THE DEATH PENALTY'S "FINELY TUNED DEPRAVITY CALIBRATORS"

FAIRNESS FOLLIES OF FAIRNESS PHONIES FIXATED ON CRIMINALS INSTEAD OF CRIMES

by

Lester Jackson, Ph.D.

2250 83rd Street (1L)
Brooklyn, New York 11214

ljackson95@gmail.com
(718) 256-2052
(718) 879-0931

WHAT FOLLOWS IS DEDICATED TO:

The 800,000 human beings UNFAIRLY singled out, in the United States since 1972, to suffer the ultimate injustice—being beaten, brutalized, raped and slaughtered;

AND

the millions of loved ones UNFAIRLY left behind with shattered lives, agonizing largely in silence—UNFAIRLY scorned and relentlessly tortured by murderer advocates, academics, media, elected officials, judges and unelected justices on the highest court in the land.

DOCUMENTATION and USE of TERMS

I. DOCUMENTATION

Because a major purpose of this article is to inform a largely unaware public, it is written to be understood by those unfamiliar with what is called the justice system. Accordingly, every effort has been made to avoid academic jargon and legalese.

However, documentation has not been sacrificed in this effort. Extensive sources are provided for those who may be skeptical of what is stated, much of which might seem incredible. All links were working as of October 9, 2014. At times, the URL in a link's footnote may work even if the link in the text does not. Anyone seeking the source for a link that might later become inoperative should feel free to contact the author.

Where possible, links are provided directly to specific locations within linked items. Otherwise, if available, specific page or part numbers within linked items are provided in parentheses next to links. Almost all items are freely accessible, but a few are available only at LexisNexis or must be purchased.

A number in parenthesis preceded by "p." is a cross-reference to a previous or later page within this article.

II. VICTIMS and HOMICIDE SURVIVORS

As used in this article, "victim" includes homicide survivor.

"Homicide survivor" has been misunderstood. The term does not absurdly mean that a murder victim can be a survivor. Instead, just as, for example, a surviving spouse is one who has outlived and is a survivor of a husband or wife, a homicide survivor is someone who has outlived and been left behind by one or more beloved homicide victims, often to endure a living death. When murders occur, homicide survivors are "collateral damage."

This point is stressed at the outset because many opponents of capital punishment, such as Justice Stevens, deny that survivors are victims at all and contend that *their* suffering should be ignored.

Nevertheless, families and friends of murdered individuals are not only "survivors" of victims; they are victims in their own right – and two times over: a) they suffer the trauma of losing those dear to them and a vital part of their own lives, and b) they are unnecessarily (and therefore unjustifiably and unfairly) tormented by murderer advocates who force them to suffer the agony of decades of torture by supercilious self-styled "compassionate" judges.

III. JUSTICES vs. SUPREME COURT

Unless otherwise specified, "justices" refers to members of the United States Supreme Court. The latter term implies legitimacy. Therefore, to highlight why capital punishment has been made into a farce over the last four decades, what follows often refers to actions by "justices" instead of "the Court."

It is the position here, shared by many, including Justices Thomas and Scalia, that this farce was created by individuals willfully and arrogantly acting on nothing but their personal values and preferences.

Outside the world of political activists, it is little understood that justices are just human beings who have the same biological components and functions as everybody else. However, in a society and country based on the idea of equality, a five-person majority of nine lawyers, who landed in their positions of immense power by sheer happenstance, presumes to have wisdom, morality and intelligence superior to more than 300 million other human beings in the United States. Instead of faithfully applying the law, they have abused the law – and the Constitution – to assume the role of presumed "conscience of the nation." Accordingly, they should be viewed as what they really are: individual people called "justices."

"The Court thus assumes the role of a finely tuned calibrator of depravity…."

— Justice Byron White, dissenting, *Godfrey v. Georgia*[*]

[*] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=446&invol=420#ff6

IT ISN'T FAIR!!

The assertion that capital punishment is unfair long has been a rallying cry for champions of duly convicted depraved murderers whose guilt is not in doubt. For example, following a fierce protracted struggle, Connecticut Gov. Dannel P. Malloy, who must face the voters in 2014, signed a capital punishment repeal statute in 2012. In doing so, he contended[1] "that doing away with the death penalty was the only way to ensure it would not be *unfairly* imposed." This mantra has been repeated again[2] and again[3] ("fairness and *justice*").

For naïve followers, this is an uncritically accepted faith lacking internal consistency and empirical basis. It is based on fallacies, unwarranted assumptions and insupportable assertions. For knowing leaders, the demand for fairness is a cynical ploy intended to abolish the penalty rather than make it fair. If their words were ever taken seriously, the inevitable ludicrous result would be abolition of *any* punishment for *any* violent crime.

THE QUEST FOR SCIENTIFIC "MORAL ACCURACY"

Gov. Malloy followed in the footsteps of other governors[4] who defied[5] the will[6] of the great majority[7] of their constituents.[8] And he also imitated similarly defiant United States Supreme Court justices.

Shortly before retiring in 1994, Justice Blackmun declared[9] (1147, 1145) with characteristic judicial activist contempt[10] for the public and the Constitution: "Although most of the public seems to desire, and the Constitution appears to permit, the penalty of death[,] I no longer shall tinker with the machinery of death." He punctuated his arrogance by pronouncing his position to be "surely … beyond dispute" – notwithstanding a strong rebuttal[11] (1141) by Justice Scalia and that no other justice joined him. Blackmun proclaimed capital punishment "unfair" because it "defies … rationality and consistency" and "does not ***accurately*** and consistently determine[12] (1256) which defendants most 'deserve' to die" (emphasis added). (Ten years later, as noted below (p. 11), law professor Scott Sundby urged[13] "moral accuracy" in addition to factual accuracy.)

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[1] http://www.governor.ct.gov/malloy/cwp/view.asp?A=4010&Q=503122
[2] https://www.aclu.org/capital-punishment/death-penalty-101
[3] http://www.oregon.gov/gov/media_room/pages/press_releasesp2011/press_112211.aspx
[4] http://www.washingtonpost.com/wp-dyn/content/article/2007/12/13/AR2007121301302.html
[5] http://www.boston.com/news/local/connecticut/articles/2012/04/22/death_penalty_repeal_carries_risk_for_malloy/
[6] http://www.lcsun-news.com/new_mexico-legislation/ci_11955779
[7] http://www.statesmanjournal.com/article/20111123/NEWS/111230429/Governor-announces-halt-all-executions
[8] http://www.americanthinker.com/2012/01/crime_without_punishment.html
[9] http://www.supremecourt.gov/opinions/boundvolumes/510bv.pdf
[10] http://homicidesurvivors.candothathosting.com/wp-content/uploads/2014/06/Getting-It-Wrong.pdf
[11] http://www.supremecourt.gov/opinions/boundvolumes/510bv.pdf
[12] http://www.supremecourt.gov/opinions/boundvolumes/512bv.pdf
[13] http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1677&context=ilj

Blackmun's declaration was received with great acclaim by media predominantly hostile[14] to capital punishment. In 2013, Emily Bazelon quoted[15] Blackmun with approval in contending capital punishment could not be applied "fairly."

In 1972, 22 years before Blackmun pontificated, Justice Stewart, voting to nullify all death penalty laws in 42 jurisdictions,[16] famously declared:[17] "These death sentences … so wantonly and so freakishly imposed … are cruel and unusual in the same way that being struck by lightning is cruel and unusual."

Stewart later demanded[18] a "principled way to distinguish [a] case, in which the death penalty was imposed, from the many cases in which it was not." Robert Franklin Godfrey had shot and killed[19] his wife and mother-in-law, and injured his fleeing 11-year-old daughter. Despite Godfrey having "acknowledged … the heinous nature of his crimes," Stewart, asserted that these "crimes cannot be said to have reflected a consciousness materially more 'depraved' than that of any person guilty of murder."

Dissenting, Justice White stressed critical facts[20] ignored by Stewart in saving Godfrey, who had "employed a weapon known for … disfiguring …," and "took out time not only to strike his daughter on the head, but also to reload … [H]is mother-in-law['s] last several moments … must have been …terrifying. [She had] a substantial portion of her head missing and her brain … protruding for some distance onto the floor."

This is what Stewart considered not especially "depraved," prompting White to accuse the Court of "***assum[ing] the role of a finely tuned calibrator of depravity***…"[21] (Emphasis added.)

Thus, in vivid language, White exposed a critical unproven assumption – or blatant assertion – underlying the "unfairness" refrain: that morality, conscience and values can be calibrated with mathematical and scientific precision. Years later, law professor Jeffrey L. Kirchmeier complained[22] (458) of the inexactitude of capital sentencing "science."

The Court's seizure of the role of depravity calibrator suffers from three basic defects: (1) It usurps self-government. (2) It relies on the premise that punishment for depravity is amenable to "fine tuning" – or any – calibration. (3) Applying that premise, the "calibrators" program highly disputable data into their "measuring instruments."

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[14] http://ssrn.com/abstract=1346142
[15] http://www.slate.com/articles/news_and_politics/jurisprudence/2013/09/supreme_court_capital_punishment_the_potter_stewart_byron_white_compromise.single.html
[16] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=408&invol=238#385
[17] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=408&invol=238#309
[18] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=446&invol=420#433
[19] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=446&invol=420#425
[20] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=446&invol=420#449
[21] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=446&invol=420#ff6
[22] http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1443&context=wmborj

Rampant judicial abuse of power[23] is documented elsewhere,[24] requiring no more than mention here. The notion that morality can be determined with the precision of an electron microscope merits only a brief comment upon its remarkable absurdity. Most of what follows will focus upon what is fed into the Fairness Phony computer, to demonstrate why this constitutes unwitting folly or cynical fraud.

CAN MORALITY BE "CALIBRATED" WITH "ACCURACY" AND "SCIENTIFICALLY"?

At bottom, a criminal trial presents two questions. First, did the defendant commit the charged crime? Second, if he did, what should be done about it? The first is a question of fact. A statement that he is guilty must be based on evidence. It may be correct or incorrect, true or false. By contrast, punishment is based upon the morality or values of those imposing it.

The first question concerns what *is* true. The second involves what *ought* to be done; and the answer cannot be said to be either true or false, but is, instead, a matter of right and wrong. Facts differ from moral and value judgments. Statements of fact can be proven true or false. Statements about what is right or wrong cannot, and are subject to profound and perpetual disagreement. (It is "seductive"[25] for justices to convince themselves that what they want to be true is true; but that is for another article.)

One of the most absolutist anti-death penalty justices in history, William Brennan, referred[26] to the issue of capital punishment as a "battle…waged on moral grounds [and] essentially a moral conflict." "Battle" and "conflict" suggest strong disagreement. If so, the notion that appropriate punishment can be "calibrated" with "moral accuracy" is absurd. That is why prescribed sentences for particular crimes, enacted by elected representatives, vary according to the values of different communities and states. The Supreme Court has declared that the jury expresses the "conscience of the community."[27] Obviously, different communities have different consciences based on different values. (As elaborated later (pp. 33-34), many justices have had far more regard for consciences that spare rather than condemn murderers.)

Few, if any, members of the clergy employ a calculator, computer or even an antiquated slide rule to sermonize about right and wrong before their congregations. The reason is obvious. Matters of right and wrong, justice and conscience are not amenable to computation by precision instruments.

Some assert[28] that there are universally applicable "moral truths" and values. This article is no place to plunge into theological and philosophical debates. Relevant here is that, if there are such truths and

[23] http://homicidesurvivors.candothathosting.com/wp-content/uploads/2014/06/Getting-It-Wrong.pdf
[24] http://homicidesurvivors.candothathosting.com/wp-content/uploads/2014/06/Humpty-Dumptys.pdf
[25] http://icutmyway.blogspot.com/2005/03/antonin-scalia-for-chief-justice.html
[26] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=408&invol=238#296
[27] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=391&invol=510#519
[28] http://onlinelibrary.wiley.com/doi/10.1002/j.2161-007X.2000.tb00178.x/abstract?deniedAccessCustomisedMessage=&userIsAuthenticated=false

values, there is no universal acceptance of *what* they are. Actually held moral values differ, often vastly, among individuals, ethnic and religious groups, cultures, societies and civilizations.[29]

Consider abortion. A majority in this country supports legalized abortion. As recently as August 14, 2014, an article appeared in the *Washington Post* denying[30] that a fetus had the "status of being" and that abortion is even a moral issue. By sharp contrast, large numbers of people do consider a fetus to be a human being and a very intense minority views abortion as murder.

Many former fetuses are thankful[31] to have been allowed[32] to be born and enabled to live[33] productive and happy lives after *Roe v. Wade*. Would Justice Blackmun, *Roe's* author – or any of his acolytes – seriously have applied the "machinery of death" attack on capital punishment to abortion and similarly argued that it "defies rationality" by failing to "accurately and consistently determine which fetuses most and least 'deserve' to" be born and allowed to live potentially rewarding lives? And would they have thus concluded that, because it is "unfairly administered," abortion should be prohibited without exception? Not a chance! Why? Because the "pro-choice" concept is based on the view that, exactly because abortion is a matter of morality and values that cannot be determined by any formula, the decision must be made by each potential mother.

Clearly, deep differences exist regarding the value placed on human life. At first blush, in the United States, these differences might appear limited to fetuses. Elsewhere, a favorite slogan[34] of suicidal terrorists is that "we love death more than you love life." Although our culture seems to value life very highly, a value abused by terrorists to their advantage, there is a major exception. Depraved murderers here also have little or no regard for human lives (aside from their own). That's why they are generally considered depraved. But it's worse, as shown by this recent headline: "Teen misses rival & shoots innocent bus rider dead as friends laugh."[35]

And still worse!! Dominant judges, academics and media personages have a similar view of the lives of law-abiding individuals. These supercilious elitists adjudge the lives of murderers, upon whom they unabashedly[36] (xvi) lavish "love,"[37] to be precious, while placing little or no value on victims' lives. Justices Brennan and Marshall, who joined Justice Blackmun's dismissive assessment of the human status of

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[29] http://www.foreignaffairs.com/articles/48950/samuel-p-huntington/the-clash-of-civilizations
[30] http://www.washingtonpost.com/opinions/stop-calling-abortion-a-difficult-decision/2014/08/15/e61fa09a-17fd-11e4-9349-84d4a85be981_story.html
[31] http://globalnews.ca/news/1199595/abandoned-in-burger-king-bathroom-as-a-newborn-u-s-woman-using-social-media-to-find-birth-mom/
[32] http://www.hlntv.com/video/2014/03/06/burger-king-baby-katheryn-deprill-speaks-nancy-grace
[33] http://www.theabortionsurvivors.com/
[34] http://www.washingtonpost.com/wp-dyn/content/article/2009/11/09/AR2009110903618.html
[35] http://nypost.com/2014/03/20/teen-opens-fire-on-crowded-brooklyn-bus-one-hit-in-head/
[36] http://www.amazon.com/In-Belly-Beast-Letters-Prison/dp/0679732373#reader_0679732373
[37] http://www.nytimes.com/1988/02/14/magazine/the-lawyers-of-death-row.html?src=pm&pagewanted=4

fetuses, opposed[38] capital punishment for convicted barbaric murderers because they are "members of the human race" and not "nonhumans… to be … discarded. [E]ven the vilest criminal remains a human being possessed of common human dignity." No kidding! Brennan and Marshall saw no difference[39] between a lawful execution and the unlawful savagery for which it was imposed. Both were equally "shocking." More recently, a typical criminal "justice" professor objected[40] to those lacking mercy for convicted murderers; Michael Campbell considers it wrong that politicians sound a "populist theme that those who do terrible things deserve to have terrible things happen to them." Unwittingly, this shows how condescendingly elitist Fairness Phonies are. The substantial popular majorities favoring capital punishment must be denigrated with a word that has a "mob rule"[41] connotation. Nevertheless, mere supercilious assertions do not explain why unrepresentative elite values should prevail in a representative democracy.

