁷⁶ Mark Gado, *Murder Within the Walls: "Think About It!"* TRUTV CRIME LIBRARY: CRIMINAL MINDS AND METHODS, available at http://www.trutv.com/library/crime/notorious_murders/not_guilty/lemuel_smith/14.html. *See also supra* note 265.

²⁷⁷ *Sumner v. Shuman*, *supra* note 32, 483 U.S. at 67, 85. *See also supra* notes 188-189; Justice Scalia, *supra* 37.

²⁷⁸ *See, e.g.*: Robert Tanner, *Studies Say Death Penalty Deters Crime*, ASSOCIATED PRESS, June 11, 2007; Hashem Dezhbakhsh and Joanna M. Shepherd, *The Deterrent Effect of Capital Punishment: Evidence from a "Judicial Experiment"*, 44 ECONOMIC INQUIRY 512 (2006); Dale O. Cloninger & Roberto Marchesini, *Execution Moratoriums, Commutations and Deterrence: the case of Illinois*, 38 APPLIED ECONOMICS 967 (2006); H. Naci Mocan and R. Kaj Gittings, *Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment*, 46 J.L. & ECON. 453 (2003).

²⁷⁹ BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, tbl. 6.79.2007 (Ann L. Pastore & Kathleen Maguire eds., 2009), available at <http://www.albany.edu/sourcebook/pdf/t6792007.pdf>.

more than all the battle deaths in all our wars over more than 200 years?²⁸⁰ Do they care that, during 1972-2008, 1,136 murderers were actually executed,²⁸¹ a rate of 0.16 percent of their 707,000 innocent victims? Can this require any conclusion but that, in the justices' moral value conceit, the lives of murderers are far more valuable than those of their victims?²⁸² What does it say about the media when the magnitude of this domestic slaughter is rarely, if ever, reported, while massive reporting is devoted to accidents and natural catastrophes, absolutely tragic but involving far fewer deaths?

Clearly, the anti-death penalty justices, without explicitly saying so and unreported by the media, have stealthily but almost completely abolished the death penalty.²⁸³

Justice Ruth Bader Ginsburg laments the "stress she feels when having to vote on 11th hour death-penalty appeals ... in which the appellant will die if the court refuses to hear the case."²⁸⁴ Justice Harry Blackmun agonized that it was "particularly excruciating" to decide capital cases.²⁸⁵

²⁸⁰ *America's Wars: U.S. Casualties and Veterans*, INFOPLEASE, available at <http://www.infoplease.com/ipa/A0004615.html>. See also U.S. DEPT. OF VETERANS AFFAIRS, FACT SHEET: AMERICA'S WARS (May 2008), available at <http://www1.va.gov/opa/fact/amwars.asp>.

²⁸¹ CLARK COUNTY PROSECUTING ATTORNEY, U. S. EXECUTIONS SINCE 1976, available at <http://www.clarkprosecutor.org/html/death/usexecute.htm> (last visited Dec. 31, 2008).

²⁸² Viewed in this light, Justice Brennan actually overstated the value he placed on victims when he quoted Camus with approval: the death penalty was "obviously no less shocking than the crime itself." *Gregg v. Ga.*, *supra* note 20, 428 U.S. at 231. In reality, given the vast disparities in (a) suffering of victims and murderers and (b) expressed concerns for that respective suffering, abolitionist justices view the death penalty as far *more*, rather than merely "no less," shocking than murder, including subsequent murders by the unexecuted. *Cf. supra* 19-20, esp. note 126; *infra* 44ff.

²⁸³ See also *supra* 29-31; note 250. Why the stealth? 35 states passed new laws after *Furman*, *supra* 37. If the public became aware of the nearly total judicial abolition of the death penalty plus the magnitude of slaughter of law-abiding citizens by judge-protected murderers, a constitutional amendment or other major backlash could be provoked. So it was politic to vitiate the death penalty piecemeal instead of all at once. *Cf. Smith, supra* note 169, *passim*; Garcia, *supra* note 219.

(Although Smith, *supra*, at 288-292, argues Supreme Court strategy has been political, and rues the backlash caused by *Furman*, he also lauds the Court's "new approach," *supra* note 182, indeed a "thunderbolt," *id.*, at 353, as opposed to a boil-the-frog assault on capital punishment. He says the Court had been "quite restrained" for 20 years, after which it has been "more aggressive." *Id.*, at 342. It is questionable that there was a sharp reversal rather than a gradual ratcheting and whether the "thunderbolt" was not really one more step in a steady progression. *Cf. J. Richard Broughton, The Second Death of Capital Punishment*, 58 FLA. L. REV. 639, 641-643 (2006) ("incremental ... demise" and "incrementalist strategy for killing capital punishment," "slowly erode," "withering"). See also *supra* notes 32, 250; *infra* note 313.

While the numbers of executions versus homicides are clear, their meaning is not. In sharp contrast to the position here that the death penalty has been all but abolished, Smith, *supra* note 169, at 285, 291, 293, advocating further judicially imposed impediments, refers to "substantially more executions....death sentences easier to achieve back with a vengeance" – indeed, "skyrocketing executions"; citing James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2047 (2000). Fifteen executions were called a "flood." *Supra* note 223. However, trying to create a bandwagon, *supra* 33, abolitionists have also argued capital punishment is in decline and under reconsideration, shown, for example, by 37 executions not being a "surge" seven months after 15 were a "flood." Stoddard, *supra* notes 167, 216. Urging clemency for the guilty, Sarat argued that, by contrast, "juries now are giving death sentences to fewer and fewer murderers." *Supra* note 182.

Clearly, this is not a debate but the arbitrary use of labels for different political purposes. Let the reader decide whether 1,136 executions for 707,000 homicides constitute "skyrocketing" and a "flood" or virtual abolition.

²⁸⁴ Steve Visser, *Justice Bader Ginsburg Visits Atlanta, Noting Threats to Women's Rights*, ATL. J.-CONST., Oct. 21, 2007, available at

<http://www.todaysalternativenews.com/index2.php?event=link,2600&values%5B0%5D=2&values%5B1%5D=4490>.

²⁸⁵ "[T]he fact that it is the death penalty, rather than life imprisonment ... makes the decisional process ... particularly

It would be stunning to find any expression of stress or “excruciation” by Ginsburg and Blackmun – or any like minded colleagues – regarding extra lives lost at the hands of murderers they have saved.²⁸⁶

When Justice Stewart voted to nullify the death penalty, he analogized it to “being struck by lightning” and referred to “a capriciously selected random handful” upon whom it would thus be unconstitutional to “permit this unique penalty to be so wantonly and so freakishly imposed.”²⁸⁷ He later demanded a “principled way to distinguish [a] case, in which the death penalty was imposed, from the many cases in which it was not.”²⁸⁸

This one-sided view of fairness, with perfect tunnel vision, ignores three factors. First, it confines fairness to comparing murderers with each other, wholly ignoring fairness between murderers and victims. Without *Booth*’s open contempt for victims,²⁸⁹ it nevertheless omits them from the fairness equation. Second, it can equally be said that victims are chosen “in the same way [as] being struck by lightning” – except that being struck by lightning is a tragic accident. Murder is deliberate, itself “wantonly and ...

excruciating for the author of this opinion ... who is not personally convinced of the rightness of capital punishment ...” Maxwell v. Bishop, 398 F. 2d 138, 153-154 (8th Cir. 1968). Cf. Alfieri, *supra* note 108, at 326: abolitionists “suffer the pain of witnessing death without consecration.” That is death of convicted murderers. What about the pain of victim “death without consecration”?

²⁸⁶ Cf. dissent from invention of constitutional right to commit punishment-free brutality, *supra* note 265. Nothing could better demonstrate the moral fault line: concern (even “love”) for convicted murderers vs. concern for their victims. On new murders (even of children) by spared convicted murderers, *see supra* 41-42 and note 272; *infra* 52.

²⁸⁷ *Furman v. Ga.*, *supra* note 22, 408 U.S., at 309-310 (Stewart, J., concurring). *See also, Kennedy v. La.*, *supra* note 28, at 2665 (must “ensure against its arbitrary and capricious application”).

²⁸⁸ *Godfrey v. Ga.*, *supra* note 32, 446 U.S. at 433. *See also* Walker v. Georgia, 129 S. Ct. 481 (2008) (Stevens, J., statement respecting cert. den.) (objecting to alleged failure to examine facts of “numerous” *unrelated other* cases).

Not contesting guilt, Godfrey proclaimed: “I’ve done a hideous crime . . . I have been thinking about it for eight years . . . I’d do it again.” *Supra*, at 426. He shot and killed his wife and mother-in-law, and injured his fleeing 11-year-old daughter with the barrel of his shotgun. *Id.*, at 425. However, himself acknowledging that Godfrey had “acknowledged . . . the heinous nature of his crimes,” Stewart, purportedly applying the Constitution, asserted that these “crimes cannot be said to have reflected a consciousness materially more ‘depraved’ than that of any person guilty of murder.” *Id.*, at 433. In other words, the murder(s) had to be especially “depraved” or extraordinarily vile. So it was nothing new when a 5-4 majority ruled that a brutal rapist of an 8-year-old was insufficiently depraved. *Kennedy v. La.*, *supra* note 28.

This is yet another heads-tails example. In *Godfrey*, the victims were murdered but, in the view of the majority, were not tortured and did not suffer enough to earn execution; in *Kennedy*, e.g., there was torture and suffering aplenty but the abolitionist justices rewarded the defendant because his victim did not die. Any port in a storm to save the depraved. Cf. *supra* note 98.

In “assum[ing] the role of a finely tuned calibrator of depravity . . .,” *supra.*, at 456, n. 6 (White, J., dissenting), Godfrey’s saviors ignored critical facts: e.g., he “employed a weapon known for . . . disfiguring . . .,” and “took out time not only to strike his daughter on the head, but also to reload . . . his mother-in-law[’s] last several moments . . . must have been . . . terrifying . . . The police . . . found her face down . . . with a substantial portion of her head missing and her brain . . . protruding for some distance onto the floor.” *Id.*, at 449, 450.

Reflecting abolitionist reliance upon fact suppression, Liebman, *supra* note 14, at 45-46, attacked Justice White as “angry” and “enraged” for daring to “recite[] the facts . . . three times, after the majority had done so once. He described in detail what he acknowledged could ‘only be described in the most unpleasant terms’ . . .” Well, we surely can’t introduce unpleasantness into saving murderers. *See also, id.*, at 78-79, on *Parker v. Dugger*, *supra* 11.

²⁸⁹ *Supra* 5. *See also infra* note 305.

freakishly imposed.” Third, only execution can guarantee that a murderer will not murder again.²⁹⁰ Justice White concurred with Stewart but conceded: “executed defendants are finally and completely incapacitated from again committing rape or murder or any other crime.”²⁹¹

By contrast, saving murderers sentences new innocent victims, with neither trials nor decades of appeals, to avoidable “wantonly and freakishly imposed” murders, without “compassionate” intervention by “merciful” justices professing concern about “fairness.” Only tunnel vision completely disregarding victims can see fairness here. Or it may be willful disregard. These justices are fully aware of unexecuted murderers who have brutalized new victims.²⁹²

Justice Blackmun, in a locution used as the title of an abolitionist book,²⁹³ declared he would “no longer tinker with the machinery of death.”²⁹⁴ Its central flaw, he wrote, was that it was hopeless to decide with “rationality and consistency” which “similarly situated” murderers should and should not receive the death penalty.²⁹⁵ That this machinery was manufactured by *his* court²⁹⁶ did not seem to faze Blackmun, who disregarded victims in the name of fairness.

If, as abolitionists assert,²⁹⁷ this is a moral issue, its crux is whether to focus upon murderers or their victims. Should a murderer’s sentence turn on others’ sentences? If exactly equal treatment for every murderer controls, especially with myriad Supreme Court restrictions and mandates, there can be no death penalty: if not all murderers receive it, none should. That would eliminate fear for would-be murderers²⁹⁸

²⁹⁰ *Supra* 9-10, 41-42; *infra* 52.

²⁹¹ *Furman*, *supra* note 287, at 311 (White, J., concurring). Justice White also conceded: “It is perhaps true that no matter how infrequently those convicted of rape or murder are executed, the penalty ... is not disproportionate to the crime and those executed may deserve exactly what they received.” *Id.* But for those obsessed with murderer interests, if all did not receive their just deserts, none should. No justice is better than some justice. Ultimately, no murderer should receive his just deserts. *Cf. infra* 46, esp. note 301.

²⁹² *Cf. supra* 10.

²⁹³ DAVID R. DOW AND MARK DOW, EDS., *MACHINERY OF DEATH: THE REALITY OF AMERICA'S DEATH PENALTY REGIME* (2002).

²⁹⁴ *Callins v. Collins*, *supra* note 240, 510 U.S. at 1145.

²⁹⁵ *Id.*, at 1152-1153 and n. 4. *See also* Steiker and Steiker, *supra* note 207, at 604 (“special cruelty” and “harm” of “underinclusion (knowing that one deserves death but that some equally deserving offender has been spared)”).

²⁹⁶ *Cf. infra* note 313 and accompanying text.

²⁹⁷ *See* Brennan, *supra* 5 and note 282; Stevenson, *infra* 54. Justice Marshall suggested capital punishment’s constitutionality depended on its morality. *Gregg v. Ga.*, *supra* note 20, 421 U.S. at 232. Also: “We ... oppose executions of the guilty ... rejection of capital punishment, on moral grounds and on grounds of social policy, does not turn on ... risk of executing the innocent. ...” Hugo Adam Bedau and Michael L. Radelet, *The Myth of Infallibility: A Reply to Markman and Cassell*, 41 STAN. L. REV. 161, 165-66 (1988).

²⁹⁸ *See supra* note 278; Charles N. W. Keckler, *Life v. Death: Who Should Capital Punishment Marginally Deter?* 2 J.L. ECON. & POL’Y 51, 61 (2006).

and increase “wanton and freakish” murders of innocent citizens. Also, abolitionist disingenuousness is shown by banning non-discretionary mandatory sentencing even for particularly heinous crimes.²⁹⁹ Requiring *both* discretion and precisely equal treatment obviously cannot be reconciled.

It is inconsistent, if not hypocritical, for the very justices who oppose mandatory death sentences and insist upon “individualized” sentencing to object that similar murders do not result in similar sentences.³⁰⁰ If “individualized” sentencing prevails when it benefits a murderer, why shouldn’t it also apply when it does not? Should not the sole consideration be the murderer and his crime? If he can complain about others treated less harshly, “individualized” sentencing is a charade.

Once it is accepted that no criminal should be punished more than any other criminal who committed the same offense, all prisons must be closed. When fairness among criminals rather than between criminals and victims becomes central, it obviously is not fair to punish those who are caught when those who are not caught or convicted get off scot-free.³⁰¹ Also, because those who are caught receive different sentences, no caught convict should receive more than the most lenient sentence ever given for a crime.

In this moral scheme, the lowest common criminal denominator complements the lowest common victim denominator, *supra* 40: (a) no criminal should be punished more harshly for inflicting more actual harm and suffering upon victims than any other criminal who committed the same act, and (b) no criminal should receive greater punishment than the criminal who received the least punishment for causing the same injury and pain. Hence, two chances to minimize punishment for all crime.