If death penalty supporters constitute a populist majority "mob," so be it. With opposite morality, they need make no apologies for valuing very highly the lives of decent innocent victims and very little – or not at all – those of convicted brutal murderers. Actual witnesses to murder of loved ones, such as the movingly eloquent Catherine Burke, believe they have every right to consider murderers to be not even human.[42]

The bottom line is this. How can morality be "accurately calibrated" in the face of sharp and deeply held disagreement about the values to be calibrated? Remarkably, the final words[43] of an executed convicted murderer, Napoleon Beazley, included this insight into a reality incomprehensible to ivory tower professors and judges: "The people who support [my execution] think this is justice. The people that think that I should live think that is justice. … [T]his is a clash … with both parties committed to what they feel is right."

Because issues of right and wrong are deeply divisive as well as not subject to being labeled true or false, it is absurd or disingenuous to seek "accurate" morality. As long as an "unbridgeable values chasm[44] exists between victims of the worst crimes and the zealous devotees of their depraved victimizers," it is either folly or deceit to talk about fairness as though it were subject to precise calibration, let alone agreement.

However, before examining calibration follies, it must be emphasized that this article addresses fairness in sentencing the guilty. This special emphasis is required by a media-abetted Phony effort to convince the public that capital punishment is unfair because executions of the innocent are rampant. They are not.

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[38] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=474&invol=973
[39] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=497&invol=639#675
[40] http://nypost.com/2014/01/28/states-consider-reviving-old-fashioned-executions/
[41] http://www.sfgate.com/politics/article/Enduring-debate-elitism-versus-populism-3189454.php
[42] http://murrieta.patch.com/groups/cat-burkes-blog/p/victims-families-for-the-death-penalty--1st-anniversary
[43] http://www.tdcj.state.tx.us/death_row/dr_info/beazleynapoleonlast.html
[44] http://homicidesurvivors.candothathosting.com/wp-content/uploads/2014/06/VICTIM-SYMPATHIES-OF-JUSTICES.pdf

INNOCENCE CLAIMS: AN UNAVOIDABLE DIVERSION

Make no mistake about it. Wrongful conviction allegations are not made out of anxiety about anyone wrongfully convicted. Instead, the single-minded Fairness Phony objective is to abolish the death penalty for the overwhelming majority who are clearly guilty. Using endless repetition, one tool is to shield the guilty under the umbrella of the infinitesimal number of those convicted of murder who *may* be not guilty. The Phonies have convinced many who do not have the time or desire to scrutinize their claims. There is no need to repeat what numerous others[45] have addressed:[46] the falsity[47] of most[48] innocence contentions.

Death penalty supporters obviously do not seek execution of innocent people. The critical issue here is whether executing the guilty is fair, period. That, and only that, is what this article is about.

Murderer advocates are just that: advocates for murderers. So again, no one should think that opposition to capital punishment by activist Fairness Phonies has anything to do with guilt or innocence. Yet they have had a field day calling for the end of capital punishment when DNA has shown someone was wrongfully convicted (but *never* actually executed). However, with the increasing reliability of scientific tools, would these opponents agree to the death penalty when DNA conclusively demonstrates guilt? Of course not!!

On May 28, 1995, Lesley Stahl of *60 Minutes* asked murderer advocates Barry Scheck and Peter Neufeld how they could argue that DNA must be used to prove innocence but not to prove guilt.[49] Like Clarence Darrow and Rose Bird (below, pp. 29, 37), they did not bat an eyelash. They responded that DNA is reliable in proving innocence but not guilt. But when not directly cornered, Scheck declared[50] that DNA must be used to disprove guilt in order to "find the person who really committed the crime." Is anyone so gullible as to believe that Scheck would agree that any actual murderer should ever be executed?

Not all murderer advocates are quite so shamelessly two-faced, at least not when communicating with each other. For death penalty abolitionists, DNA has provided a public relations windfall. But this has mostly applied to convictions that took place before DNA proved so reliable and routine. The more forthright opponents have openly conceded and warned that, from their point of view, DNA is a time bomb. Ultimately, old cases will all be resolved. What about new cases where DNA conclusively proves guilt?

Carol and Jordan Steiker feared the "peril" that, as DNA increased confidence in convictions, this could

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[45] http://www.prodeathpenalty.com/liebman/cassell_innocents.htm
[46] http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7185&context=jclc
[47] http://www.cjlf.org/files/CampbellExonerationInflation2008.pdf
[48] http://prodpinnc.blogspot.com/2013/04/the-innocent-frauds-standard-anti-death.html
[49] Transcript available at LexisNexis.
[50] http://www.truthinjustice.org/DNA-DP.htm

"salvage"[51] (622) rather than lead to abolition of capital punishment. Bryan Stevenson cautioned[52] (25) that it is "misguided" to focus on the "wrongly convicted" because, in his view, no murderer should be executed.

Ultimately, then, Fairness Phony efforts aim to save the guilty rather than the innocent. No abolitionist would ever agree that capital punishment is appropriate, even when evidence of guilt is not just beyond a reasonable doubt but "overwhelming." Indeed, that is the very definition of "abolitionist."

Although the Fairness Phonies seek precise accuracy in sentencing those they concede are guilty, the Steikers have objected to efforts to assure the factual accuracy of determining guilt in the first place. Yes, they genuflect to concerns about convicting the innocent. But their real protest is against[53] (612) "shift[ing] constitutional criminal procedure toward limiting the vindication of constitutional values … in tension with[] verdict accuracy." For them, convicting the guilty takes a back seat to "promoting abstract values (such as dignity, fairness, or equality) [even] at the expense of accuracy in criminal trial verdicts."

Translated into plain English, as will be further shown (e.g., pp. 12-13), the legal system has been hamstrung by judicially invented "constitutional" rights nowhere found in the Framers' creation. These so-called rights are often confined to blocking conviction of the guilty. And for Phonies, if the guilty go completely free, so much the better. This is not about trade-offs that free some guilty in order to guard against convicting the innocent. This is about protections solely for the clearly guilty, period.

Judicial murderer advocates have made this clear. For example, in 1977, repeat rapist Ricky Knapp[54] murdered Linda Jill Velzy, an 18-year-old college girl. He confessed three times and was caught in the act of exhuming her body for re-burial in what he thought was a better hiding place. In overturning his conviction, a bare majority[55] of New York State's highest court judges conceded that the evidence against Knapp was "overwhelming" (173, 177). On more than one occasion, New York high court judges have granted total freedom to murderers whose guilt was supported by overwhelming proof. (See below, p. 43.)

U.S. Supreme Court justices also have directed their efforts at saving the guilty rather than rescuing the wrongfully convicted. In 1968, four years before five justices invalidated all existing death penalty statutes, six justices reversed the death sentence of a cop killer. But they stressed[56] that they were *not* "render[ing] invalid the conviction, as opposed to the sentence, in this or any other case." Even overtly anti-victim[57] Justice Stevens

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[51] http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7188&context=jclc
[52] https://www.acslaw.org/files/2003%20convention_death%20penalty_panel%20transcript.pdf
[53] http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7188&context=jclc
[54] http://www.nytimes.com/1982/10/13/nyregion/conviction-of-confessed-killer-is-upset.html
[55] http://www.leagle.com/decision/198221857NY2d161_1206.xml/PEOPLE%20v.%20KNAPP
[56] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=391&invol=510#f21
[57] http://homicidesurvivors.candothathosting.com/wp-content/uploads/2014/06/DP-Values-of-Justice-Stevens-sent.pdf

(joined by O'Connor, Souter, Ginsburg and Breyer), acknowledged[58] (321) "the fact that habeas corpus petitions that advance a substantial claim of actual innocence are extremely rare …'[A]lmost never suggested … is that the prisoner was innocent ….'" Notwithstanding the presumption of innocence, Stevens even conceded:[59] "Experience teaches us that most people formally charged with crime are guilty."

In sum, because Fairness Phonies revile any execution as unfair, their focus is not on avoiding wrongful conviction but on minimizing *sentencing* of the rightfully convicted. Again, that is what this article is about.

CALIBRATION, FAIRNESS-PHONY STYLE

Notwithstanding espousal by many justices, often a majority, and countless academics, the worst that can be said about the contention – that fairness can be accurately calibrated – is that it is absurd if not outright delusional. In 1971, just one year before five[60] colleagues declared a still ongoing decades-long guerilla war[61] (185) against capital punishment, Justice Harlan observed[62] that there could be "no simple formula" to identify cases calling for the death penalty.

(A) The Paramount Value: Because Victims Don't Count, Don't Count Victims

"Garbage-in/garbage-out" is a term coined because no calculator can yield results any better than the data fed into it. Because any formula or computer model for "accurately" calibrating morality is going to depend on its criteria, the line is crossed from the silly to the sinister when confronting actual proposed concrete fairness factors. In reality, these factors are nothing but the value judgments of the programmers. Fairness Phonies themselves thus provide the best refutation of their precision-morality oxymoron.

In this regard, a striking Indiana University Law School Symposium[63] devoted to a proposed "model death penalty code," is "must-reading" for living violent-crime victims, tormented murder victims' survivors, as well as those who care about them and, yes, for those who care about fairness – must-reading because it demonstrates just what they are up against. This conference exposes the murderer-advocate mindset[64] in all its naked ugliness. It is highly doubtful that its recurring one-sided "fairness" motif would ever be accepted by most law-abiding people.

The participants proclaim, as an *axiomatic* presumption merely to be asserted without any need to be demonstrated, that the criteria for capital punishment must be extremely "narrow" to ensure that its

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[58] http://www.supremecourt.gov/opinions/boundvolumes/513bv.pdf
[59] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=435&invol=333#f12
[60] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=408&invol=238
[61] http://www.supremecourt.gov/opinions/boundvolumes/512bv.pdf
[62] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=402&invol=183#204
[63] http://www.repository.law.indiana.edu/ilj/vol80/iss1/
[64] http://homicidesurvivors.candothathosting.com/wp-content/uploads/2014/06/NYT-Mindset-.pdf

imposition is "rare" – a value shared and imposed by justices who decree mercy for merciless murderers. Having made it rare, they turn around and complain that it is unfair because it is rare. This sets the stage for the real objective: to save *all* murderers, no matter how many victims they slaughter and how brutally.

In pursuit of their objective, Fairness Phonies do not worry about *victims.* Indeed, they dare not if they are going to torture[65] already traumatized victims and create[66] new ones without being conscience-stricken. Obviously, it is far easier to champion convicted murderers when their victims are completely ignored and not given one second's thought. If murderer-advocate justices had their way, which five once[67] did, victims would be thrown out of court[68] (16). In their world,[69] fairness has little or nothing to do with victims, who are or should be a non-calibrated non-factor. And victims with the temerity to speak up in protest must be treated with hostility[70] and contempt.[71]

Victims' view of justice is unworthy of consideration. Lest there be any doubt, the Symposium's welcoming remarks and four panel discussions take up roughly 44-45,000 words. Of that number, the word "victim" appears 19 times according to Microsoft Word. The majority of mentions are general, while seven profess false concern for victims to justify death penalty opposition. There is not a single mention of victims as a factor in support of capital punishment.

Victims simply do not count in fairness or "moral accuracy" calibrations. This point is glaringly punctuated by Sundby's 2350 words devoted to his quest for "Moral Accuracy,"[72] which do not include the word "victim" – not once!

Thus, a critical factor is banished from the fairness calculus. It does not appear to occur to the panelists to weigh the value of a barbaric savage against the value of his decent, law-abiding victim(s). For Fairness Phonies, this is unnecessary because, as noted, they assign virtually no value to the lives of victims while prizing highly those of savage murderers. The hypocrisy is mind-boggling when, like Justice Brennan, they also prattle on and on about the "human dignity" of their idols and how everyone is equally human. It turns out that, in their eyes, victims are far less equal than their torturers.

As Dr. William A. Petit poignantly and agonizingly explained:[73] "If you allow murderers to live,

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[65] http://homicidesurvivors.candothathosting.com/wp-content/uploads/2014/06/NOTION-OF-JUSTICE.pdf
[66] http://homicidesurvivors.candothathosting.com/wp-content/uploads/2014/06/Sinister.pdf
[67] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=482&invol=496
[68] http://www.law.cornell.edu/supct/pdf/07-5439P.ZC1
[69] http://homicidesurvivors.candothathosting.com/wp-content/uploads/2014/06/VICTIM-SYMPATHIES-OF-JUSTICES.pdf
[70] http://homicidesurvivors.candothathosting.com/wp-content/uploads/2014/06/Sleazy-Semantics.pdf
[71] http://homicidesurvivors.candothathosting.com/wp-content/uploads/2014/06/DP-Values-of-Justice-Stevens-sent.pdf
[72] http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1677&context=ilj
[73] http://ctmirror.org/death-penalty-opponents-take-new-tack/

you're giving them more regard, more value, than many people who have been murdered."

This is clearly demonstrated by data that *can* be calculated. Simply stated, between 1972 and 2012, there were 783,832 murders[74] resulting in 1,369 executions[75] as of February 26, 2014, or 0.175%. In other words, the life of one murderer is worth the lives of 572 murder victims. That is one measure of the value placed on victims and murderers by the unrepresentative elitists who have captured the legal system. Another measure is provided by leading death penalty "abolitionists," who have unashamedly declared[76] that they prefer the murders of 100 decent, law-abiding victims to the execution of one convicted murderer.

Moreover, while abolitionists, as discussed above, constantly allege wrongful convictions, their worst case only serves to demonstrate the position taken here. The self-styled Death Penalty "Information" Center touts what it calls an "Innocence List"[77] of those supposedly "exonerated" (but not one actually executed – see below, p. 52). If, for argument's sake, the list is taken at face value, as of September 8, 2014, its total number was 146 – 146! Many, if not most, of that number were anything but innocent (see, e.g., here[78] and here[79]). In any event, compare 146 to 783,832 murder victims. There is absolutely no doubt that all of the latter were absolutely innocent. For the record, 146 is 0.0186% of 783,832.

Finally, on April 26, 2014, *The Economist* implied[80] that the death penalty should be abolished because America's homicide rate "declined sharply" to 4.7 murders per 100,000 people in 2012. This was conveniently omitted: in a population of 314 million, that antiseptic-sounding number equals 14,827 murders,[81] with grief multiplied by all the loved ones suffering from the losses. Meanwhile, the same people who so airily dismiss the murders of nearly 15,000 innocent, law-abiding people go ballistic that, in 2013, 39 barbarians[82] were executed and, as noted, 1,369 were executed for nearly 800,000 murders in four decades. To top off the insult added to the horrific injury of real victims, another professor found it "disturbing"[83] (458) when hundreds of thousands of murders in 26 years resulted in 3,000 very much alive convicts on death rows.

Yet again, hard numbers show that death penalty opponents place an extremely high value on convicted murderers' lives and a very low value, if any, on those of their victims. The fact, that murderer advocates often

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[74] http://www.disastercenter.com/crime/uscrime.htm
[75] http://www.clarkprosecutor.org/html/death/usexecute.htm (As of February 26, 2014.)
[76] http://books.google.com/books?id=xVUdAAAAQBAJ&pg=PA50&lpg=PA50&dq=black+bedau+1,000+percent&source=bl&ots=HPwJKSkvkO&sig=7-slLH0sBzsqDryjLCjouVO7zO8&hl=en&sa=X&ei=o1USU_XZA8qZ1AH5r4CQCg&ved=0CCYQ6AEwAQ#v=onepage&q=black%20bedau%201%2C000%20percent&f=false
[77] http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row
[78] http://homicidesurvivors.candothathosting.com/2010/04/09/press-release-exonerated-former-death-row-inmate-reconvicted/
[79] http://www.cjlf.org/files/CampbellExonerationInflation2008.pdf
[80] http://www.economist.com/news/united-states/21601270-america-falling-out-love-needle-slow-death-death-penalty
[81] http://www.disastercenter.com/crime/uscrime.htm
[82] http://www.clarkprosecutor.org/html/death/usexecute.htm
[83] http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1443&context=wmborj

feel a need to feign sympathy for victims, shows just how inexplicable and untenable their true values are.