Justice Black was prescient: “It is seemingly becoming more and more difficult to gain acceptance for the proposition that punishment of the guilty is desirable.”³⁰²

²⁹⁹ *Sumner v. Shuman*, *supra* 42 and notes 187-189; Scalia, *supra* 37.

³⁰⁰ *Cf.*: “at least one of these judicially announced irreconcilable commands [severely limited discretion to impose death and unlimited discretion not to] which cause the Constitution to prohibit what its text explicitly permits must be wrong.” *Callins*, *supra* note 240, at 1142 (Scalia, J., concurring). *Cf. supra* 39; *infra* note 313. *See also, McCleskey v. Kemp*, *supra* note 187.

³⁰¹ Judge David Bazelon argued it was “discriminatory” that professional criminals “know their rights,” while others do not. Letter to former Attorney General Nicholas deB. Katzenbach (June 16, 1965), reprinted in Bazelon, *supra* note 177, at 159-60. Katzenbach replied: “I have never understood why the gangster should be...the model... in the name of equality... This is simply the proposition that if some can beat the rap, all must beat the rap.” Letter to Judge Bazelon (June 24, 1965), *Id.*, at 167. *Cf. supra* note 291, *infra* notes 325, 326. And if many who are guilty of what abolitionists concede are the most horrendous murders escape capital punishment, *supra* note 182, by their reasoning here, how can *any* such murderers be justifiably executed?

³⁰² *Kaufman v. U.S.*, *supra* note 207, 394 U.S. at 240-241. *See also* Judge Hand, quoted *supra* 31. *Cf.* The death penalty is merely one aspect of the moral divide between those who agree and disagree with Justice Black. *Supra* note 48; Stuntz, *infra* note 363 (harsher punishments: “pathological”).

V

NO ARGUMENT TOO PREPOSTEROUS – IF ONLY THE PUBLIC KNEW

Attorney Mark Pulliam observed: “Nothing, even words whose meaning should be clear, is free from doubt in a courtroom, and no argument is too preposterous for a lawyer to make with a straight face.”³⁰³ For those with a passion for the “humanity” of cold-blooded murderers, no argument is too absurd to stretch out cases of the clearly guilty for decades. This is abetted by the media.

Media Blackout: Justice Breyer’s Obsession. In saving Johnny Paul Penry, the Supreme Court anguished Pamela Carpenter’s family for 28 years.³⁰⁴ The unreported reaction of justices responsible for such travesty is not concern for the family, but for the murderer! The public has no idea that Justices Stevens³⁰⁵ and Breyer³⁰⁶ contend murderers who game the system long enough should be spared the death penalty because *they* thereby have suffered too much. Breyer, citing foreign courts,³⁰⁷ has agonized for more than a decade³⁰⁸ about “suffering inherent in a prolonged wait for execution,” the “‘horrible ... feelings’ that accompany uncertainty about whether, or when, the execution will take place,” “the ‘dehumanizing ... lengthy imprisonment’” and “the ‘inevitable long wait’ that exacts ‘a frightful toll’” on the murderer.³⁰⁹

Justice Thomas objected: “It is incongruous to arm capital defendants with an arsenal of ‘constitutional’ claims [to] delay their executions, and simultaneously to complain when executions are inevitably delayed.”³¹⁰

Breyer seems obsessed with trying to reward depraved murderers who, aided by him and his

³⁰³ *Supra* note 214.

³⁰⁴ *Supra* 13.

³⁰⁵ *Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., memorandum respecting cert. denial). Stevens actually denies families are even victims when they endure the loss of torture-murdered loved ones. *Kelly v. Cal.*, 129 S. Ct. 564 (statement respecting cert. den.) (“so called ‘victim impact’”; a “misnomer” because impact is only on “third parties”; “troubling ... to rouse sympathy for the victims and increase jurors’ antipathy” for convicted murderers – blessed with Supreme Court-mandated license to submit any evidence to arouse sympathy for *them*, e.g., *Lockett*, *supra* note 32, *McCleskey*, *supra* note 187). *Cf. supra* note 27; *infra* note 319. Stevens should see Sharon Turco, *Victim’s Mother Will Witness Execution*, CINCINNATI ENQ., April 28, 2003 (“ruined the lives of everyone close to her.”), available at http://www.enquirer.com/editions/2003/04/28/loc_Brewer28.html.

³⁰⁶ *Knight v. Florida*, 528 U.S. 990, 993 (1999) (Breyer, J., dissenting from denial of certiorari).

³⁰⁷ *Id.*, at 996. “I am unaware of any support in the American constitutional tradition or in this Court’s precedent ... were there any such support ..., it would be unnecessary ... to rely on the European Court of Human Rights, the Supreme Court of Zimbabwe, the Supreme Court of India, or the Privy Council.” *Id.*, 990 (Thomas, J., concurring in denial of certiorari).

³⁰⁸ *Lackey v. Texas*, *supra* note 305.

³⁰⁹ *Knight v. Florida*, *supra* note 306, at 994-995.

³¹⁰ *Id.*, at 990, 992 (concurring).

colleagues, have so protractedly delayed their executions that very many would be horrified if they knew. Alas, it made no news when, for the *sixth* time, on October 15, 2007, he dissented on this ground from a denial of certiorari.³¹¹ Noting that Joe Clarence Smith was “first sentenced to death 30 years ago,” Breyer asserted he could “reasonably claim that his execution at this late date would be ‘unusual.’ ... much of the delay at issue seems due to *constitutionally* defective sentencing proceedings. And whether it is ‘cruel’ to keep an individual for decades ... under threat of imminent execution raises a serious *constitutional* question.” (Emphasis added.)

In response: First, if not actually appearing in a justice’s writings, this might seem a parody of abusive “constitutional claims” on behalf of murderers. Second, Breyer’s constitutional question is so “serious” that no other justice joined him in *Smith* or three of his four prior cited cases.³¹² Third, the “constitutionally defective sentencing proceedings” often could not be known by trial courts to be defective when they occurred, and the “delay ... stems from this Court’s Byzantine death penalty jurisprudence.”³¹³ Fourth, like Justices Ginsburg and Blackmun,³¹⁴ Breyer’s compassion and concern for cruelty show no sign of including victims.³¹⁵

Fifth, if apprised of the facts of this barely reported case, a large percentage of the American public would surely want to know, as in *Uttecht, supra* 3, how it could linger decades.³¹⁶ And could this occur

³¹¹ *Smith v. Ariz., supra* note 16 (citing *Lackey* and *Knight supra* notes 305, 306; *Elledge v. Florida*, 525 U. S. 944 (1998) (Breyer, J., dissenting from denial of certiorari); *Foster v. Florida*, 537 U. S. 990, 991 (2002) (same)). See also *Allen v. Ornoski*, 546 U.S. 1136 (2006) (Breyer, J., dissenting from denial of stay and certiorari).

³¹² The exception: *Lackey, supra*.

³¹³ Thomas, J., *Knight, supra*, at 991. Cf. *McKoy v. North Carolina*, 494 U.S. 433, 470n. (1990) (Scalia, J., dissenting) (“Disparaging a practice we have at least encouraged, if not indeed coerced, gives new substance to the charge that we have been administering a ‘bait and switch’ capital sentencing jurisprudence”). See *Walton v. Ariz., supra* note 190, 497 U.S. at 657 (Scalia, J., concurring), for a list of procedural rules created by the Court between 1976 and 1990, in its “assumed ... role of rulemaking body.” See also *supra* 29-31, 45 and notes 32, 187. For a particularly terse and trenchant comment on divining the Court, see *Nix v. Williams*, 467 U.S. 431, 450-51 (1984) (White, J., concurring); see also *Abdul-Kabir v. Quarterman*, 127 S. Ct. 1654, 1676 (2007) (Roberts, C.J., dissenting) (“our precedents did not provide [state courts] with ‘clearly established’ law, but instead a dog’s breakfast of divided, conflicting, and ever-changing analyses. That is how the [shifting] Justices on *this* Court viewed the matter, ... repeatedly lamenting the failure of their colleagues to follow a consistent path.” (original emphasis)).