To homicide survivors and those who care about them, the idea that the lives of murder victims are as valuable as, if not far more than, those of their murderers is as elementary as 2+2. But, for murderer devotees, this concept may as well be rocket science. The latter hold sacred the lives of the most brutal murderers while disdaining the lives of their victims. Illustrating the vast gulf between murderer and victim supporters, Emily Bazelon sees 1,300 executions as "shockingly *high*."[84] Victims and other law-abiding people should be forgiven if they view that number as "shockingly *low*." Again, 1,369 executions are 0.175% of 784,000 murders. Compare that to the Phonies' dismissive attitude toward 14,827 murders in a single year.

Clearly, contrary to the Fairness Phony false contention that wrongful executions are rampant (above, pp. 5-6), the tragic truth is that even well-deserved executions are not rampant. Indeed, one of the reasons all capital punishment statutes were nullified in 1972 was that there were "so few" executions (below, p. 34).

The hypocrisy of these numbers is breathtaking. Fairness Phonies rant about what is least quantifiable: conscience and value judgment. Yet they ignore what *can* be quantified. Their utterly one-sided view of fairness is demonstrated by at least four different numbers – new victims they would sacrifice to save one murderer, "victim" mentions, execution rates and their own infinitesimal "innocence list."

Many if not most law-abiding individuals would likely consider inclusion of victims to be vital to any evaluation of fairness. Nevertheless, with victims scorned by those who misrule the legal system, no one should be surprised by frequent indefensibly irrational sentences.

MURDERER-ADVOCATE NIRVANA: VICTIMS OUT-OF-SIGHT/OUT-OF-MIND

Indiana Symposium participant Edwin Colfax made the goal clear:[85] "fairness in the application of the death penalty *among the guilty*…." (Emphasis added.) In 2011, when Oregon's governor attacked[86] the death penalty, to save a convicted murderer previously kept alive to commit a second brutal[87] murder, John Kitzhaber announced his personal[88] view of "fairness and justice": it is "morally wrong" to execute some for murders when others are not executed for similar murders. This is akin to Gov. Malloy's rationale quoted at the outset. Finally, Indiana panelist Sundby[89] demanded a "guarantee"[90] not only that murder convictions be "factual[ly] accurate," but that any jury decision to impose the death penalty be "morally accurate," a

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[84] http://www.slate.com/articles/news_and_politics/jurisprudence/2013/09/supreme_court_capital_punishment_the_potter_stewart_byron_white_compromise.single.html
[85] http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1646&context=ilj
[86] http://www.oregon.gov/gov/media_room/pages/press_releasesp2011/press_112211.aspx
[87] http://www.americanthinker.com/2012/01/crime_without_punishment.html
[88] http://www.nytimes.com/2011/11/23/us/oregon-executions-to-be-blocked-by-gov-kitzhaber.html?_r=2&adxnnl=1&adxnnlx=1407521678-GLkp/fcAh+WN18GAAVWCfA
[89] http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1677&context=ilj
[90] http://papers.ssrn.com/sol3/papers.cfm?abstract_id=661067

requirement that this punishment be "applied consistently to similar defendants for similar crimes."

Fairness is thus limited to comparing the fate of one barbarian to another. Punishment must be consistent for "similar defendants for similar crimes."

Just think about those words. They represent the essence not only of murder advocacy, but of the entire mindset of what former Attorney General Edwin Meese labeled the "criminals' lobby."[91] Deeply buried in these words is a yearning for a criminals' paradise where there is no punishment for any violent crimes.

Only in utopia can one expect identical or even similar punishment for identical or similar crimes.

First, legislators in different jurisdictions, juries and judges acutely differ about appropriate sentences. Judges howl[92] in protest when legislators limit their discretion as a result of gross sentence disparities for nearly identical crimes. As will be discussed (pp. 17-18), justices now demand "individualized sentencing." So to express dismay when this does not result in "similar sentences for similar crimes" is no different from expressing shock that custom-made clothing does not fall into the one-size-fits-all category.

Second, many criminals are never caught.

Third, on behalf of those caught, judicial sorcerers[93] (6) have drastically altered the legal system in the last 60 years to assure that it is extremely more likely[94] (7-18) that the guilty will *not* be convicted (let alone appropriately punished) than that the innocent *will* be convicted. Consider the bitter complaints of dissenting justices: "cavalier…just a game" (Scalia) (12); [95] justices "playing a grisly game of 'hide and seek[']… sporting theory of criminal justice…." (Burger);[96] "sport of fox and hound" (Rehnquist);[97] new trials for the "clearly guilty" (Black).[98] Finally, just two years ago, Justice Scalia summed up[99] (dissent, 12-13) the lengths to which activist justices have gone to protect not the innocent but the "clearly guilty":

> [E]ven though there is no doubt that [Cooper] is guilty …; even though he has received the exorbitant gold standard of American justice—a full-dress criminal trial with its innumerable … limitations upon the evidence that the prosecution can bring forward, and … the requirement of a unanimous guilty verdict by impartial jurors; the Court says that his conviction is invalid …. I am … saddened by … this Court's attitude toward criminal justice. The Court … embraces the sporting-chance theory of criminal law, in which the State functions like a conscientious casino-operator, giving each player a fair chance to beat the house, that is, to serve less time than the law says he deserves. …

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[91] http://news.google.com/newspapers?nid=1291&dat=19810529&id=QSJUAAAAIBAJ&sjid=gY0DAAAAIBAJ&pg=2899,5606435
[92] http://www.nytimes.com/2003/12/08/nyregion/new-york-s-federal-judges-protest-sentencing-procedures.html
[93] http://www.law.cornell.edu/supct/pdf/97-7541P.ZD
[94] http://www.law.cornell.edu/supct/pdf/04-1170P.ZC
[95] http://www.law.cornell.edu/supct/pdf/00-8452P.ZD1
[96] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=430&invol=387#416
[97] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=443&invol=916
[98] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=394&invol=217#241
[99] http://www.supremecourt.gov/opinions/11pdf/10-209.pdf

(Justice Scalia's reference to limiting evidence merits a comment. As *Law and Order* fans know, defendants often seek exclusion of what reliably proves their guilt. Justices imposed this "exclusionary rule" upon the states in 1961[100] after refusing to do so in 1949.[101] Sold[102] as protecting "*all* persons" against unlawful privacy violations by police, this rule actually *benefited criminals exclusively*. As explained[103] by Justice Frankfurter, "exclusion of evidence ... serves only to protect those upon whose person or premises something incriminating has been found." Innocent people whose privacy has been violated may sue the taxpayers for any "official lawlessness" of their employees, the police, but they obviously cannot reap the special court-created reward of being freed despite clear proof of guilt of the most brutal crimes. Meanwhile, it is the future victims of freed barbarians who are punished, not the police. What a bizarre way to punish "unlawful police conduct"!)

So the only way to meet the consistency-among-criminals view of fairness is to punish no one for any criminal act because it is certain that some will go unpunished – even when guilt has been clearly established!

But now, consider the complete inanity, if not utter fraudulence, of confining fairness to consistency among guilty barbarians – without regard to victims.

(A) Justice Stewart's Lightning

As noted at the outset, Justice Stewart objected to death sentences in some cases because they were not imposed in many others. To him, they were wanton, freakish and "cruel and unusual in the same way [as] being struck by lightning …." This comparison suffers from three serious defects.

First, although, on a prominent criminal law blog, outrage[104] was expressed at a recent 5-4 opinion barely mentioning the victims of brutal rape-murders and denigrating their humanity, in reality, this has been standard operating procedure of anti-capital punishment justices for decades. Thus, Stewart's 1972 analogy showed, right from the start, that ignoring victims was an indispensable weapon in the unelected justices' war against capital punishment. Stewart disregarded the law-abiding victims of rape, torture and murder. He expressed no concern that they, too, are chosen "in the same way [as] being struck by lightning" – ignoring that being struck by lighting is a tragic accident or Act of God. By stark contrast, murder is deliberate, unlawful and "wantonly and … freakishly imposed" by the very barbarians seeking mercy and fairness.

Second, Stewart disregarded the ancient equitable doctrine of unclean hands.[105] Simply stated, the

[100] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=367&invol=643
[101] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=338&invol=25
[102] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=367&invol=643#655
[103] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=338&invol=25#t1
[104] http://www.crimeandconsequences.com/crimblog/2014/05/insulting-the-memory-of-victim.html#comments
[105] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=277&invol=438#t15

courts will not entertain the pleas of those with legally dirty hands.[106] People cannot seek redress for acts they themselves have engaged in. Although this has been used in civil cases, it applies to crimes.[107]

Stewart's lightning objection was on behalf of cruel individuals who "wantonly and freakishly" selected innocent victims to be "struck by lightning." He sought fairness for those who had committed the ultimate acts of unfairness – and in the very cases addressing that ultimate unfairness. It would be no surprise if, in the judgment of most homicide survivors, anyone who commits the worst imaginable unfairness forfeits – or should forfeit – any claim to fairness among his peers – let alone precision fairness.

This deserves repetition and the utmost emphasis. ***The clean hands standard dictates that anyone guilty of the worst imaginable unfairness should be deemed to have forfeited any claim to fairness!***

In his separate opinion joining the 1972 declaration of war against capital punishment, Justice White conceded:[108] "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." Clearly guilty murderers, who have intentionally plunged their hands far into the filth of the ultimate unfairness, have (or should have) no claim to fairness. But for those obsessed with murderers, if all do not receive their just deserts, none should. No justice is better than some justice. No one contemplating murder should fear, even slightly, receiving his just deserts. That's what Fairness Phonies yearn.

Third, because only execution can guarantee that a murderer will not murder again, Stewart ignored the absolute certainty[109] that new law-abiding victims will by struck by lightning at the hands of those Stewart saw himself as saving from being struck by lightning. What can be more arbitrary[110] – and unfair – than the selection of victims, and infinitely more so for those murdered and raped by spared convicted murderers and rapists? The ultimate arbitrary unfairness is to protect convicted murderers and rapists at the expense of randomly sacrificed new decent and law-abiding victims. It is painful enough to lose loved ones to murder; but just imagine the excruciating pain suffered by the parent of a child tortured, raped and murdered by a savage previously convicted of murder but unfairly – yes, unfairly! – given a "second chance." Depending on one's value compass, one might consider this the supreme immorality, obscenity, arbitrariness and – lightning.

(B) From Lightning to Lunacy

While the lightning comparison is highly dubious, that is the least of it. After Stewart and his

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[106] http://dictionary.law.com/Default.aspx?selected=2182
[107] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=420&invol=671#t18
[108] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=408&invol=238#311
[109] http://homicidesurvivors.candothathosting.com/wp-content/uploads/2014/06/Sinister.pdf
[110] http://www.amnestyusa.org/our-work/issues/death-penalty/us-death-penalty-facts/death-penalty-and-arbitrariness

four accomplices, in five solo opinions, each joined by nobody else, issued their 1972 fiat invalidating all existing death penalty statutes, justices were compelled by the intensely negative public reaction to concoct an irrational if not insane Rube Goldberg mess, resulting in excruciating torture[111] of homicide survivors with decades-long litigation involving uncontested guilt. This did not concern justices engaging in repeated chicanery and fancy footwork. Justice Scalia denounced "bait and switch"[112] death penalty decisions; Justice Rehnquist said they went from "pillar to post."[113] When four anti-death penalty justices failed to prevail, even they complained: "the Court has lost its way in a procedural maze[114] of its own creation." Needless to say, they did not acknowledge their own role in begetting this judicial muddle.

In 1971,[115] unfettered jury discretion in deciding whether to impose a death sentence was declared constitutional. But in 1972,[116] the death penalty was held unconstitutional because juries had *too much* discretion. In 1976,[117] some death penalty statutes were held unconstitutional for supposedly providing *too little*[118] discretion although they had been newly enacted in good faith precisely to comply with the 1972 fiat. States thus had to figure out how many discretion angels could dance on the head of a Supreme Court pin.

It would be pointless here to attempt a detailed constitutional analysis. To paraphrase Prof. Lino Graglia,[119] what justices did had absolutely nothing to do with the Constitution – other than using it as a subterfuge to misuse power to impose personal values upon a public that did and does not share those values.

Justice Scalia notes[120] (2) that, for nearly two centuries, it was not considered possible that justices could "interpret" the Constitution to abolish the death penalty. Of course, for any five justices determined to dictatorially impose their personal values on everyone else, "interpret" is really a synonym for "misinterpret."[121] Or, as Rehnquist put it, to pursue their cause, these justices "conscripted[122] rather than interpreted" the Constitution. The best evidence that they did not faithfully apply the Constitution is that they repeatedly changed what they said it meant, despite the fact that there had been no new Constitutional Amendment regarding the death penalty. Not one written word of the Constitution had changed while justices kept saying, with lightning speed, that the words meant something different from case to case.

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[111] http://homicidesurvivors.candothathosting.com/wp-content/uploads/2014/06/NOTION-OF-JUSTICE.pdf
[112] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=494&invol=433#ff5
[113] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=438&invol=586#629
[114] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=477&invol=527#541
[115] http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?navby=case&court=us&vol=402&invol=183
[116] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=408&invol=238
[117] http://www.law.cornell.edu/supremecourt/text/428/280
[118] http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?navby=case&court=us&vol=428&invol=325
[119] http://hillsdaletest.com/items/show/399
[120] http://www.law.cornell.edu/supct/pdf/07-5439P.ZC2
[121] http://homicidesurvivors.candothathosting.com/wp-content/uploads/2014/06/Humpty-Dumptys.pdf
[122] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=428&invol=280#324

Justices themselves have implicitly acknowledged that they change the Constitution without bothering to require duly ratified amendments. But that might not be fair to those sentenced more harshly before judicial *de facto* amendments than they could have been afterwards. A vast case law[123] was thus spawned to grapple with whether and when a "new constitutional rule" applies retroactively to cases already decided.

This is an absolutely damning indictment: how can there be "new constitutional rules" for an old Constitution that the people did not change? Justice Stevens,[124] flip-flopper extraordinaire,[125] has insisted that the Court does not[126] (6) "devise" or "create" new rules of law, but only "articulates" what "pre-exists" in the *original* Constitution. But he also has accused fellow justices of "newly mint [ing]"[127] (n75) and "inventing"[128] (14) rules "out of whole cloth." So he argued (a) justices do create new rules despite (b) not doing so.

Is that clear?

Although Rehnquist complained[129] that "reasonable predictability … has been all but completely sacrificed," there actually has been one predictable overriding principle: an end-justifies-the-means dedication to saving convicted barbarians, facilitated by contempt for victims. If justices cannot save *all* murderers, they nevertheless "demand" that the number of murderers "eligible" for capital punishment be "narrow."

Like guilty suspects who are aware of their rights but confess because they can't help themselves, justices cannot resist revealing their utter arrogance. Yes, they give lip service to the Constitution, but nevertheless reveal, with Freudian slip after Freudian slip, what they really do while hiding behind that once-sacred document. Thus the *Court* "demanded"[130] so-called narrow "death eligibility" (Stevens); "*we* prohibited"[131] execution of certain convicted barbarians and "*we* have established substantive limitations" on the death penalty (Powell); death sentences reduced[132] "as a result of" (28) the *Court's* rules justified by a "necessity to constrain" (29) capital punishment (Kennedy). (All emphases added.)