³¹⁴ *Supra* 43-44.

³¹⁵ Since Breyer ignored Smith’s victims, it is fitting to reveal *their* suffering: “Smith was on probation for two prior rape convictions.... On January 1, 1976, the nude body of Sandy Spencer was found in the desert ... Her nose and mouth had been stuffed with dirt and taped shut, causing asphyxiation. ... Spencer also suffered nineteen stab wounds to the pubic region and a vaginal tear ... caused by penetration. ... three stab wounds to her breasts and a sewing needle ... embedded in her left breast.... On February 2, 1976, Neva Lee’s nude body was discovered in the desert She, like Spencer, had died from ‘asphyxiation due to airway obstruction with soil.’ Ligature marks were present ... a result of injuries suffered before death. She ... had puncture and stab wounds to her chest, abdomen, and breasts and damage to her vulva.” *State v. Smith*, 159 P.3d 531, 535 (Ariz. 2007).

³¹⁶ Breyer wrote delay dissents in 1998 and 1999. *Knight, supra* note 306; *Elledge v. Fla., supra* note 311. Yet these 1974 murder cases lingered on. *Knight* remains on death row. *Death Row Roster, supra* note 16. Elledge effectively reduced his

without media cooperation by not reporting facts?³¹⁷ Only one obscure paper commented: “absurd We doubt that Justice Breyer would favor any attempt to hasten the appeals process”³¹⁸ Although Breyer has complained about delays of 17 and 25 years being too long, *Lackey* and *Knight*, he has voted for stays and new proceedings in equally delayed cases.³¹⁹ Also, media headlines scream “rush to kill” after “only” 14 years and “immediate execution” 21 years after the murder.³²⁰ So, for opponents, when is execution after a multi-year delay a “rush to kill” and too “immediate” and when does delay suddenly become too long to allow execution? Justice Breyer provides no answer.

Sixth, beyond lack of any real concern for victims’ families and confining concern for suffering to brutal murderers, opponents have used their protracted judicial torture of families to rationalize abolition. Tying the system in knots and putting families through repeated dilatory trials and appeals on behalf of the clearly guilty, abolitionists express “compassion” by arguing the torture they themselves inflict,

sentence, dying naturally nearly 34 years after his three murders, including rape. Roberto Santiago, *33 Years on Death Row, Inmate Dies of Illness*, MIAMI HERALD, May 3, 2008. Admitting guilt, Elledge deemed himself a “political prisoner,” blaming the prosecutor for his sentence. His web page is available at <http://www.ccadp.org/williamelledge.htm> (visited Jan 8, 2009).

William Bonin, the “Freeway Killer,” sexually assaulted and brutally murdered between 14 and 21 boys in 1979 and 1980. It took 17 years to execute him despite “overwhelming” evidence of guilt. *Bonin*, *supra* note 272, 59 F.3d at 850, 821, 836, 843; Harriet Chiang, *et al.*, *'Freeway Killer' Put to Death*, SAN FRAN. CHRON., Feb. 23, 1996, A1.

³¹⁷ A LexisNexis search on Nov. 30, 2007 revealed five brief mentions of this case, none featured: Robert Barnes, *Court Won't Take Up Delayed Executions*, WASH. POST, Oct. 16, 2007, A 17 (suburban edition); *Justices Deny Arizona Death Row Appeal*, ASSOCIATED PRESS ONLINE, Oct. 15, 2007; James Vicini, *Court Rejects Appeal by 30-year Death Row Inmate*, REUTERS, Oct 15, 2007, available at <http://www.reuters.com/article/domesticNews/idUSN1535414820071015?sp=true>; Linda Greenhouse, *Justices to Hear Challenge to Money-Laundering Law*, N.Y. TIMES, Oct. 16, 2007, A 20 (77 words in article devoted to other cases); Editorial, *Refusing to Lie in the Bed He Made*, CHATTANOOGA TIMES FREE PRESS (Tennessee) October 21, 2007 F5.

³¹⁸ *Chat. Times*, *id.*

³¹⁹ *Supra* note 311. Fifteen days after his *Smith* dissent, Breyer was in the majority that delayed again Earl W. Berry’s imminent execution, with no concern for the suffering of murder victim Mary Bounds’ family (*cf. supra* note 305). *Berry v. Epps*, 128 S. Ct. 531 (2007). *Berry v. State*, 575 So. 2d 1, 4 (Miss. 1990). Once more, guilt was not disputed. *Supra* note 109. A local paper reported: “For 20 years, [the 78-year-old widower, Charlie] Bounds and his daughter, Jena Watson, have been in and out of courtrooms waiting for the day Mary’s killer would pay for his crime.” Watson said: “It will never be over for us, *but we won't have to deal with court proceedings and appeals processes and all those things that remind us of him.*” Danza Johnson, *Victim's Family Plans to Attend Execution*, Northeast Miss. Daily J., Oct. 30, 2007, A 1. Emphasis added. But they *were* forced to deal with more proceedings. On the excruciatingly painful reaction of the victim’s family, *see, e.g.*, Shelia Byrd, *Family Frustrated After Late Reprieve in Killer's Execution*, ASSOCIATED PRESS, Oct. 30, 2007. It was suggested that the real cruel and unusual punishment was that inflicted on the family, *Sparing Berry*, *supra* note 117. The family suffered this knowing, while admitting guilt, Berry lacked any remorse. Kathleen Baydala, *U.S. Supreme Court Halts Execution of Miss. Man*, The Clarion-Ledger, October 31, 2007, available at <http://prisonworld.xsbb.nl/viewtopic.php?f=35&t=814307&view=previous>.

Berry was executed on May 21, 2008, reiterating lack of remorse and stating 21 years was enough – for him! Jack Elliott, Jr., *Condemned Mississippi Killer Berry Executed*, ASSOCIATED PRESS, May 22, 2008. This does not diminish the many months of additional pain inflicted on the Bounds family by the extra Supreme Court stay. See also Peter Bronson, *A Cruel Penalty for Victims*, CINCINNATI ENQ., Feb. 3, 2003, available at http://www.enquirer.com/editions/2003/02/03/loc_bronson03.html.

The moral perspective of those who care about murderers rather than victims was captured by Clarence Darrow in the Leopold-Loeb case: “consider the families of these two defendants[.] ... I am sorry for the bereavement of Mr. and Mrs. Franks [victim’s parents] ... *But as compared with the families of Leopold and Loeb, the Franks are to be envied - and everyone knows it.*” CLARENCE DARROW, THE PLEA OF CLARENCE DARROW, AUGUST 22ND, 23RD & 25TH MCMXXIII IN DEFENSE OF RICHARD LOEB AND NATHAN LEOPOLD, JR. ON TRIAL FOR MURDER (1924) 117 (Emphasis added.) Contrast this with Judge Kozinski’s formulation: “One knows not whether to pity more the victims of this ordeal or their parents....” *Bonin*, *supra* note 272.

³²⁰ *Supra* 28-29.

compounding the pain of losing loved ones, could be relieved by abolition.³²¹ Faux concern also has been shown for rape victims who survive torture and attempted murder.³²² A corollary argument is that the very non-enforcement of the death penalty and concomitant massive costs of repetitive decades-long “Byzantine” legal proceedings justify repeal of death penalty statutes.³²³

This smacks of the parent murderer seeking mercy because he is an orphan.