"Narrowness" of "death eligibility" and "necessity to constrain" capital punishment are pure judicial fantasies enabled by unconstrained judicial arrogance. Absolutely nothing in the Constitution requires the certain sacrifice of decent, peaceful, non-violent people in order to keep alive the most violent and dangerous.

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123 http://books.google.com/books?id=UVtOAQAAQBAJ&pg=PA196&dq=%22new+constitutional+rule%22&hl=en&sa=X&ei=AHI4U__cOcPksASV3YLYCg&ved=0CDQQ6AEwAA#v=onepage&q=%22new%20constitutional%20rule%22&f=false
124 http://homicidesurvivors.candothathosting.com/wp-content/uploads/2014/06/DP-Values-of-Justice-Stevens-sent.pdf
125 http://homicidesurvivors.candothathosting.com/wp-content/uploads/2014/06/Stevens-One-Sided.pdf
126 http://www.law.cornell.edu/supct/pdf/06-8273P.ZO
127 http://www.law.cornell.edu/supct/pdf/08-205P.ZX
128 http://www.law.cornell.edu/supct/pdf/06-278P.ZD
129 http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=438&invol=586#629
130 http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=506&invol=461#501
131 http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=481&invol=279#305
132 http://www.law.cornell.edu/supct/pdf/07-343P.ZO

Make no mistake about it. As Justices Scalia[133] and Thomas[134] (dissent, 9) have protested, this was an illegitimate imposition of justices' personal moral preferences, misusing the Constitution as a pretextual fig leaf. Single-minded devotion to saving the lives of those convicted of depravity consistently led to completely contradictory rationales professing that the Constitution meant whatever this devotion required it to mean. Consistent pursuit of the goal produced wildly inconsistent "interpretations."

As noted, this was necessitated by the strong negative reaction to the bare majority's attempt to ban capital punishment outright in 1972; 35 states[135] responded with new or amended death penalty statutes. In turn, unnoticed by the public, artful justices sought to slowly[136] eviscerate the death penalty, turning it into a potemkin punishment village. To again quote Justice Scalia[137] (185): "The heavily outnumbered opponents of capital punishment [made] this unquestionably constitutional sentence a practical impossibility." These opponents included justices who, hiding behind a "fog of confusion," abused their power to strike blow after "blow"[138] (751-52) against the People in [their] campaign against the death penalty"

Some states sought to deal with the 1972 objection to too much jury discretion by removing all discretion and making capital punishment mandatory for first degree murder. If five justices objected that juries had too much discretion, resulting in too few death sentences to be fair, these states would remove jury sentencing discretion. However, anti-death penalty justices refused to stand for that either. Suddenly, they declared that it was not fair if juries considered only the crimes but not the criminals who committed them.

(C) Criminals vs. Crimes

In 1976, four years after invaliding statutes purportedly because they resulted in *inconsistency*, the Court invalidated statutes that sought *consistency* by making the death penalty mandatory for all first degree murders. However, Justice White dissented from the Court's own inconsistency:[139] having four years earlier invalidated unfettered jury death penalty discretion, "we are now in no position to rule that … eliminat[ing] overt" jury discretion "suffers from the same constitutional infirmities…." Nevertheless, a controlling plurality of three justices proclaimed[140] (C) that a mandatory death penalty statute unconstitutionally denied "particularized" consideration of "the character and record of each [individual] convicted defendant … exclud[ing] … compassionate or mitigating factors stemming from the diverse

[133] http://www.law.cornell.edu/supct/pdf/00-8452P.ZD1
[134] http://www.supremecourt.gov/opinions/11pdf/10-9646.pdf
[135] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=428&invol=153#232
[136] http://www.floridalawreview.com/2010/j-richard-broughton-the-second-death-of-capital-punishment/
[137] http://www.supremecourt.gov/opinions/boundvolumes/512bv.pdf
[138] http://www.supremecourt.gov/opinions/boundvolumes/504bv.pdf
[139] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=428&invol=325#346
[140] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=428&invol=280#t38

frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings…" Justice Rehnquist responded[141] that the plurality did not come "within a light-year" of supporting "the principle that the Constitution required individualized consideration." (Significantly, 18 years later, when Justice Blackmun openly declared his determination not to enforce death penalty laws, he conceded[142] (1150) that "individualized sentencing in capital cases was not considered essential at the time the Constitution was adopted." Thus, because justices did not like the actual Constitution, they changed it on their own – in arrogant defiance of the crystal clear procedures[143] prescribed for amending the document.)

The 1976 cases were so inconsistent that the same justices declared that juries in mandatory death penalty cases simultaneously and impermissibly had *both*[144] too little[145] discretion – and[146] too much![147]

In 1978[148] and 1982,[149] absurdity was taken to the limit, as justices suddenly purported to find in the Constitution a command that everyone convicted of a capital crime be given a chance to present *any* "evidence" that might "mitigate" his barbaric deed to avoid a death sentence. For those too obtuse to understand, many years later, Justice Sotomayor helpfully clarified[150] the need for mitigation: a crime might be too heinous to be explained yet, at the same time, could be "mitigated" to save a murderer's life. More on mitigation later (p. 27).

Over the years, as summarized[151] by Justice Stevens, he and colleagues sabotaged capital punishment by (1) banning it for barbaric crimes *they* deemed "insufficiently depraved" (e.g., any rape, even torturing little girls); (2) saving designated barbarians (nearly 18-year-olds, the allegedly retarded who calculatingly plot rape and murder); (3) compelling admission of all so-called "mitigating" evidence; and (4) restricting admission of "aggravating" evidence. ("Sabotage"[152] is Justice Scalia's characterization.)

"REASONED MORAL RESPONSE": THE GREAT FAIRNESS FRAUD

The latter two factors – compelling admission of all "mitigating" evidence, while restricting "aggravating" evidence was sold by justices as "guiding" juries to "reasoned moral response"[153] or

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[141] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=428&invol=280#321
[142] http://www.supremecourt.gov/opinions/boundvolumes/510bv.pdf
[143] http://www.archives.gov/federal-register/constitution/article-v.html
[144] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=428&invol=325#346
[145] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=428&invol=280#301
[146] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=428&invol=280#t37
[147] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=428&invol=325#334
[148] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=438&invol=586#604
[149] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=455&invol=104#110
[150] http://homicidesurvivors.candothathosting.com/wp-content/uploads/2014/06/Sotomayor-Mdrr-Adv.pdf
[151] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=506&invol=461#501
[152] http://www.pewforum.org/2002/01/25/session-three-religion-politics-and-the-death-penalty/
[153] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=506&invol=461#493

"reasoned moral decision."[154] This terminology exemplifies what George Orwell long ago explained[155]: manipulation of language to achieve political goals.

Murderer-advocate justices mask their true intent: to stack the deck in favor of depraved barbarians and against their victims. No matter how much these justices may deny it, it is they who appeal to emotion, not reason. Seeking the utmost avoidance of victims and their suffering, they want to avoid "reason" in order to maximize sympathy for the most brutal savages.

In sum, they want to ***focus on criminals and avoid focus on their crimes (i.e., the very reasons for punishment)***, because the latter focus necessarily entails impact on actual victims and thwarts portrayal of murderers as the true victims.[156] Justice Stevens made this clear in shockingly unreported cases that an unbiased media would have made lead stories on televised evening news and front pages of major newspapers.

In 2007, taking the rare[157] (8) step of reading[158] his dissent[159] from the bench and joined by three other justices, he objected to revealing that Cal Coburn Brown had committed robbery, torture, rape, murder and attempted murder. Falsely calling mere *mention* of these crimes a "graphic description of the underlying facts," Stevens accused the majority of "attempt[ing] to startle the reader or muster moral support for [their] decision." Obviously, he and his cohorts wanted to keep secret what Brown really did. Anyone who wants to know why can find the actual "underlying facts" here.[160]

Stevens fully let the cat out of the bag in 2008. Many law-abiding people, including victimized survivors, would likely be stunned to realize the depth of anti-death penalty justices' contempt for victims. As noted above (p. 13), Justice Stewart expressed little concern about *victims* "struck by lightning." In 1987, this sentiment on the Supreme Court reached its zenith, when a bare 5-4 majority of justices banned[161] presentation of victim impact evidence of harm caused by convicted murderers. This included describing the victim – the life lived and the life lost – as well as the impact on the surviving loved ones, their grief and the loss to them. In 1991, a 6-3 majority reversed[162] the ban. Notably, Justices Marshall and Blackmun, who so often had voted to change Constitutional meaning in the absence of any change in wording, whined[163] that this rare reversal favoring victims had taken place with no change in the law and was nothing but an

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[154] http://www.supremecourt.gov/opinions/12pdf/11-10974_d1o2.pdf
[155] https://www.mtholyoke.edu/acad/intrel/orwell46.htm
[156] http://homicidesurvivors.candothathosting.com/wp-content/uploads/2014/06/VICTIM-SYMPATHIES-OF-JUSTICES.pdf
[157] http://www.aallnet.org/main-menu/Publications/llj/LLJ-Archives/Vol-102/pub_llj_v102n01/2010-01.pdf
[158] http://www.foxnews.com/story/2007/06/04/supreme-court-reinstates-death-sentence-for-man-convicted-in-carjacking-rape/
[159] http://www.law.cornell.edu/supct/pdf/06-413P.ZD
[160] https://www.courtlistener.com/wash/71Aw/state-v-brown/
[161] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=482&invol=496
[162] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=501&invol=808
[163] http://www.law.cornell.edu/supct/html/90-5721.ZD1.html

exercise of judicial power. There appears to be no limit to shameless blatant judicial hypocrisy.

As suggested by Marshall, it would take only a change in justices to restore the victim ban dear to murderer advocates. Justice Stevens never accepted admissibility of victim impact evidence, a highly persuasive "aggravating factor." In one case, he claimed[164] (16) that evidence regarding "personal characteristics of the [murder] victim and the emotional impact [on the] family" should be excluded because "it sheds no light on … moral culpability … and thus serves no purpose other than to encourage jurors to make life or death decisions on the basis of *emotion rather than reason*." (Emphasis added.)

Emotion rather than reason? Really? Months later, unable to restrain himself, Stevens fully revealed his concept of fairness. Remember, stacking the deck to save murderers requires limiting the evidence against them ("aggravating" factors) and admission of any and all "mitigating" evidence, however farfetched and irrelevant. The best way to limit "aggravating" evidence is to prevent jurors from learning the full extent of the harm done. That means keep out the victims – both those who died and their loved ones forever condemned to a living death. Turn them into "faceless stranger[s]."[165]

To do this, Stevens first called it a misnomer[166] to say that a murder victim's loved ones were themselves victims, despite the trauma inflicted by their loss. In Stevens' mind, they were downgraded to mere "third parties." Jurors should never hear about *their* suffering at the hands of convicted murderers.

Second, and most importantly, Stevens found[167] (7) it "troubling … to rouse jurors' sympathy for the victims and increase jurors' antipathy for the capital defendants." (The latter term was a true "misnomer." During sentencing, the proper term should be "convicted murderers," not "capital defendants." They cease being defendants upon conviction.)

So that's it. ***When the likes of Stevens say they want "reasoned moral decisions" or that murder sentences should be based on reason rather than emotion, what they really mean is that such sentences should be based on sympathy for the murderer and antipathy for the victim. They don't object to emotional decisions. They want decisions "channeled" by emotion in favor of murderer***s. That is to be achieved with limited "aggravating" evidence and unjustifiably unlimited irrelevant "mitigating" evidence.

(A) Limiting "Aggravating" Factors

Since 1991, victims have had some say in sentencing proceedings.

This is far from an unmixed blessing for victimized survivors of murder victims. Their suffering is

[164] http://www.law.cornell.edu/supct/pdf/07-5439P.ZC1
[165] http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?navby=volpage&court=us&vol=490&page=821#821
[166] http://www.supremecourt.gov/opinions/08pdf/07-11073stevens.pdf
[167] http://www.supremecourt.gov/opinions/08pdf/07-11073stevens.pdf

protracted and intensified. They are compelled to relive their worst nightmares again and again and yet again, as anti-death penalty Fairness Phonies drag out cases for decades with repetitive abusive proceedings[168] intended solely to delay or prevent the executions of convicted murderers whose guilt is not in doubt.

Do the Phonies ever concern themselves with whether that is fair?

(1) *Impact on Victims*

(a) *Phony Fairness to Victims: Who Really Cares?*

Death penalty opponents not only seek to restrict evidence of harm to victims, they often add insult to injury by contending that it is *they* who are truly concerned about victims.

For example, after doing all they can to torture homicide survivors[169] with endless bogus legal claims eagerly entertained by their "impartial" judicial supporters, they profess deep concern[170] for victims: if only the loved ones would surrender[171] by agreeing to keep murderers alive, that would end the litigation torture engaged in by the litigation torturers themselves. Not only is that extortion, it is also a lie.

It is a lie because torture will never end as long as a murderer is alive. As soon as Fairness Phonies save his life, they proceed[172] (520) to an endless struggle for his freedom – with a chance to commit further violence resulting in avoidable torture for yet more victims. So they never intend to stop torturing homicide survivors. They merely shift the torture. Instead of the survivors having to endure endless legal proceedings to see the murderer executed (decades after his barbarity), they will have to endure[173] endless legal proceedings to oppose his release[174] from prison. (A classic case is Wilbert Rideau, discussed below, p. 35)

Well now, wait a minute! What about life without possibility of parole? Surely that would assure families of murder victims that they would never again have to endure endless parole hearings. (Supposedly[175] "bloodthirsty" Texas[176] has this option.) The few who study this subject *know* that this is a Big Lie – one of the biggest. If a legislature can enact a statute establishing so-called life-without-possibility-of-parole, a later legislature can just as easily be pressured – by the same propagandists who have obtained a number of repeals of death penalty statutes – to eliminate that option too, not only for future convicted murderers but also for those already sentenced under that false and absolutely impossible-to-guarantee promise. And if that is not

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[168] http://freebeacon.com/national-security/family-members-of-911-victims-storm-out-of-meeting-with-ksm-defense-team/
[169] http://homicidesurvivors.candothathosting.com/wp-content/uploads/2014/06/NOTION-OF-JUSTICE.pdf
[170] http://www.deathpenaltyinfo.org/node/2236
[171] https://www.aclunc.org/article/truth-about-life-without-parole-condemned-die-prison
[172] http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7185&context=jclc
[173] http://nypost.com/2014/01/07/slain-womans-son-fights-to-keep-her-murderer-behind-bars/
[174] http://www.nytimes.com/2001/01/19/nyregion/new-jersey-court-orders-parole-for-man-who-killed-two-officers-in-1963.html
[175] http://homicidesurvivors.candothathosting.com/wp-content/uploads/2014/06/MYTHS-Garland+Sharp-WP-7-18-10-LJ-WC.pdf
[176] http://www.chron.com/news/houston-texas/article/Nearly-400-capital-murder-convicts-get-life-2299362.php

enough, who can guarantee what future justices will do? Not only have justices eviscerated the death penalty over the last four decades, in the last four years,[177] they have commenced to slowly do away with[178] the life-without-parole option. It would probably be foolhardy to wager one's life-savings betting that they will stop.

Also, governors have commutation and pardon powers. Moreover, there is the ever-present fear and reality of convicted murderers escaping[179] to commit more brutality. And resourceful convicted murderers don't have to escape. They have assaulted, raped and murdered both fellow inmates and prison guards – while in prison.[180] Early in 2014, Thomas Knight[181] was finally executed for murdering a death row prison guard in 1980. Knight had been convicted of the 1974 murders of a business couple, 64 and 60. Serving a sentence *inside* prison for a prior murder, the notorious Clarence Ray Allen[182] ordered cohorts *outside* to murder three witnesses against him[183] (987-89).