More Absurdity. It would be no surprise if, given the bar to execution of the allegedly mentally retarded, it will be claimed to be unfair to execute intelligent murderers³²⁴ with happy childhoods, or those

³²¹ Upon signing New Jersey’s death penalty “repeal,” *supra* 33, Gov. Corzine, in addition to asserting superior morality, professed compassion for victims’ families, perhaps even doing them a favor: “the loved ones ... may be more deeply hurt by long delays and endless appeals than they would be if there were certainty of life in prison...” *Supra* note 221. But this easily made promise is never a “certainty.” *Supra* 9-10. A Republican rationalized defying his party because a victim’s wife “found the lengthy appeals process for capital sentences excruciating.” Peters, *supra* note 218. Marilyn Flax, also a victim’s widow, objected: “What I would like ... is not change the law, but enforce the law.” *Id.*; *N.J. Rept.*, *supra* note 219, at 57. *See also id.*, at 56-57; *supra* note 220 (Kanka reference). Justice Scalia says the hardest death penalty criticism to take is the “bemoaning of ‘the enormous costs that death penalty litigation imposes on society,’ including the ‘burden on the courts and the lack of finality for victim’s families’ Those costs, those burdens, and that lack of finality are in large measure the creation of ... Justices opposed to the death penalty....” *Baze v. Rees*, *supra* note 14, 128 S. Ct. at 1555 (Scalia, J. concurring).

³²² The court feigned concern for victims to justify rescuing and “respecting” child rapists deserving of “dignity,” professing worry about the ordeal of the victim testifying and added incentive to kill her. *Kennedy v. La.*, *supra* note 28, 128 S. Ct. at 2662-63, 2664. But to obtain a life sentence the victim would have to testify anyway and she was, in fact, not murdered with the death penalty still law. Having pretended concern, the court then attacked child victims, as unreliable. *Id.*, at 2663. *See also supra* note 98.

³²³ *Supra* 27-28, 47-48 and notes 167, 219.

³²⁴ Some receive special treatment because they have literary and oratorical gifts enabling them to write best sellers, appear on television or radio, obtain sympathetic media coverage, and hoodwink gullible intellectuals and elites unable to believe such people capable of vicious murder. So five justices one day might decree it unfair to execute murderers lacking these gifts. (Orwell famously said: “One has to belong to the intelligentsia to believe things like that: no ordinary man could be such a fool.” GEORGE ORWELL, *Notes on Nationalism*, in *I BELONG TO THE LEFT*: 1945 (Peter Davison ed., 1998) 141, 154.

Norman Mailer helped Jack Abbott, in prison for murder, *supra* note 50, obtain parole and publish *IN THE BELLY OF THE BEAST* (1981). He believed Abbott “an intellectual ... a potential leader ... with a vision of ... a better world” *Id.*, at xi. Seeking his release, Mailer said “[t]here is a point past which any prisoner can get nothing more from prison....” *Id.*, at xvi. But Abbott’s next victim would have gotten something more: his life!! *Supra* note 50. Mailer added: “*I love Jack Abbott* for ... having learned to write as well as he does” *Id.* (Emphasis added.) On “love” of murderers at the expense of future victims, *see supra* 41.

William F. Buckley, Jr. aided the publishing and prison release of an author/rape-murderer for whom he also wrote an introduction. EDGAR SMITH, *BRIEF AGAINST DEATH* (1968). *See also* SMITH, *A REASONABLE DOUBT* (1971). Incredibly, *after* Smith committed new crimes, including attempted murder, and admitted he had fooled Buckley, *supra* note 50, the latter, in his intellectual conceit, aided the successful campaign for the release of another convicted murderer, Gary McGovern. *Supra* note 49.

Freed murderer Wilbert Rideau, *infra* 51, honed his literary gifts in prison, also attracting a wide following. Although one cannot dispute the impressive nature of Rideau’s biography and resume (*available at* <http://www.wilbertrideau.com/bio.html>; <http://www.wilbertrideau.com/resume.html>), he still stabbed a young woman to prevent her from being a witness against him.

Roger Keith Coleman, *supra* 20ff., acquired a cult media following. “His death ... followed a blizzard of television appearances, including an appearance on the ‘Donahue’ program a legal and public relations marathon that brought [Coleman] from obscurity to international attention.” Applebome, *supra* notes 131, 149. Once again, the willing dupes were shown to be, well, willing dupes. *Cf. supra* note 166. James McCloskey, a leading death penalty opponent and champion of Coleman’s innocence for many years, plaintively asked: “How can somebody, with such equanimity, such dignity, such quiet confidence, make those his final words [i.e., asserting his innocence] even though he is guilty?” Maria Glod and Michael D. Shear, *Tests Show Dead Man's Guilt; DNA Results in 1981 Case Hurt Foes of Capital Punishment*, WASH. POST, January 13, 2006, B 1. For a succinct summary of clever manipulative murderers, including Coleman, *see* Bridget Johnson, *Stolen Innocence; Death Penalty Foes Make Easy Marks for Vicious Murderers*, OPINIONJOURNAL.COM, Jan. 18, 2006, *available at* <http://www.opinionjournal.com/extra/?id=110007827>.

who, while not mentally retarded, were not smart enough to avoid getting caught,³²⁵ or could not help themselves because they were unfairly poor³²⁶ – or accursedly rich!³²⁷

This is all of a piece with the systematic attempts by advocates to sanitize and minimize the magnitude of their clients' cruelty.³²⁸ In 1961, Wilbert Rideau robbed a bank, and kidnapped and shot three victims, stabbing one to make sure she was dead. This was downplayed as merely "incredibly stupid and tragic." Also, not denying his crime, he convinced many, including the last jury to hear his case, that he "never intended...to hurt anybody," despite having taken with him a loaded gun *and* a knife.³²⁹ Similarly, the New Jersey Supreme Court vacated a death sentence because it said it was not clear that a rapist really intended to kill a victim he stabbed 53 times, including 18 in the genital area.³³⁰

"Superior Judgment." Having expressed lack of confidence in the judgment of "decent jurors" and the superiority of its "own independent judgment,"³³¹ it is revealing, if not astonishing, to recall some of what the Court's allegedly superior judgment includes.

Three justices (Breyer, Ginsburg and Souter) sided with Jose Medellín,³³² who bragged about

³²⁵ See *Minnick v. Miss.*, 498 U.S. 146, 166-167 (1990) (Scalia, J., dissenting): "we have gone far beyond any genuine concern about suspects who do not know their right to remain silent, or who have been coerced The sharp-witted criminal would know better than to confess; why should the dull-witted suffer ...? ...That some clever criminals may employ ... protections to their advantage is poor reason to allow criminals who have not done so to escape justice. ...a rule that foolish mistakes do not count would leave most offenders not only unconvicted but undetected." See also *supra* note 301.

³²⁶ See *Bazelon*, *supra* note 177, esp. at 91-100. In response to Judge Bazelon's concern that proposed efforts to fight crime would unfairly burden the poor, *id.*, at 159, Attorney General Katzenbach addressed the judge's "conception of equality," *Id.*, at 163: Because poverty can breed crime, fighting crime is likely to affect the poor more than the rich. However, "government cannot and should not ignore their effects during a criminal investigation. *Otherwise, so many persons guilty of crime would be insulated from conviction that our system of prevention and deterrence would be crippled.*" *Id.*, at 165 (emphasis added).

³²⁷ Darrow argued murderers Leopold and Loeb "might have done better if they had not had so much money.... *Great wealth* often *curse*s all who touch it.... ...it is just as often a great misfortune to be the child of the rich as it is to be the child of the poor. *Wealth has its misfortunes.* ... There are times when *poverty is fortunate.*" *Supra* note 319, at 87, 63, 74, 4. (Emphasis added.) Darrow added, were they "unconnected with families of great wealth, there is not a state's attorney in Illinois who could not have consented at once to ... punishment in the penitentiary for life. ... unfortunately, the parents have money." *Id.*, at 4-5.