In other words, to avoid the lawful execution of one cold-blooded murderer, the Fairness Phony version of morality caused the unlawful slayings of three innocent victims who performed their civic duty by testifying. What in the world is fair about that?

So again, murderer advocates seeking to end the death penalty by claiming to act out of concern for suffering homicide survivors are selling a bill of goods. They know very well that, when someone is murdered, his or her loved ones are immediately sentenced to endless torture at the hands of the very same advocates peddling this line. And only execution of the murderer will end the torture.

As long as their idols are kept alive, dedicated murderer advocates will never tire of giving the likes of convicted rapist-murderer Richard Biegenwald[184] a chance to rape, torture and murder more innocent young women. In fact, they are[185] on the job right now![186]

Bogus concern for victims, does not apply just to murderers. Declaring that a 300-pound man had a "Constitutional right" to rape an 8-year-old girl free from any fear of execution, five justices pretended this was for the victim's benefit. They feigned worry[187] (32) about the ordeal girls would face from testifying in capital proceedings. But to obtain a purported life sentence, victims would have to testify anyway, and

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[177] http://www.supremecourt.gov/opinions/09pdf/08-7412Modified.pdf
[178] http://www.supremecourt.gov/opinions/11pdf/10-9646.pdf
[179] http://www.law.cornell.edu/supremecourt/text/433/584
[180] http://www.americanthinker.com/2012/01/crime_without_punishment.html
[181] http://www.clarkprosecutor.org/html/death/US/knight1360.htm
[182] http://www.clarkprosecutor.org/html/death/US/allen1005.htm
[183] http://scholar.google.com/scholar_case?case=4023852550319512992&hl=en&as_sdt=6&as_vis=1&oi=scholarr
[184] http://www.nytimes.com/1983/05/09/nyregion/five-killings-a-fearful-silence-is-broken.html?scp=1&sq=biegenwald&st=nyt
[185] http://www.sentencingproject.org/doc/publications/inc_federalsentencingreporter.pdf
[186] http://www.prisonpolicy.org/research/sentencing_policy/
[187] http://www.law.cornell.edu/supct/pdf/07-343P.ZO

would still face their own sentences to a lifetime of fearing and testifying against efforts to free their attackers. (Having pretended concern, the justices shamelessly attacked (33) child victims as unreliable.)

(b) *Phony Fairness to Victims: Exception to the Rule.*

Fairness Phonies make an exception to their opposition to victim impact evidence, professing to care about select victims. Although they fear victim impact evidence due to the barbaric harm it can demonstrate, they have a backup claim. They "worry" that it is, yes again, "unfair" – unfair to victims who allegedly suffered less if evidence is admitted about victims who suffered more. They deplore[188] the prospect of placing a higher value[189] on some victims than others (39:33).

This professed concern rings hollow for several reasons.

First, the overriding objective is always to save murderers by wielding whatever conflicting rationales are necessary from case to case. Thus their champions also strive to keep out evidence about hapless victims leaving no one to mourn. But Chief Justice Rehnquist pointed out:[190]

> [V]ictim impact evidence is not offered to encourage comparative judgments … for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not. It is designed to show, instead, each victim's "uniqueness as an individual human being," whatever the jury might think the loss to the community resulting from his death might be. [One case[191] excluded evidence that] the victim was an out-of-work, mentally handicapped individual, perhaps not, in the eyes of most, a significant contributor to society, but nonetheless a murdered human being.

It was justices such as Brennan, Marshall and Stevens who rigidly[192] insisted that a convicted murderer be allowed to present *any* "mitigating" evidence showing his "uniqueness as an individual human being" but that such evidence regarding the victim should be strictly prohibited – *regardless of the victim's status*.

That "one-sided … moral judgment"[193] is fairness?!

Second, on Nightline January 25, 1984,[194] Alan Dershowitz complained:

> [W]e … focus [too much] on victims … [I]t 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…. [T]he defendant is the same; the act is the same; and the culpability is the same.

However, those with this view also distinguish attempted from successful murder despite the act and intent being the same. If sincere, they would agree that any act intending to kill unlawfully should be a capital crime and not depend on the victim's luck, health, ingenuity and medical care. But when a victim fails to die despite

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[188] http://www.highbeam.com/doc/1P2-1061417.html
[189] http://www.oyez.org/cases/1990-1999/1990/1990_90_5721#argument
[190] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=501&invol=808#823
[191] http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?navby=volpage&court=us&vol=490&page=805#820
[192] http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?navby=volpage&court=us&vol=490&page=805#814
[193] http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?navby=volpage&court=us&vol=490&page=805#817
[194] Original transcript in author's possession.

the best effort to murder him, Fairness Phonies have great interest in the culprit's impact on his victim.

(The differing harm and grief caused by convicted murderers is an agonizingly gut-wrenching matter. It must and will be further addressed (pp. 49-51), especially in light of the following point.)

Third, as distasteful as it may be for many to accept, in American society, everyone is equal before the law but people do not live or behave equally. Hence, the law has always treated different *conduct* differently. Yes, Justices Brennan and Marshall thought the lawful execution of a murderer was "no less shocking" than what the murderer unlawfully did to his victims (above, p. 5). Nevertheless, has political correctness obliterated any ability to appreciate differences in the conduct of Adolph Hitler and Albert Schweitzer? Can anyone not fanatically devoted to murderers doubt that murder of a president has far greater impact than other murders? Who actually believes that the murder of Lincoln did not do incalculable harm to this country? A distinct word is used for murdering a leader: assassination. It assaults his followers, what they stand for, the entire body politic and representative government.

To take another example, many find it unpleasant to face, but there is far more grief and loss inflicted by a drunk driver convicted of murdering[195] a devout mother of eleven[196] who is also a valued community leader than when a victim is alone and friendless. To disregard this is to contend that, if some murderers cause less grief and harm than others, this should benefit all murderers, by reducing so-called "moral culpability" to the least harm caused by any murderer anywhere. But is it fair for those who wreak more harm to benefit because others inflict less? If not every murderer causes the same level of grief and if Supreme Court justices demand that murderers be treated as individuals, shouldn't there also be accountability, on a case-by-case basis, for the full magnitude of the harm done to individual victims?

This is yet another example of trying to benefit murderers by comparing criminals to each other without considering the actual crimes against real victims. Thus, the Phonies argue that each murderer should benefit from the lowest sentence received by any murderer and, as a fallback position, they contend that each murderer should benefit from the least harm caused by any other murderer in crimes having nothing to do with the particular crime at hand.

Finally, regarding admissibility of evidence of actual harm done, Justice White cogently observed:[197]

> Many if not most jurors … 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

[195] http://openjurist.org/739/f2d/945/united-states-v-fleming
[196] http://trove.nla.gov.au/work/94869798?q=David+Earl&c=article&versionId=108218344
[197] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=482&invol=496#516

> merits significantly more punishment than someone who drove his car recklessly through the same stoplight …when no pedestrian was there to be hit…[I]f 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 … [J]ust as the murderer should be considered as an individual, so too the victim is [a unique] individual[.]

(2) *Limiting Other Aggravating Evidence*

In addition to seeking to restrict evidence of crime impact on victims, other limitations on "aggravating" evidence have been imposed – with considerable hypocrisy. Anti-death penalty justices limited the use of "aggravating" evidence only after first "demanding" that juries find factors sufficiently "aggravating" to warrant a death sentence. This was a judicial concoction and not a Constitutional requirement.

When, as noted (p. 1), Justice Blackmun declared that he would no longer vote to uphold any death sentence, he objected to the death penalty "as currently administered." But Justice Scalia retorted that the way the death penalty was "currently administered" was due to "incompatible commands" imposed by justices after 1972 with no basis in the Constitution.

One unschooled in the "wizardry"[198] of judicial "sophists" (dissent, 28), might consider committing first degree murder[199] sufficient to justify a death sentence, period. Justice Scalia complained[200] that his fellow justices 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." And Justice White objected[201] that banning mandatory death sentences required states to be

> constitutionally prohibited from considering any crime … so serious that every person who commits it should be put to death regardless of … his character. … ***[T]he major justification for concluding that a given defendant deserves to be punished is that he committed a crime***. Even if the character of the accused must be considered … surely a State is not … forbidden to provide that ***the commission of certain crimes conclusively establishes that the criminal's character is such that he deserves death***. [Emphasis added.]

However, for anti-death penalty justices, no crime *alone* could justify a death sentence. Juries suddenly were required to find specified but limited "aggravating" factors. But that was not enough! Any such finding ultimately had to pass muster with five justices, who also suddenly declared that they had the last word on jury findings – a fiat without a single word in the Constitution that gives them the last word and which they had not claimed to have for nearly 200 years. (No precedent was cited for this claim when

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[198] http://www.supremecourt.gov/opinions/11pdf/11-393c3a2.pdf
[199] http://criminal.findlaw.com/criminal-charges/first-degree-murder-overview.html
[200] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=504&invol=719#751
[201] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=428&invol=325#358

first[202] asserted. In later cases, the claim – labeled[203] "laugh[able]" by Justice Scalia – was cited as precedent. In other words, justices write fiction and then seek to legitimize it by citing their own unprecedented creative writing as precedent in later cases.)

For example, although Robert Franklin Godfrey described the murders he had committed as "heinous," as noted above (p. 2), Justice Stewart pronounced them insufficiently depraved to warrant a death sentence. While Justice Sotomayor condescendingly lectured other judges that brutal murders could be "mitigated" despite being too heinous to be "explained" (above, p. 18), Stewart thought murders also could be insufficiently heinous to meet "aggravation" requirements. Homicide survivors might be sorely tempted to conclude that this is undiluted gobbledygook excreted by justices who are unscrupulous lawyers[204] highly skilled in altering and twisting the clear meaning of words[205] to advance any ulterior motive whatsoever.

Removing all doubt, in a case similar to Godfrey's and decided eight years later, William Thomas Cartwright was sentenced to death for the premeditated murder of a husband and attempted murder of his wife in their home. Although he had shot her in both legs, slit her throat and stabbed her twice, she miraculously survived. Nevertheless, justices declared unconstitutionally vague[206] the jury's finding that this crime was "especially heinous, atrocious, and cruel." These words could not be an "aggravating factor" because they provided insufficient notice[207] to Cartwright that he would risk a death sentence. After all, how could he possibly have anticipated that commission of such a crime would put his own life at risk?

Only in a Fairness Phony Fantasyland could such a question be taken seriously**!**

Three further points are noteworthy regarding the Cartwright opinion. First, the justices spurned language adopted by states in reliance upon the Model Penal Code[208] (221) drafted by the prestigious American Law Institute.[209] Second, it was written by the very same idiosyncratic[210] Justice White who, in the Godfrey case, had criticized Justice Stewart for establishing the Court as a "finely tuned calibrator of depravity." Third, it was none other than Justice Stewart himself who famously said[211] of "hard core pornography" that he could not define it but "I know it when I see it." Of course, he occupied the lofty position of high court justice. Mere jurors required "guided" rather than "unchanneled" discretion because

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[202] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=433&invol=584#597
[203] http://www.law.cornell.edu/supct/pdf/07-343P.ZA1
[204] http://pjmedia.com/victordavishanson/decline-of-western-civilization/?singlepage=true
[205] http://homicidesurvivors.candothathosting.com/wp-content/uploads/2014/06/Humpty-Dumptys.pdf
[206] http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?navby=case&court=us&vol=486&invol=356
[207] http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?navby=case&court=us&vol=486&invol=356#361
[208] http://digitalcommons.law.utulsa.edu/cgi/viewcontent.cgi?article=1837&context=tlr
[209] http://www.ali.org/index.cfm?fuseaction=about.overview
[210] http://www.americanthinker.com/2012/01/crime_without_punishment.html
[211] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=378&invol=184#197

they were too stupid or too irrational or too biased to be able to recognize a particularly heinous murder. (As noted below (pp. 33-34), anti-death penalty justices make an exception: the role of the jury is sacrosanct whenever it spares a brutal murderer. In that event, the jury is exalted as the "conscience of the community.")

And by the way, try telling the family of a deliberately slain victim to take comfort because the murder of their loved one was merely ordinary but not especially heinous. Surely they will accept the "fairness" of such an assessment. This raises a key question (below, p. 51): should death for first degree murder be mandatory in order to avoid such heartbreaking distinctions?

In this vein, Indiana Symposium panelist Jeffrey J. Pokorak[212] (76) objected to accepting torture and rape as aggravating factors because, as he conceded, "almost every murder involves 'torture.'" So using these factors to warrant a death sentence would not serve the purpose of "narrowing" death "eligibility." They, too, must be excluded. After all, isn't the objective of Fairness Phonies to choke the death penalty to death?

Trivializing the gravity of barbarity is one weapon. Another is to canonize barbarians as saints.

(B) ***"Mitigating" Factors:***

(1) ***Anything Under the Sun?***

Was Justice Rehnquist resorting to hyperbole when he accused fellow justices of encouraging the "bizarre" use of "anything under the sun"[213] to save the lives of convicted murderers?

As originally concocted by justices, states were ordered to allow introduction of any evidence that might "mitigate" an unlawful murder, such as a bad life or a not too bad criminal history. But it was not long before anti-death penalty justices ordered that anything – absolutely anything! – must be allowed, including events occurring long after the murder and evidence having nothing to do with the murder or the convict.

There are enough examples to fill an encyclopedia devoted to outrageous absurdities. Here, providing only a brief sample is feasible. Much of what follows falls into the you-can't-make-this-stuff-up category. Yet it's all too tragically true.

Richard Boyde may have committed premeditated murder of a store clerk begging for his life but, more importantly, he won a "dance choreography"[214] prize. Still on death row October 2, 2014, 33 years after[215] bashing a 19-year-old girl on the head nearly 20 times with an iron dumb-bell bar[216] (211) to silence her as a witness against him, Fernando Belmontes sought mitigation based on his claimed religious devotion both

[212] http://www.repository.law.indiana.edu/ilj/vol80/iss1/19/
[213] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=438&invol=586#631
[214] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=494&invol=370#f5
[215] http://www.cdcr.ca.gov/capital_punishment/docs/condemnedinmatelistsecure.pdf
[216] http://openjurist.org/350/f3d/861/belmontes-v-s-woodford

before (37) and after (177) his crime. In addition, two federal appellate judges declared his barbarity to be not "especially heinous" (211) – so much for "aggravating" factors. (On convicted murderers "getting religion," for a rare honest media presentation on this subject, as well as on false innocence claims, see here.[217])

Placing icing on the cake, four Supreme Court justices advocated the concept of "forward-looking mitigation[218] [17] … the possibility that [Belmontes] would lead a constructive life" in prison. Not only does this have absolutely nothing to do with his brutal crime, they conceded that it was only a "possibility." It is also "possible" that a particular murderer will murder again and certain that some murderers will.

When justices try to "mitigate" past murders with rank speculation about what *might* happen in the future, this demonstrates how desperate they are to save the depraved – and the lengths they will go to do so.

Is it any wonder that Richard Cooey argued that he was "too fat"[219] to execute? Why shouldn't that mitigate the fact that all he had done[220] was to abduct, rape, beat and strangle to death two college girls. Throat-slasher Joseph Murphy contended that an executioner might have cancer.[221] Regarding health, a reason given for not executing quadruple-murderer Clarence Ray Allen, referred to above (p. 22), was that, while scheduled to die anyway, Allen might find the stress of thinking about his impending execution so great that he could have a heart attack[222] and die. Jonathan Simmons, who beat and sexually attacked four old ladies (including his own grandmother) and murdered one of them, must be allowed to "succeed" in arguing for mercy because he "only preyed on elderly women"[223] (176) and would not be able to do so in prison.