Under "individualized consideration," *supra* 5. 39 and note 188, wouldn't they be presumed to know better, more be expected of them, and hence the punishment greater? If poverty is mitigating, shouldn't wealth and a good home be aggravators? But Darrow, having said disadvantage is "rightfully" considered, also argued that advantage was itself mitigating. *Op. cit.*, at 63.

The upshot is that the less well off should be punished less harshly than the better off, but it is unfair to punish the better off more harshly than the less well off. Again, "heads the murderer wins, tails the victim loses." *Supra* 39.

Justice Stevens' concurring opinion in *Baze v. Rees*, *supra* note 14, 128 S. Ct. at 1548, is a tour de force of heads-tails casuistry, viz.: unconstitutionality increases if execution suffering increases but also if it decreases. The Constitution requires executions to be humane, but if the murderer's suffering is far less than his victim's, execution is unconstitutional because it is too humane to do justice to the victim and serves no retributive purpose. *Cf. id.*, at 1554 (Scalia, J., concurring). *Cf. supra* note 214.

³²⁸ *Cf. supra* 13-15, 25-26.

³²⁹ Liptak, *supra* note 51.

³³⁰ *State v. Jackson*, *supra* note 219.

³³¹ *Supra* 4, 6, 8, 13; esp. 16, 36-37.

³³² *Medellín v. Texas*, 128 S. Ct. 1346; *stay and hab. corp. den.*, 129 S. Ct. 360 (2008).

brutally robbing, raping, and murdering two girls³³³ – 14 and 16, but dubbed “young women.”³³⁴ If this Mexican citizen, actually raised and educated in the United States, had prevailed, alien murderers would have a right American murderers lack, to call their native country’s consulate here.

Earl Enmund “never intended” to murder anyone and only “somehow participated” in a robbery in which an elderly couple was murdered – *except* that Enmund planned the crime in the first place.³³⁵ It was unfair for Robert Parker to be sentenced to death when he did not do the actual killing and two of his accomplices got off with life sentences – except that, it turns out, Parker *ordered and threatened* one of them to do the shooting, after which Parker slit the victim’s throat and took her ring and necklace.³³⁶

Four justices agreed the Tison brothers should not receive the death penalty because they did not intend that anyone be murdered³³⁷ when all they did was to smuggle a chest filled with guns into a prison to help the escape of two convicted murderers, one serving a life sentence for murdering a guard during a prior escape.³³⁸ The ensuing four murders of an entire family including a two-year-old³³⁹ could not possibly have been foreseen by the young Tisons!³⁴⁰ Although a 5-4 majority of the U.S. Supreme Court appeared to rule that the Tisons could be executed, they were not, because the Arizona courts felt the high court actually, in the end, left little choice.³⁴¹

A murderer should have a serious chance to succeed with the argument that he would not pose a future threat to society if sentenced to life without parole because he was “only” dangerous to old ladies.³⁴² It a sign of mental retardation when a rape is carefully planned and the victim is calculatingly murdered to

³³³ Ex Parte Jose Ernesto Medellín, 223 S.W.3d 315 (Tex. Crim. App. 2006) (Hervey, J., concurring). Medellín “makes no claim that he did not brutally rape and murder two teenage girls (ages 14 and 16) with fellow gang members ... he boasted about his active participation He bragged about how he sexually assaulted the two victims. He related that he put his foot on the throat of one of the girls because he was having difficulty strangling her with a shoelace and she would not die. The girls were unrecognizable when their bodies were found.” *Id.* Ms. Greenhouse apparently objected to revealing these details. *Supra* note 7.

³³⁴ *Supra* note 332, Brief for Petitioner 6, *available at* http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/06-984_Petitioner.pdf. In *Baze*, Justice Stevens deems death “excessive ... for ... raping a 16-year-old woman.” *Supra* note 14, 128 S. Ct. at 1549 (Stevens, J., concurring). By contrast, if a nearly 18-year-old commits a premeditated torture murder and boasts about it, the Court terms him not a *man* but a “juvenile,” still in childhood – presumably a “boy.” *Roper v. Simmons*, *supra* note 28, 543 U.S. at 574-575. For further misrepresentation on behalf of Medellín, see *supra* note 332, 128 S. Ct. at 1360n.

³³⁵ *Supra* 11.

³³⁶ *Id.*

³³⁷ *Tison v. Arizona*, 481 U.S. 137, 159 (1987).

³³⁸ *Id.*, at 139.

³³⁹ *Id.*, at 140-141.

³⁴⁰ *Id.*, at 164-174.

³⁴¹ *State v. Tison*, 774 P. 2d 805 (Ariz. 1989); Walter Berry, *Man Executed in Arizona for Killing Four People After Prison Break*, ASSOCIATED PRESS, January 23, 1997.

³⁴² *Supra* 9ff.

avoid capture and return to prison.³⁴³ An act that is “heinous” if committed by a person one day over 18 is rechristened “irresponsible” if he is one day under 18; it is indecent to expect a nearly 18-year-old person to appreciate the wrongfulness of premeditated torture-murder and joyfully boasting about it.³⁴⁴ A murderer under 18 is a “juvenile,” a “boy,” but a victim of 16 is an “adult woman” and, moreover, she is “unharméd” when raped under threat of death!³⁴⁵ When a 300-pound man rapes an 8-year-old girl, tearing her vagina so that her rectum protrudes into it, requiring surgery, this is inadequate “moral depravity.”³⁴⁶ Because a nearly-18-year-old torturer-murderer has deficient “moral culpability,” he must be allowed “to attain a mature understanding of his own humanity.”³⁴⁷ But, for the mature 300-pound torture rapist whose 8-year-old victim does not die, forget moral culpability, because his “dignity” must be “respected....to allow him to understand the enormity of his offense” that is not so “enormous” as to justify execution.³⁴⁸ There can be no death penalty for “ordinary” murder with insufficient torture or suffering – or for barbaric torture without death.³⁴⁹ As a group, punishment of the depraved must be reduced if their number grows, and increased depravity by an individual confers upon him constitutional immunity from punishment for additional depraved acts.³⁵⁰ States should be laboratories to reward murderers who game the system, but not to impose penalties to protect the public.³⁵¹ Finally, lack of confidence in juries goes only so far. When they impose the death penalty, they cannot be trusted; but when they do not, the court has such confidence in their judgment that it is used to establish “national consensus” against the capital punishment.³⁵²

Are these judgments really superior to those of “decent jurors”?

Guilty But Innocent. It is good public relations to argue the innocent are being executed wholesale. But for those who “love” murderers, *supra* 41, this is really beside the point. In the ultimate in sanitizing, Bryan Stevenson declared:

³⁴³ *Supra* 12-13.

³⁴⁴ *Roper v. Simmons*, *Supra* 7-8; 543 U.S. at 560, 561, 568, 570, 573.

³⁴⁵ *Supra* notes 265, 334.

³⁴⁶ *Supra* 13-16.

³⁴⁷ *Roper*, *supra*, at 574. *Roper* has been called “embarrassing,” even by supporters of saving sadistic 17-year-old murderers. Jeffrey Rosen, *Juvenile Logic*, NEW REPUBLIC, March 21, 2005, 11.

³⁴⁸ *Kennedy v. La.*, *supra* 15-16; 128 S. Ct. at 2665. *Cf. Id.*, at 2676 (Alito, J., dissenting) (“stark contrast to *Atkins* and *Roper* ... characteristics of ... defendants ... diminished their culpability). Transcript. *id.*, *supra* note 87, at 51.

³⁴⁹ *Supra* note 288.