A contestant for an award as one of the most appalling anti-death penalty lawyers should be attorney Jeremiah Donovan. His client, Joshua Komisarjevsky (and Stephen Hayes) broke into the home of prominent Connecticut physician, Dr. William A. Petit, Jr. They robbed, tortured, sexually attacked and murdered Dr. Petit's wife and two daughters. They tried to murder Dr. Petit but, amazingly, he survived. Donovan engaged in vicious personal attacks on everyone in sight, including the judge and the victims. But he really outdid himself, and almost every other anti-death penalty attorney, when he sought to minimize the depravity by claiming that Komisarjevsky had only "ejaculated upon"[224] rather than sodomized one of the murdered girls.

These are the kinds of people who prattle about being "fair" to murderers.

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[217] http://www.springfieldspringfield.co.uk/view_episode_scripts.php?tv-show=the-closer&episode=s02e12
[218] http://www.law.cornell.edu/supct/pdf/05-493P.ZD
[219] http://www.blueridgenow.com/article/20080804/NEWS/811005242
[220] http://www.clarkprosecutor.org/html/death/US/cooey1124.htm
[221] http://news.yahoo.com/lawyers-seek-details-ohio-executioners-cancer-063034669.html
[222] http://nl.newsbank.com/nl-search/we/Archives?p_product=CERB&p_theme=cerb&p_action=search&p_maxdocs=200&s_dispstring=allfields%28heart%20attack%29%20AND%20date%2811/18/2005%20to%2011/18/2005%29&p_field_date-0=YMD_date&p_params_date-0=date:B,E&p_text_date-0=11/18/2005%20to%2011/18/2005%29&p_field_advanced-0=&p_text_advanced-0=%28%22heart%20attack%22%29&xcal_numdocs=20&p_perpage=10&p_sort=YMD_date:D&xcal_useweights=no
[223] http://www.supremecourt.gov/opinions/boundvolumes/512bv.pdf
[224] http://www.nytimes.com/2011/08/30/nyregion/signs-of-provocative-defense-in-cheshire-triple-murder-case.html?pagewanted=all&_r=0

For sheer absurdity, lawyers for Sean Vines used the famous 2000 election case of *Bush v. Gore* to oppose executing their convicted murderer. This was rejected[225] (889) by the California Supreme Court.

Any television viewer knows that a bad childhood is a golden oldie in the save-a-saintlymurderer-today hit parade. That includes having a parent[226] who drank[227] (3) or abused drugs. Also alleged to be part of a bad childhood is growing up poor. Of course, this fails to explain why most poor people with bad childhoods do not commit murder and are, in fact, the most likely victims. Also, even if poverty breeds crime, former Attorney General Nicholas Katzenbach argued[228] (492), it does not follow that crime should not be fought: "so many persons guilty of crime would be insulated from conviction that our system of prevention and deterrence would be crippled. This would in fact increase the suffering of the less favored in our society, for it is they who live in the high-crime areas and they who are the usual victims of crime."

Why exactly is it fair to increase the suffering of poor law-abiding people in order to protect poor vicious people?

Poverty as mitigation is used too often to require illustrations. But isn't that "unfair" to privileged barbarians who cannot plead being poor? Not to worry. Clarence Darrow[229] did not bat an eyelash. He contended that being born rich was a "grievous misfortune,"[230] a curse,[231] that "poverty is fortunate."[232] Thus his rich child-murderer clients were the true victims, and "compared with [their] families," the parents of the murdered boy were to be "envied—and everyone knows it."[233] At the same time, Darrow proclaimed[234] that "nobody … sympathizes with [the latter] more than I."

When pondering how a point has been reached in which victims are to be envied and premeditated murderers are victims, remember that Darrow set the standard for being a great lawyer who "towered over the legal profession."[235] These are the kinds of people true victims confront and who have turned the concept of fairness upside down. And it is business as usual for U.S. Supreme Court justices.

The upshot: in Fairness Phony heaven, murderers win and victims lose. One might think that, under "individualized sentencing," the better off are presumed to know better, more should be expected of them, and

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[225] http://scholar.google.com/scholar_case?case=4668583375690329311&hl=en&as_sdt=6&as_vis=1&oi=scholarr
[226] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=498&invol=308#314
[227] http://www.law.cornell.edu/supct/pdf/05-1575P.ZD
[228] http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1290&context=articles
[229] https://openlibrary.org/books/OL6479541M/The_plea_of_Clarence_Darrow_August_22nd_23rd_25th_MCMXXIII_in_defense_of_Richard_Loeb_and_Nathan_Leo
[230] https://archive.org/stream/pleaofclarenceda00darr#page/68/mode/2up/search/misfortune
[231] https://archive.org/stream/pleaofclarenceda00darr#page/74/mode/2up/search/curses
[232] https://archive.org/stream/pleaofclarenceda00darr#page/4/mode/2up
[233] https://archive.org/stream/pleaofclarenceda00darr#page/116/mode/2up
[234] https://archive.org/stream/pleaofclarenceda00darr#page/86/mode/2up
[235] http://books.google.com/books?id=iwd4Ez3g_vgC&q=towered+over+the#v=onepage&q=darrow%20towered&f=false

hence punishment should be greater. If poverty is mitigating, shouldn't wealth and a good home be the opposite? But Darrow argued that advantage was itself mitigating. So 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.

Related to poverty vs. wealth is intelligence vs. alleged stupidity of the murderer. According to Indiana Symposium panelist Pokorak[236] (77), it is unfair to execute those who are "careless… leaving physical evidence behind" and are not "clever … criminal masterminds [or] planners." Justice Scalia had a simple answer:[237] "why should the dull-witted suffer for his lack of mental endowment? [The] Constitution protect[s] the guilty as well as the innocent, but it is not [its] objective to set the guilty free. That some clever criminals may employ [procedural] 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." Decades earlier, Judge Bazelon complained that it was "discriminatory"[238] (486) that professional criminals "know their rights," while the ignorant and inexperienced do not. Attorney General Katzenbach responded (494): "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."

If some can beat the rap, all must beat the rap! That's the Fairness Phony rallying cry in a nutshell. That is the result when the major sentencing consideration is the criminal rather than his crime.

While there is no end to the outrageous arguments made to "mitigate" the savage deeds of brutal murderers in order to save their lives, a few deserve special recognition.

(2) *A Dishonor Roll of Mitigation Hypocrisy and Duplicity*

(a) *Too "Intellectually Disabled" to Understand? Psychiatrists vs. Jurors*

Discussed above was the solicitude of murderer advocates for those not clever enough to avoid capture. In 2002, six justices took mitigation beyond mere stupidity. They barred execution of the allegedly "retarded" or, in up-to-date politically correct parlance, "intellectually disabled."

One problem with this is that, while it may be hard to do well on a test, it is not hard to do poorly on purpose[239] (17). A much greater problem is the conflict between common sense and ivory tower theories. For example, consider the repeat rapist and premeditated murderer, parolee Johnny Paul Penry. This rock star[240]

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[236] http://www.repository.law.indiana.edu/ilj/vol80/iss1/19/
[237] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=498&invol=146#166
[238] http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1290&context=articles
[239] http://www.law.cornell.edu/supct/pdf/00-8452P.ZD1
[240] http://bonnie2__1.tripod.com/westofeden/id1.html

of murderer groupies[241] carefully selected and stalked his victim, Pamela Mosely Carpenter, tortured her and raped her. He then murdered her because[242] "***I had to so she wouldn't squeal on me.*** … I knew that if I … raped her that I would have to kill her because she would tell … and ***I didn't want to go back to the pen***." (Emphasis added.) Nevertheless, based on obviously fanciful retardation claims, murderer advocates, including U.S. Supreme Court justices, were able to drag out his case for 28 years, mercilessly and additionally torturing Carpenter's family[243] for decades, until, after three death sentences by three different juries, the family and prosecutors surrendered, agreeing to a purported life sentence. (Carpenter's brother is a Hall of Fame football star; no one is immune from abuse by justices for the benefit of murderers.)

Anti-death penalty justices twice saved Penry's life in the face of juries that rejected the claim that someone who carefully planned and thought out a rape-murder was retarded or "intellectually disabled." This cold-blooded barbarian knew exactly what he was doing and that it was wrong, unlawful and subject to lawful punishment. Nevertheless, his retardation appeals never stopped and ultimately succeeded.

Ordinary people with ordinary common sense might wonder how someone who carefully plans a rape and murder that he fully understands is wrong can be considered retarded.

The answer: "expert" psychiatrists.

As recently as May 27, 2014, five murderer advocates posing as impartial justices, not in so many words, but in essence, ceded[244] (7-12) authority over capital punishment to anti-death penalty psychiatrists. Of course, the latter easily match the former in presumptuousness and arrogance.

To understand, it is worth considering a seemingly unrelated matter, the 1984 presidential election. Between them, Ronald Reagan and Walter Mondale had decades of public service and appearances. Nevertheless, a psychiatry professor at a highly prestigious medical school, "Distinguished Professional"[245] Leopold Bellak, M.D., warned[246] that nothing less than the "fate of the world" depended on subjecting these experienced high profile candidates to tests of mental ability provided by his profession. For Bellak, the judgment of the voters based on their knowledge of the candidates' careers was just not good enough!

Reagan and Mondale did not submit to Bellak's tests but, with a sigh of relief, the world luckily

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[241] http://www.deathrow.at/
[242] http://scholar.google.com/scholar_case?case=7180231972302216627&hl=en&as_sdt=6&as_vis=1&oi=scholarr
[243] http://www.nytimes.com/2000/11/17/us/supreme-court-stops-execution-of-texan.html
[244] http://www.law.cornell.edu/supct/pdf/12-10882.pdf
[245] http://www.nytimes.com/2000/03/30/us/leopold-bellak-83-expert-on-psychological-tests.html
[246] http://www.nytimes.com/1984/08/26/opinion/l-letters-one-more-checkup-for-candidates-156809.html?action=click&module=Search&region=searchResults&mabReward=relbias%3Aw&url=http%3A%2F%2Fquery.nytimes.com%2Fsearch%2Fsitesearch%2F%3Fsrchst%3Dcse%23%2Fleopold%2Bbellak%2Ffrom19840822to19840829%2F

survived. However, Ewa Berwid was not so lucky. Her husband, Adam,[247] had promised repeatedly to murder her, assuring a judge in open court that he would do so if given the chance. But he was granted freedom for a day by two psychiatrists convinced that they knew best. Such was their arrogance that they did this without alerting prosecutors or Ewa despite large red warnings written on Berwid's file folder urging that this be done. Only psychiatrists would be surprised that Adam promptly stabbed Ewa multiple times in front of their children, leaving them with a lifetime of nightmarish memories.

This is but one example. A tome would be required to recount the many lives lost due to mistakes of psychiatrists and other "experts." (See here,[248] here[249] and here[250] for more on misguided psychiatry.)

Now back to the decision by five justices to effectively substitute psychiatrists for jurors in their anti-capital punishment crusade. The five blocked an execution for what they themselves described this way:[251]

> On February 21, 1978, Freddie Lee Hall … and his accomplice, Mark Ruffin, kidnaped, beat, raped, and murdered Karol Hurst, a pregnant, 21-year-old newlywed. Afterward, Hall and Ruffin drove to a convenience store they *planned* to rob … [T]hey killed … a sheriff's deputy who attempted to apprehend them. [Emphasis added.]

A detailed analysis of this extraordinary opinion cannot be undertaken here. However, six points stand out.

First, this case has been tied in knots and dragged out for 36 years, during which at least two different juries sentenced Hall to death.

Second, this case parallels the Leopold Bellak proposal, except that presidential candidates are free to reject psychiatric nostrums; those trapped in a legal system ruled by whimsical judicial fiats are not so free. What the May 27 fiat boils down to is the imposition of rule by so-called "experts" over common sense. As with Penry, how can someone be considered retarded when he plans a crime and commits a murder on the rational basis that he does not want to be identified? Adding to the arrogance of these justices is *their own* quotation[252] (4) of the sentencing judge:

> [n]othing of which the experts testified could explain how a psychotic, mentally-retarded, brain-damaged, learning-disabled, speech-impaired person could formulate a plan whereby a car was stolen and a convenience store was robbed.

In a word, the jury and the judge rejected the experts in favor of obvious common sense; the justices rejected the judge, the jury and common sense in favor of the experts. Time and time again, experts have

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[247] http://www.teresacarpenter.com/voice_murder.pdf
[248] http://ageoflucidity.files.wordpress.com/2013/06/szasz-thomas-s-the-myth-of-mental-illness-foundations-of-a-theory-of-personal-conduct-2nd-1974-no-ocr.pdf
[249] http://www.nytimes.com/2012/09/12/health/dr-thomas-szasz-psychiatrist-who-led-movement-against-his-field-dies-at-92.html
[250] http://psychwatch.blogspot.com/
[251] http://www.law.cornell.edu/supct/pdf/12-10882.pdf
[252] http://www.law.cornell.edu/supct/pdf/12-10882.pdf

been shown to be foolish at best and dangerously destructive at worst (e.g., here,[253] here[254] and here[255]).

Third, closely related to the second point, this case is a parody of a parody. The absurdity that sentences can be can be "calibrated" "scientifically," with "precision" and "moral accuracy" already has been explored and need not be repeated here. Justice White's reference to justices assuming the role of "finely tuned calibrators of depravity" was an objection to their own subjective declaration that Robert Godfrey's brutal murder of his wife and mother-in-law was not "materially" more depraved than other murders.

On May 27, five justices went further, not themselves evaluating what Freddie Hall actually did, but relying on the ever-changing calibrations[256] (Alito, 8-9) of psychiatrists alleged to be experts. Murderer advocates may say this is "fair." But for victims, this can only be seen as the height of unfairness and injustice.

Fourth, in other contexts, Justice Scalia has accused other justices of relying very selectively upon precedents, foreign law[257] (14) and legislative history, in order to achieve their preferred outcomes. Citing Judge Harold Leventhal, he called[258] this "the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends."

Similarly, the Hall opinion ignores experts who justify placing[259] retarded people in residential areas on the very ground[260] that they are no more dangerous than anyone else. Even Justice Stevens conceded (13):[261] "There is no evidence that they are more likely to engage in [premeditated] criminal conduct than others…." So, 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? Only the five justices' selected "experts" would dispute that a truly retarded person is incapable of *planning* rape, robbery and *rationally* motivated murder.

The final two points require special emphasis.

(i) *Justices and Jurors: Schizophrenia or Duplicity?*

Fifth, as previously noted (p. 3), the Supreme Court has said that the jury expresses the "conscience of the community." When it has suited their prejudices, anti-death penalty justices have expressed veneration for juries. For example, Justice Stevens one-upped the earlier statement. Not only does the jury express

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[253] http://www.amazon.com/The-Experts-Speak-Authoritative-Misinformation/dp/0679778063
[254] http://ptchanculto.binhoster.com/books/-Pol- Recommended Reading/Sowell, T. - Intellectuals and Society/Intellectuals and Society.pdf
[255] http://lib-161.lse.ac.uk/archives/fabian_tracts/235.pdf
[256] http://www.supremecourt.gov/opinions/13pdf/12-10882_kkg1.pdf
[257] http://www.law.cornell.edu/supct/pdf/02-102P.ZD
[258] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=507&invol=511#519
[259] http://www.nytimes.com/1988/01/17/nyregion/group-homes-for-retarded-gaining-success-and-goodwill.html
[260] http://www.scu.edu/ethics/publications/iie/v2n1/nimby.html
[261] http://www.law.cornell.edu/supct/pdf/00-8452P.ZO

community's conscience, it is "the decisionmaker that is best able"[262] to do so, a point he later reiterated[263] (518-19). In a landmark 2002 case,[264] justices "effectively declare[d][265] five States' capital sentencing schemes unconstitutional" (3) because they did not require juries to find the existence of "aggravating factors" not required[266] by the Constitution in the first place. Five years ago, seven justices (including Souter, Breyer and Kennedy) declared[267] (3): "Jurors routinely serve as impartial factfinders in cases that involve sensitive, even life-and-death matters. ... [I]n all cases, juries are presumed to follow the court's instructions [and] exclude ... raw emotions." Two murderer sympathizers,[268] Justices Sotomayor and Breyer, recently extolled[269] (n2) the virtues of juries deciding punishments in accordance with their consciences.