³⁵⁰ *Supra* 16, 42 and note 265.

³⁵¹ *Supra* 35-36.

³⁵² *Jacobi*, *supra* notes 231, 238, at 1142-1147, 1156, esp. 1144; *Kennedy v. La.*, *supra* note 28, 128 S. Ct. at 2657.

... innocence has been a very effective way to get people who would otherwise not think about this issue...to do that. ...it is misguided to focus on those ... in the very narrower sense of the word, wrongly convicted. ... I've represented ... over a hundred people on death row I've never represented anybody who I thought was guilty of the death penalty. All of my clients are *innocent of the death penalty*, and ... There are a lot that are innocent of a capital crime, even if they're involved in the crime.³⁵³

We represent *anyone* ... at risk of death. We believe that all accused are innocent of the death penalty because we reject capital punishment³⁵⁴

In other words, the condemned murderer was guilty of the act but did not merit the death penalty.

Voila! With verbal prestidigitation, guilt magically becomes innocence.

In *Sawyer v. Whitley*, the Supreme Court said: "The phrase 'innocent of death' is not a natural usage...."³⁵⁵ It addressed the argument that Sawyer had committed murder but should not have received (i.e., was "innocent" of) the death penalty. It is appropriate to note that he and his accomplice

struck [Frances] Arwood repeatedly with their fists and dragged her by the hair into the bathroom. There they stripped [her] naked, literally kicked her into the bathtub, and subjected her to scalding, dunkings, and additional beatings. [Sawyer] left Lane to guard the victim, and apparently to rape her, while [Sawyer] went ... to boil water to scald her. [Sawyer] kicked Arwood in the chest, causing her head to strike the tub ... rendering her unconscious. The pair then dragged [her] into the living room, where they continued to beat and kick her. [Sawyer] poured lighter fluid on the unconscious victim, particularly her torso and genital area, and set the lighter fluid afire. He told Lane that he had done this to show "just how cruel he could be." There were further brutalities Arwood ... remained in a coma until she died of her injuries approximately two months later.³⁵⁶

This, then, is the conduct those who "love" murderers claim to be "innocent of the death penalty"!

This is what they believe merits mercy! In their moral world, Sawyer's life was as valuable as Arwood's, and he had as much "humanity" and "human dignity" and was entitled to as much "respect."

To keep alive, for decades, undeniably guilty, cold-blooded killers, giving them a chance to kill again, their advocates have sought to "humanize" them,³⁵⁷ while dehumanizing and disregarding their

³⁵³ Remarks, *The Future of the Death Penalty*, ACS CONFERENCE (Aug. 2, 2003) 23, 25, available at http://www.acslaw.org/files/2003%20convention_death%20penalty_panel%20transcript.pdf (emphasis added.) Also: "it is a mistake to focus single-mindedly on ... innocence someone can be found guilty of a [murder], and then – in the punishment phase – found 'innocent' of the death penalty ... a life sentence rather than death." Dow, *supra* note 293, at 4-5. See also Steiker and Steiker, *supra* note 207; David R. Dow, *The End of Innocence*, N.Y. TIMES, June 16, 2006, A 31 ("Innocence is a distraction. Most ... on death row ... did what the state said they did. But that does not mean they should be executed"). Smith, *supra* notes 169, 182 (spare those guilty of "horrendous ... brutal" murders), Sarat, *supra* note 182 (seeking mercy for the guilty).

³⁵⁴ Posting of Bryan Stevenson, *Death Row on Trial*, ABC ONLINE FORUM, May 28, 2001, available at <http://www2b.abc.net.au/4corners/sforum53/posts/156.shtm> (emphasis added).

³⁵⁵ 505 U.S. 333, 335, 340 and *passim* (1992).

³⁵⁶ *Sawyer v. Smith*, 497 U.S. 227, 230 (1990); *Sawyer v. Whitley*, *supra* note 355, at 335.

³⁵⁷ "[P]ortray the defendant as a human being with positive qualities.... few people are thoroughly and one-sidedly evil.

innocent victims, who receive no rights, protection or concern. Individual and “intrinsic” “worth” and “dignity” “as human beings,” “potential to attain a mature understanding of [one’s] own humanity” – these are values exclusively for murderers.

Advocates for murderers seek to make victims into Soviet-style “non persons.” This requires avoiding facts.³⁵⁸ 700,000 “out of sight, out of mind” is their motto.

But abolitionists, including justices,³⁵⁹ aren’t content with that. They not only label the guilty “innocent,” but rechristen as “victims” those guilty of the worst brutality, and those who would punish them as “brutal” “perpetrators” of “organized violence” or “state violence”³⁶⁰ Judges who play a role in capital punishment are “violence-abetting”³⁶¹ and further the “infliction of pain.”³⁶² To a layperson, this rhetorical sleight of hand would surely seem misguided if not surreal.

They may deny it, but abolitionists evince a callous, if not utterly cruel, lack of concern for *actual* victims. It is positively scandalous that they have been allowed to claim the moral high ground.³⁶³

Every individual possesses some good qualities and has performed some kind deeds. ...” Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U.L. REV. 299, 335 (1983). So the murderer is really a “good person” who made a “stupid” mistake. *Cf. supra* 51. Past good deeds excuse bad deeds. *Cf. supra* 38. No conduct can be so heinous as to deem its perpetrator *per se* “bad” or “evil,” period. Even Stevenson conceded “pure evil.” *Supra* 41. *See also* Jim Doyle, *Double Life of a Death Row Killer*, SAN FRAN. CHRON., Jan. 12, 2006, A 1; *supra* notes 253, 108 (Alfieri, at 332-33, 351).³⁵⁸ Justice Stevens complains: “the facts are often so disturbing.” *Supra* note 27. *Cf.* Ronald J. Tabak, *Finality Without Fairness: Why We are Moving Towards Moratoria on Executions, and the Potential Abolition of Capital Punishment*, 33 CONN. L. REV. 733, 748-50 (2001). Like other abolitionists, *supra* 1-2, 4-5, 40, Tabak objects that there had been too much past focus on specific crimes and not enough on general issues; the pendulum has swung toward the latter, he approvingly says. “Particular crimes ... criminals ... horror stories....almost always enlist sympathy for the victim, horror at the perpetrator, and a punitive reaction....Conversely, when public discourse shifts away from a focus on specific incidents toward a focus on general issues [how the death penalty works and fails] those opposed ...gain ground.” *Supra*, at 749. *See id.*, at 739-42 (examples of media focus on the condemned rather than their victims).

Yes, a few specific crimes have been reported, but the position here is that this has been grossly inadequate due to suppression of facts about murderers and their deeds for the precise reason Tabak indicates. Also, a March 30, 2008 Lexis-Nexis search found no major media use of an AP report, *supra* note 278, that capital punishment saves lives. It noted abolitionists “have gained momentum ... DNA exonerations ... ha[ve] weighed against capital punishment. The moral opposition is loud ... *What gets little notice*, however, is a series of academic studies ... that claim ... the death penalty” deters murder. *Id.* (Emphasis added.)

³⁵⁹ *Infra* note 363

³⁶⁰ *Infra* note 362; Liebman, *supra* note 14, at 95.

³⁶¹ *Id.*, at 93.

³⁶² *Id.*, at 94; quoting Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1602-1603, 1607, 1613 (1986).

Cover repeatedly calls condemned murderers “victims” and those who enforce the law “perpetrators” of “organized violence,” and objects to the “pain and fear” “suffered” by the “victims.” *Id.*, 1629. It was argued that setting an execution date for notorious murderer Clarence Ray Allen, *supra* note 55, would cause him “undue stress” leading to a heart attack. Barbara Arrigoni, *Execution Date Set for Murder Conspirator*, CHICO ENTERPRISE-RECORD, Nov. 18, 2005. Texas Governor Rick Perry was labeled a “murderer” for allowing execution of an actual murderer. Manuel Roig-Franzia, *Mexican National Executed in Texas*, WASH. POST, Aug. 6, 2008; A06. *Cf. supra* notes 108 (Cooey), 333.

³⁶³ Five justices suggest that those who favor and/or consider constitutional the death penalty for torture rape of a child causing severe physical injury – including four dissenting justices! – thereby advocate “descent into brutality” and “transgressing ... decency” and “civilized standards.” *Kennedy v. La.*, *supra* note 28, 128 S. Ct. at 2650, 2658. This also applies to torture murder. *See, e.g., Roper v. Simmons*, *supra* note 28, 543 U.S. at 561-63, 575. *See also* Allen & Shavell, *supra* note 54, at 626

CONCLUSION

Those who dominate the media and courts, including the Supreme Court, oppose the death penalty. Substantial majorities of the American people have supported it. Yet, opponents have prevailed in all but name only; when only 0.16 percent of homicides result in executions, the penalty has been effectively abolished. This is concealed by abolitionist justices and their media allies to avoid a hostile reaction by a fully informed public whose values have been egregiously but stealthily trampled upon. To maintain the ruse, a token few sacrificial murderers are allowed to be executed for the vast number of homicides; and even they are never executed without a protracted struggle.

The key to abolitionist success is vast deception.

First, it is dishonest to pretend that the death penalty has not been abolished, in the name of a Constitution that explicitly and repeatedly permits it.

Second, if this is a moral issue, as foes assert, it is very easy to proclaim oneself morally superior by citing only seemingly hapless docile murderers on death row without giving a thought to what they have done and may do again if allowed. The debate is routinely obfuscated by focusing on them but ignoring or trivializing the suffering and even existence of their past, present *and future* victims.

Third, *inter alia*, a fair moral debate would not be confined to experts but would **confront the public** with these questions:

Is it moral to value, in practice, the life of a law-abiding innocent citizen vastly less than that of a clearly guilty barbaric murderer? Is it moral to demand absolute death penalty perfection, with heartless unconcern for the perfect certainty of causing new innocent victims of clearly guilty murderers kept alive by mistakes in catering to abolitionist sensibilities?

Is it moral, as abolitionist justices would, to exclude victim impact evidence? Is it moral to aver that grieving family members are not also victims? Given the original torture inflicted, often

(noting “self-righteous displays of commitment to revealed truth, the truth being that opposition to the death penalty goes without saying,” its proponents possess “horrifying moral shortcomings” and are “moral[ly] deprav[ed]”); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001) (i.e., supporters’ politics “pathological”); Donald L. Beschle, *Why Do People Support Capital Punishment? The Death Penalty as Community Ritual*, 33 CONN. L. REV. 765, 789, 777-78, 776, 789 (2001) (abolitionists find it “emotionally satisfying” to see supporters as “morally obtuse”; proponents compared to practitioners of “ritual sacrifice” in “primitive” societies; condemned murderers sacrificial “victims”).

sadistically, upon victims, is it moral to compound that torture by forcing their families to endure decades-long obstructive legal proceedings unrelated to guilt or innocence? Is it moral for abolitionists to use this very torture they have inflicted, by manipulating a legal system run amok, as a weapon to compel proponents to surrender by accepting abolition to relieve the torture?

Is it moral to allow disingenuously absurd excuses to keep alive those guilty of crimes even abolitionists concede to be “horrendous,” “brutal” and “evil”? Is it moral to excuse evil deeds because their perpetrators may have done good deeds ostensibly rendering them forgivable “good persons”? Should criminal law proscribe and penalize misconduct by anyone or merely by “bad” but not “good” persons? Is it immoral to declare certain deeds themselves *per se* indicia of evil, regardless of past perpetrator history? Is it moral to condone evil by classifying a victim as an adult but a murderer of the same age as a juvenile?

Is it moral to label those who support or administer the death penalty “perpetrators” of “state violence” and those executed the “real victims” of violence, empathizing with suffering of the condemned rather than those they tortured? Is it moral to “love and care” about brutal, sadistic and premeditated murderers? Is it “uncivilized” to mandate or permit the death penalty for conduct the term “uncivilized” does not sufficiently describe, and are those who seek this “uncivilized”?

Is “no confidence” in the “decent [jury] person’s” judgment warranted? What is “moral depravity” and who should decide – five unaccountable justices, or elected legislators and decent jurors? Does the self-presumed morally superior “independent judgment” of justices merit respect or acceptance when, for example, they (a) assert rape under threat of death, three weeks after giving birth, is not harmful, and (b) order trial judges to aid convicted murderers by misleading juries? Is it moral to reduce penalties for the depraved as a group because their numbers grow, and to reward an individual’s increased depravity with immunity from punishment for new depraved acts? Is Justice Alito correct that, “in the eyes of ordinary Americans, the very worst child rapists ... are the epitome of moral depravity” – contrary to the Court’s edict that torture-rape of a child by a 300-pound man, causing harm even his judicial benefactors concede to be too gruesome to adequately describe, is insufficiently morally depraved to merit execution?

Is it illegitimate, even “pathological,” for representatives to enact laws that reflect the wishes

and interests of their constituents, because such laws are contrary to the Supreme Court's "vision"? Is it tolerable for the moral values of five unelected justices to trump the public's in a representative democracy? *A fortiori*, is it morally and constitutionally tolerable for five justices to impose their values as superior to those of their fellow citizens, when these very justices preach equality, especially that the life and "dignity" of a murderer is worth at least as much as his victim's, if not more? Is all this really "decency," as in the Supreme Court's concocted mantra, "evolving standards of decency"? Does "decency" require more concern for the "suffering" and "humanity" of the cold-blooded or their victims?

If justices persist in imposing their own unpopular values to abolish a punishment expressly authorized by the Constitution, is the Supreme Court entitled to continued respect and the legitimacy dependent upon that respect?

Fourth, avoiding a balanced moral debate requires deliberately covering up or refusing to report key facts of cases and/or, where that fails, affirmatively making false statements about them. This includes deception about (a) the nature of the murders committed (concealing the details so as not to "startle" moral sensibilities, in Justice Stevens' words); (b) the nature of the murderers (e.g., pretending they are too retarded or too young to know rape and murder are wrong, when in fact they fully know it); (c) what the courts have been and are doing to protect brutal murderers whose guilt is unchallenged and crystal clear (e.g., imposing their own moral values, baiting and switching that renders it virtually impossible for states and trial judges to know and hence apply the requisites for imposing the penalty); and (d) the sentence (e.g., positing life without parole as a viable alternative that can be guaranteed).

Fifth, the public would be horrified and demand an explanation if informed that (a) the courts have dragged out brutal murder cases for over thirty years when there is no doubt about guilt, and (b) there are actually justices who want to reward the murderers for the delay. One need not be a legal expert to realize there is something profoundly wrong with this – and, yes, immoral.

Moral assessments of facts require knowledge of those facts – full knowledge, not half-truth. Opponents of the death penalty, in the courts, the media and the legal establishment have spared no effort to make sure that the public does not acquire full knowledge.

It is an aim of this article to persuade at least some in the media to provide a less imbalanced death penalty account. Failing that, hopefully death penalty proponents will publicize the case. Opinion leaders with media access should inform a wide audience what is at stake. Those who care about victims should raise money and conduct widespread advertising. Only a massive internet, media and advertising campaign can provide a remedy for the condescension, arrogance and usurpation by the five person Supreme Court majority that has eviscerated the death penalty – in defiance of public opinion and on behalf of those who cannot fairly prevail in the democratic process.

This cannot continue if even some of the facts in this article become widely known.