But remember, anti-death penalty justices never lose sight of their objective: to save fairly convicted murderers. The May 27 Hall rescue is but a recent example of many. These justices confine their exaltation to juries whose consciences result in saving the precious lives of brutal barbarians. The same justices do not hesitate to disregard juror consciences that impose death sentences. And to confuse matters even more, when it has suited their objective, anti-capital punishment justices have faulted juries for imposing "so few"[270] death sentences. This flies in the face of the avowed objective (above, p. 16) to "narrowly constrain" what they call "death eligibility" and thus have "few" death sentences.

In a word, for justices opposed to capital punishment, juries can be trusted when they do not impose death sentences and cannot be trusted when they do impose such sentences. For these justices, as Justice Scalia remarked (above, p. 12), it is "just a game." Again, murderers win; victims lose.

Sixth, when the same justices (a) profess to find sacred those jury decisions not imposing death, and yet (b) show complete disrespect for juries that vote for death sentences (even preferring the constantly mutating speculations of psychiatrists), only the willfully blind can fail to see that these justices are brazenly dishonest, prepared to change their justifications from case to case, and guided only by what they find most expedient to support their diktats on behalf of brutal murderers.

(b) *Too Smart to Understand*

Discussed above (p. 29) was the challenge faced by murderer advocate Clarence Darrow, who could

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[262] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=468&invol=447#tt3
[263] http://www.supremecourt.gov/opinions/boundvolumes/513bv.pdf
[264] http://www.law.cornell.edu/supct/pdf/01-488P.ZS
[265] http://www.law.cornell.edu/supct/pdf/01-488P.ZD
[266] http://www.law.cornell.edu/supct/pdf/01-488P.ZC
[267] http://www.supremecourt.gov/opinions/08pdf/08-1034.pdf
[268] http://www.americanthinker.com/2011/08/the_threat_of_liberal_judicial_activism_reaches_new_heights.html
[269] http://www.supremecourt.gov/opinions/13pdf/13-5380_08l1.pdf
[270] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=428&invol=280#315

not plead that poverty mitigated the cold-blooded murders committed by his wealthy clients. A similar quandary is faced in the age of denials of "moral culpability" due to "diminished intellectual capability." What is a murderer advocate to do with a clearly brilliant murderer who does not even deny his guilt?

Take the case of Wilbert Rideau. No one can accuse this award-winning writer[271] of not having superior intelligence. Nevertheless, three different juries in two different venues convicted and sentenced to death this bank robber-murderer (1961, 1964, 1970). Each time, he was rescued by appellate judges, twice by justices of the U.S. Supreme Court. After delaying an incredible 28 years, he sought and received from murderer-friendly appellate judges a fiat ordering[272] a *fourth* new trial. Obviously, by 2005, 44 years after Rideau's multiple acts of savagery, there was not much prosecutors could do with 13 witnesses no longer available. So the fourth jury found him guilty of manslaughter, and he was freed to become, not an "ex-con," but an honored "cult hero"[273] and star murderer advocate.[274]

One fact, standing out above all others, demonstrates everything that is wrong with a so-called "justice system" that has been sabotaged by judges hostile to capital punishment. Rideau never denied[275] that, in committing a premeditated bank robbery, he (a) kidnapped three employees, (b) took them to a secluded area, (c) shot them and (d) repeatedly stabbed the one who was unable to escape to make doubly sure she was dead.

Instead, he claimed: he "never … intended…to hurt anybody"; the robbery went bad; and he abducted and shot the employees in unpremeditated panic because they tried to flee (stabbing the one who failed to make it). One of his coterie of murderer advocates added that this was all "incredibly stupid and tragic."

Is that what nowadays is the chic characterization of the premeditated brutalization of three human beings, including the murder of one? A mere stupid mistake?

As to the stabbing and shootings being unintentional, are a loaded guns and a lethal knives brought to planned bank robberies by mistake? To accept this, one has to believe that a person of clearly superior intelligence could not possibly understand why he was committing this planned bank robbery with the aid of multiple lethal weapons rather than, say, an unloaded gun. Moreover, one has to believe that, when robbery victims confronted by deadly weapons seek to run for their lives, it is *their* fault if they get hurt and the heavily armed robber did not intend to murder all three although he only was able to repeatedly stab one of them to make sure she was dead.

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[271] http://www.wilbertrideau.com/
[272] http://caselaw.findlaw.com/us-5th-circuit/1365508.html
[273] http://crimevictimsmediareport.com/?p=3291
[274] http://www.wilbertrideau.com/capital-defense-consultant.html
[275] http://www.nytimes.com/2005/01/17/us/17rideau.html?pagewanted=all&_r=1&

In addition to the incredible fraudulence of this non-intent claim, explained in detail here,[276] the Rideau case is also a classic illustration that life-without-parole is an utter fraud. (Above, p. 21.) Once a murderer's life is unfairly declared more valuable than those of his victims, a campaign often begins to get him out of prison. In these cases, appeals never stop; trials never stop. Rideau spent more than four decades abusing the legal system until he finally found the right judges to get him out of jail. After the fourth trial, a jury sprung him. As the district attorney said, there could no longer be a case once 13 key witnesses were unavailable.

Rideau has now had 53 years more than Julia Ferguson. That's what the Phonies think is fair.

Also, this case graphically illustrates that advocates for murderers and victims will never agree on what is fair. Rideau's lawyer called[277] the killing "a terrible act, a criminal act, one for which he deserves great punishment, but not one for which he deserves to be locked up for the rest of his life. He did a terrible thing, but it wasn't murder." How many victims' advocates could possibly believe that that wasn't murder, that three juries which convicted Rideau of murder got it wrong when there were witnesses available to testify?

One need not be a lawyer to understand the difference between an unintended accident and a murder. If a pedestrian is unintentionally hit by a car and the driver does not run, that is an accident. By contrast, it is quite another matter when a driver deliberately runs somebody down.[278] A bank robbery planned and committed with lethal weapons is not an accident.

There is no end to cases where murderer advocates claim murders were not murders. To cite just one other example, New Jersey's Supreme Court overturned a death sentence by alleging that it was not clear[279] (93-94) that a rapist intended to kill a victim he viciously stabbed 53 times, including 18 in the genital area.

In the final analysis, it makes no difference to murderer advocates whether a murderer's intelligence is very low or very high. Their goal is to try to bamboozle juries and justices to accept the notion that planned murders were not planned.

But perhaps "bamboozle" is the wrong word. Surely, judges and justices know exactly what they are doing: saving cold-blooded murderers, using any and all available tricks. That is one reason why this article refers to them as Phonies.

(c) *Premeditation as Mitigation*

Clearly, nothing fazes double-talking murderer advocates. For them, murder is indeed "mitigated" by "anything under the sun." Thus, they alleged that Rideau did not intend to commit murder.

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[276] http://crimevictimsmediareport.com/?p=3291
[277] http://www.nytimes.com/2005/01/16/national/16rideau.html?fta=y&module=Search&mabReward=relbias%3Ar&_r=0
[278] http://murderpedia.org/female.H/h/harris-clara.htm
[279] http://www.njleg.state.nj.us/committees/dpsc_final.pdf

But what if murder *was* intended? That was no problem for one of the most notorious murderer advocates ever to hold high office, former California Chief Justice Rose Bird. Openly opposing capital punishment, she voted against all 61 death sentences[280] to come before her. She and two colleagues were removed[281] by California's voters who had had enough. (Of course, the whole country's voters do not have the luxury of being able to rid themselves of lawless murderer advocates on the U.S. Supreme Court).

On behalf of Maurice Seton Thompson, Bird wrote for a 4-3 majority overturning his death sentence because – because he *did intend* to commit murder. She implied, with obvious insincerity given her entire record, that she would have upheld the sentence were murder *not* his primary intent. She declared[282] (325) that Thompson was "primarily a killer instead of a thief" because the prosecution failed to establish that his crime was 'a murder in the commission of a robbery [rather than] the exact opposite, a robbery in the commission of a murder.'" Again, guilt was uncontested.

And again, heads-the-murderer-wins, tails-the-victim-loses. The standard murderer-advocate argument is that murder was not intended; but if it helps the murderer, it will be argued that, yes, murder *was* intended.

(d) *Execution Methods*

As indicated above (p. 14), brutal murderers, with blood on their "unclean hands" and guilty of the worst unfairness, have forfeited any legitimate claim to fairness. So, homicide survivors and their supporters might find it galling for the cruelest individuals to claim they should not be executed because this might cause undue suffering. Obviously, an execution is not fun. But neither is torture by a barbarian facing execution.

Further adding to the sheer gall of those making this argument is that they have danced from method to method. The electric chair to replace hanging. The gas chamber to replace the electric chair. Lethal injection to replace the gas chamber. Now they disingenuously[283] scream about lethal injection. In order to complain about "botched" executions, physicians have been pressured[284] not to participate, preventing those with the most skill from assuring absence of complications. Further compounding their gall,[285] anti-death penalty activists repeatedly have exerted enormous pressure[286] to make the quickest acting drugs unavailable[287] and then alleged that available drugs are too slow-acting.

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[280] http://www.nytimes.com/1999/12/06/us/rose-bird-once-california-s-chief-justice-is-dead-at-63.html?pagewanted=print
[281] http://articles.chicagotribune.com/1986-11-19/news/8603270146_1_california-justices-justices-rose-bird-california-supreme-court
[282] http://scholar.google.com/scholar_case?case=9801550712636168134&hl=en&as_sdt=6&as_vis=1&oi=scholarr
[283] http://prodpinnc.blogspot.com/2014_06_08_archive.html
[284] http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion206.page
[285] http://www.medicaldaily.com/oklahoma-executions-delayed-european-lethal-injection-drug-suppliers-refuse-sell-us-prisons-271568
[286] http://www.tulsaworld.com/news/courts/death-row-inmate-killed-teen-because-she-wouldn-t-back/article_e459564b-5c60-5145-a1ce-bbd17a14417b.html
[287] https://www.aclunc.org/news/new-records-handed-over-dea-show-prison-officials-may-have-broken-law-when-importing-lethal

Nothing could better illustrate the duplicity of these people in the service of murderers.

Nothing could better illustrate their heartless ruthlessness in further torturing loved ones who have suffered the trauma of needlessly and avoidably being robbed of persons dear to them by vicious murderers.

As Justice Scalia put it[288] (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." Meanwhile, families of those brutally murdered endlessly suffer from frivolous litigation about executions that opponents seek to make painful for the very purpose of propagandizing the public into revulsion against capital punishment.

(e) *Turning Torture of Victimized Homicide Survivors into a Mitigating Factor*

The Sixth Amendment of the U.S. Constitution refers to a "speedy trial." Here's a small sample of what anti-death penalty justices and other murderer advocates have made of that.

- The *New York Times* squealed[289] in anguish just before John Ferguson[290] was executed on August 5, 2013. After all, he only had committed eight murders, six 36 years earlier.
- On November 20, 2013, Joseph Franklin[291] was executed for a murder committed 36 years earlier. In reality, he had many murders under his belt, convicted of eight[292] and boasting of 20.
- On January 8, 2014, Thomas Knight, discussed above (p. 22), was executed for murder of a prison guard 33 years earlier while in prison for two other murders six years before that.
- In June, 1974, John Jacob Dougan slaughtered an 18-year-old boy pleading for his life. Dougan sent audio tapes to the media and the boy's mother describing the savagery in detail and bragging[293] (3) about what he had done and how much he had enjoyed it. As of September 23, 2014, Dougan was still on death row,[294] 40 years later. Why?!
- And let's not forget Johnny Paul Penry (above, pp. 30-31), saved after 28 years and three jury death sentences and only because his victim's family and prosecutors could take no more delay-abuse.

While it is, hopefully, not the goal of murderer-advocate justices (e.g., here,[295] here,[296] here[297]) to torture victims, they surely have shown a "depraved indifference"[298] to the victim agony they cause, often amounting to disdain.[299] This suffering is caused by interminable delays "demanded" (above, p. 16) by justices, forcing victims to endlessly relive and relive their losses and the resulting pain.

Lest anyone conclude that this agony is bad enough, it does not stop there. For Justices Stevens and Breyer ***advocate turning justices' unwarranted torture of victimized homicide survivors into a mitigating***

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[288] http://www.supremecourt.gov/oral_arguments/argument_transcripts/05-8794.pdf
[289] http://www.nytimes.com/2013/08/05/opinion/florida-ignores-the-supreme-court.html?_r=0
[290] http://www.clarkprosecutor.org/html/death/US/ferguson1343.htm
[291] http://www.clarkprosecutor.org/html/death/US/franklin1355.htm
[292] http://murderpedia.org/male.F/f/franklin-joseph.htm
[293] http://www.law.fsu.edu/library/flsupct/71755/op-71755.pdf
[294] http://www.dc.state.fl.us/activeinmates/deathrowroster.asp (As of July 17, 2014; murder committed July 15, 1974)
[295] http://www.americanthinker.com/2012/12/justice_sotomayor_and_murderer_advocacy.html
[296] http://www.americanthinker.com/2011/08/the_threat_of_liberal_judicial_activism_reaches_new_heights.html
[297] http://www.americanthinker.com/2012/03/for_whom_their_hearts_bleed_the_odd_sympathies_of_liberal_justices.html
[298] http://definitions.uslegal.com/d/depraved-indifference/
[299] http://homicidesurvivors.candothathosting.com/wp-content/uploads/2014/06/NOTION-OF-JUSTICE.pdf

factor for the very murderers of their loved ones. Yes, that's right! The largely unreported reaction of justices responsible for such travesty is not concern for the slain person or that person's traumatized family, but for the murderer! Stevens,[300] Breyer, their academic acolytes[301] and, recently,[302] a rogue federal judge have contended[303] that murderers who game the system long enough should be spared the death penalty because *they* thereby have suffered too much.

Breyer has often wailed[304] (3) 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. By contrast, Justice Thomas retorted[305]: "It is incongruous to arm capital defendants with [a Byzantine] arsenal of 'constitutional' claims [to] delay their executions, and simultaneously to complain when executions are inevitably delayed" (3, 2).

Incongruous but ever so devious and calculating!

Say this for Justices Brennan and Marshall. They did not hide their death penalty opposition while mangling the Constitution. By contrast, concealing their actual absolutist personal values and realizing they could not get away with outright abolition of capital punishment, other justices schemed to slowly eliminate it while faking support. Justice Stevens was a classic,[306] voting to save convicted murderers when his was a deciding vote but often not when he lacked the votes. Moreover, after openly declaring his refusal to uphold any death sentence (above, p. 1), Justice Blackmun revealed[307] this: "One of the Justices called me, and I don't think I should say this, but he said, I'm very proud of you for taking that position."

There can be little doubt that some justices have flatly opposed capital punishment but felt it impolitic to disclose that – resorting instead to destroying it on a case-by-case basis, waging a "guerilla war," in Justice Scalia's words (above, p. 8). Thus Stevens and Breyer voted for contrived delays as a ploy to advance their true goal. As Breyer[308] (3) put it, delay is not compatible with the death penalty. In other words, abolish it.

It is justices such as these, not voting flatly to abolish the death penalty, who have turned the legal system into a nightmare for homicide survivors and a farce undreamed of by the Constitution's Framers.

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[300] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=000&invol=u10302
[301] http://scholarlycommons.law.wlu.edu/wlulr/vol54/iss1/7/
[302] http://www.cacd.uscourts.gov/sites/default/files/documents/Jones%20v.%20Chappell.pdf (July 16, 2014.)
[303] http://www.supremecourt.gov/opinions/08pdf/08-7369Stevens.pdf
[304] http://www.law.cornell.edu/supct/pdf/98-9741P.ZD
[305] http://www.law.cornell.edu/supct/pdf/98-9741P.ZA
[306] http://homicidesurvivors.candothathosting.com/wp-content/uploads/2014/06/DP-Values-of-Justice-Stevens-sent.pdf
[307] http://www.pbs.org/newshour/bb/law-jan-june94-blackmun_press_conf/
[308] http://www.supremecourt.gov/opinions/10pdf/11-6029.pdf

The mostly anti-death penalty media[309] conceals a closely-kept secret from the public. Justices who inflict torture upon grieving survivors, to save brutal murderers and rapists, violate federal law and their own precedent. Unlawful[310] torture, as defined[311] by federal statute, includes the intentional infliction of "severe…mental pain or suffering." The high court itself has declared[312] that "a punishment is barred by the Eighth Amendment [even when there is] no physical mistreatment, no primitive torture[, if it] subjects the individual to … ever-increasing fear and distress." Yet justices torture survivors to protect the torturers of their loved ones. Either justices are oblivious to the pain they inflict upon victimized survivors or, like Rhett Butler, they just "don't give a damn."

(f) *Safety in Numbers*

During an epidemic, people normally cry out to do more to alleviate the problem. For example, legislators enact laws calling for stiffer sentences when there are crime waves. Supreme Court justices, however, have turned this common sense on its head. According to a 5-4 anti-capital punishment majority, the Constitution – or at least their rewritten maimed version – decreases[313] (28) punishment for a crime when the number committing it rises. One can go through the actual Constitution with a fine-tooth comb without coming close to finding a single word placing a ceiling on the number of executions elected representatives and juries may impose for particular barbaric acts. Yet five justices, on their own, have dictated that there can never be capital punishment for rape, including the rape of little girls, no matter how brutal or how much injury and trauma are caused. Because there are so many rapists, allowing capital punishment for them would cause too many executions and therefore be inconsistent with the justices' concoction that it is "necess[ary] to constrain"[314] (29) this penalty.

This is what happens when the focus is upon criminals instead of their crimes. When to their advantage, punishment then depends upon criminals as a group rather than the crimes they individually commit. If it will benefit the depraved criminal, the glories of "individualized sentencing" are thrown out the window. The depraved individual is rewarded, not for his own past, but for what has utterly nothing to do with him or his brutal deeds. Here, fairness is not "similar punishments for similar offenses." Fair punishment is not based on comparison with sentences others receive, but rather depends upon how many others perpetrated the same outrage, even if they all receive the same sentence. As the number goes up, the maximum punishment goes

[309] http://ssrn.com/abstract=1346142
[310] http://www.law.cornell.edu/uscode/text/18/2340A
[311] http://www.law.cornell.edu/uscode/text/18/2340
[312] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=356&invol=86#101
[313] http://www.law.cornell.edu/supct/pdf/07-343P.ZO
[314] http://www.law.cornell.edu/supct/pdf/07-343P.ZO

down. The barbarian is rewarded because too many of his "professional colleagues" do the same thing.

Thus "fairness," according to five justices, requires that child rapists should be protected because there are so many of them. There would be just too many executions to be tolerated by the sensibilities of justices doing everything they can to limit the number of executions, not because this runs counter to the Framers' intent but because justices don't like capital punishment, regardless of what the public and juries want.

Talk about safety in numbers – for the rapists!

(g) *How the Worst Aggravating Factor Became the Best Mitigating Factor*

For nakedly indefensible irrationality employed to save the lives of murderers championed by Fairness Phonies, nothing can surpass turning the most aggravating factor into the most mitigating factor. When a barbarian's record of achievement results in a purported *life* sentence without parole and he cannot receive a death sentence, any new savagery he manages to commit is *automatically mitigated to zero*.

Consider Lemuel Smith, Gary Haugen and Ehrlich Anthony Coker. Each of these sterling murder-advocate heroes received zero punishment for the most savage acts of brutality.

- A bare majority[315] of New York State's highest court judges rewarded[316] Smith for his prior barbaric misdeeds, so that he received no punishment[317] for the torture, rape and murder of a 31-year-old mother of three and prison guard, Donna Payant (including biting off her nipples, his trademark). The judges upheld the guilty verdict while neutering its significance by making it punishment-free.
- For a new barbaric murder, Haugan, a rapist-murderer, received the personal fairness blessing of Oregon's Gov. Kitzhaber (above, p. 11), who blocked Haugan's execution. Kitzhaber was apparently unconcerned about the fairness of subjecting a second human being to extreme barbarity enabled only by a grant of "mercy" for prior barbarity.
- Not to be outdone, seven U.S. Supreme Court justices prohibited[318] any punishment for Coker's rape, under threat of death, of Elnita Carver three weeks after she gave birth.

Coker was rewarded for having a record so bad that he was already under a life sentence for previous rape, attempted murder and successful murder. To be clear, the justices reversed Coker's sentence for raping Carver on the ground that adult rape was not serious enough to warrant the death penalty. Four justices even declared that rape could be innocuous; after all, "Mrs. Carver was unharmed."[319] (Lest anyone wonder why this article refers to Justice White as idiosyncratic, these words were written by him. He was all over the capital punishment map, which does not render invalid the many excellent observations he did make. Like Longfellow's little girl,[320] when he was good, he was very, very good; when he was bad, he was horrid.)

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[315] http://www.leagle.com/decision/198410463NY2d41_1101
[316] http://www.nytimes.com/1984/07/04/nyregion/captial-punishment.html
[317] http://www.crimelibrary.com/notorious_murders/not_guilty/lemuel_smith/14.html
[318] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=433&invol=584#605
[319] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=433&invol=584#587
[320] http://www.bartleby.com/360/1/120.html

Adding further irrationality, had Coker raped Carver *before* rather than *after* he had committed murder, perhaps the Carver rape conviction could have been used as an "aggravating" factor to justify a death sentence for murder. But since he raped Carver after the murder conviction, for which he already had been given a "life" sentence, he could not be punished for the new rape – the justices' door prize for the prior murder. In other words, Coker was given a gold star for the *sequence* of his crimes.

Because Coker committed the murder (and other barbaric acts) first, that was not sufficiently aggravating to permit execution for Carver's rape. In fact, nothing could be sufficiently aggravating to warrant capital punishment for rape, period.

A decade after justices bestowed the gift of life upon rapists with a history of murder, they asserted that the Constitution prohibits the people's representatives from mandating[321] capital punishment for any further savagery by those already serving an ostensible life sentence, including rape and murder. In other words, the absolutely worst depraved criminals were granted a "Constitutional" opportunity to avoid punishment for all additional violence they commit – either in jail or by escaping or after inexplicable release.

Perhaps victims should be thankful for small favors. Anti-capital punishment justices did not ban the death penalty for murder; they only ruled that it could not be mandatory for new murders and that it could never be imposed for any additional barbaric violence short of murder committed by a convicted murderer. The latter includes threatened murder, attempted murder and the most vicious assaults and rapes.[322] So, at a minimum, as far as justices are concerned, any convicted murderer supposedly serving a life sentence is free to commit, without fear of further punishment, any violence he wishes if his new victims do not die.

And, of course, where[323] state judges, legislators and governors have banned or repealed the death penalty, even additional murders can be committed free from punishment.

It is widely accepted that a convict's record *must* be considered, because the worst records warrant the severest sentences while lack of a bad criminal history justifies leniency. Indeed, that is behind Supreme Court justices' anti-capital punishment fiats dictating that any and all "mitigating" evidence, including a convicted murderer's record, must be admitted so as to minimize death sentences.

This might make sense in an ivory tower on a judicial Mt. Olympus. However, as Justice Holmes[324]

[321] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=483&invol=66
[322] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=433&invol=584
[323] http://homicidesurvivors.candothathosting.com/wp-content/uploads/2014/06/Crime-Without-Punishment.pdf
[324] http://www.constitution.org/cmt/owh/commonlaw01.htm

famously wrote, "[t]he life of the law has not been logic: it has been experience." Painful experience and loss of innocent lives demonstrate that, if a predator already serving a life sentence cannot be executed, he has a free pass to commit, without fear of further punishment, new violent crimes (including rapes and murders) for the rest of his life. Other than death, what punishment can be added to a life sentence?

As Chief Justice Burger succinctly explained,[325] unavailability of the death penalty prevents any "effective punishment" and renders states unable to "protect innocent persons from depraved human beings."

When a criminal's record is so depraved that it immunizes[326] him from any punishment for further crimes, far from making sense, this is lunacy on stilts.

Was this really required by the Constitution's Framers? Is it really fair?

And this is only part of the irrationality of the so-called "justice system"!

(h) *The Judicially Created Mitigating Benefits of Repeat Violent Crime*

One-upping U.S. Supreme Court justices, judicial murderer advocates on New York State's highest court have gone beyond banning punishment for new criminal violence by those already serving life sentences. At least they are kept in prison when caught. In New York, clearly guilty murderers who committed prior violent crimes have been allowed to go *scot-free* – because they committed prior violent crimes!

Can't believe it? Well, an aptly entitled movie, *Outrage*,[327] provides a rare – and amazingly accurate – media portrayal of the absurd lengths to which some judges go to free brutal murderers. Those who don't trust any media should consult the dissent of three judges[328] (236, 239):

> A defendant who commits a crime while out on bail should not be immune from questioning by police with respect to his latest criminal acts. Such a rule … benefit[s] the repeat offender….[T]he police … did not know defendant had counsel on … earlier charges [and] defendant never indicated in any manner that he desired the aid of an attorney … [T]he majority … carries the right to counsel to unheard of extremes.
>
> It is the common criminal, not the one-time offender, who nearly always … [has] at least one serious charge pending, so that the attorney in the picture can provide him with virtual immunity from questioning in subsequent investigations. … [The] majority has …provid[ed] what is in effect a dispensation for the persistent offender.

Further details and protests concerning New York's "embarrassing," "incomprehensible" and "unjust" protection for career criminals can be found "here"[329] and "here."[330] When career criminals have greater protection against conviction than first time offenders, this again may strike many as utterly irrational.

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[325] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=433&invol=584#605
[326] http://homicidesurvivors.candothathosting.com/wp-content/uploads/2014/06/Crime-Without-Punishment.pdf
[327] http://www.imdb.com/title/tt0091709/reviews
[328] http://www.leagle.com/decision/198127853NY2d225_1260.xml/PEOPLE%20v.%20BARTOLOMEO
[329] http://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=1187&context=lawreview
[330] http://www.courts.state.ny.us/Reporter/3dseries/2011/2011_01316.htm#7CASE

(i) *The White Collar Fairness Exception*

Sentencing has been made irrational in two senses.

First, when a certain point is reached, a progressively worsening criminal record magically about-faces from aggravating to mitigating, making the worst offenders "ineligible" for further punishment no matter what additional atrocities they commit.

Second, the lack of any criminal record makes a law-abiding individual "eligible" for far harsher punishment than if he had the most violent and depraved possible criminal record. And in New York, a criminal record may render a murderer "ineligible" not only for punishment but even for conviction.

In sum, ***when punishment is determined by an obsession with criminals rather than a focus upon their crimes, sentencing becomes unrelated to the severity of crimes***.

In his classic address,[331] 74 years ago, on the role and duties of prosecutors, then-Attorney General, and later Justice, Robert H. Jackson made the following trenchant observation:

> [T]he most dangerous power of the prosecutor [is] that he will pick people … rather than…cases …. [A] prosecutor stands a fair chance of finding at least a technical violation … on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man … to pin some offense on him.

These words ring far truer today than in 1940: Harvey Silverglate contends that legislators have created so many non-violent crimes that everyone commits Three Felonies a Day.[332] Others object that almost everything has been criminalized[333] and dishonest rogue prosecutors[334] can now[335] place everyone under arrest.[336]

Now more than ever,[337] peaceful people – considered by themselves and others to be decent, hard-working and law-abiding – are being ensnared, prosecuted, persecuted and sentenced to jail as criminals. They are being financially destroyed, with their lives and families ruined. They are being punished for doing what the most violent and depraved can do with impunity (and can do far worse).

For example, defrauding the government is a serious crime that should not be excused. But should this result in a 14 to 41-year prison sentence for a man with no prior criminal record,[338] which at age 52 could be a life sentence, when high court justices ordered that Ehrlich Coker not be punished at all for rape?

Was that "fair"?

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[331] http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-by-robert-h-jackson/the-federal-prosecutor/
[332] http://www.threefelonies.com/Youtoo/tabid/86/Default.aspx#Lacey
[333] http://www.amazon.com/Go-Directly-Jail-Criminalization-Everything/dp/1930865635
[334] http://licensetolie.com/
[335] http://www.columbialawreview.org/wp-content/uploads/2013/07/Reynolds-113-Colum.-L.-Rev.-Sidebar-1023.pdf
[336] http://www.amazon.com/One-Nation-Under-Arrest-Prosecutors/dp/0891951342/ref=pd_sim_b_3/177-3241970-8687401?ie=UTF8&refRID=106SJ2EZ9QHD14T4P4QS
[337] http://store.cato.org/go-directly-jail-criminalization-almost-everything-digital-edition
[338] http://homicidesurvivors.candothathosting.com/wp-content/uploads/2014/06/IRRATIONAL-SENTENCING.pdf

As noted (p. 38), murder cases last decades. Sometimes they do not end until a convicted and sentenced murderer dies of natural causes.[339] By stunning contrast, at warp speed, Ronald J. Strong, a sick 50-year-old non-violent man, was prosecuted and sentenced to jail for having an attack of uncontrollable diarrhea[340] in a federal courthouse. As of August, 2014, a skilled gainfully employed young single mother of two, with no criminal record, faced a 42-month prison sentence for mistakenly[341] believing a permit issued for a gun lawfully purchased for self-defense in one state would be valid in neighboring state. The Supreme Court will soon decide the fate of John L. Yates, a commercial fisherman sentenced to jail for the dastardly deed of allegedly destroying three fish.[342] Still worse, former New York City Police Commissioner Bernard Kerik, himself having spent nearly four years in jail for a white collar crime, says he served with another commercial fisherman who was not only jailed for catching too many fish[343] but also had his profitable business destroyed[344] along with the livelihood of his family and a loss of tax revenue to the government (11:10).

It is not the purpose here to delve into courthouse diarrhea attacks, gun permits and fishing. Instead, the point is this. *The "disproportionately" harsh punishment for the crimes in the cases cited cannot remotely compare to rape and murder – unpenalized rape and murder!*

There is no end to examples of prosecution and persecution of hard-working and always law-abiding individuals without criminal records – often for what many people, if not most, would not even believe to be crimes. (For more, see here,[345] here[346] and here.[347]) However, those with the most barbaric records, precisely because they are the worst barbarians, have been given the "right" to commit further barbarity free from fear of any punishment.

Outside the Wonderland of Fairness Phonies, one needs no precise measuring instrument to understand that this is morally wrong and supremely unfair.

All this punctuates the vast values chasm referred to at the outset (p. 5). One side focuses upon violent crimes; the other is fixated[348] on protecting violent criminals and ruining the lives of decent, non-violent[349] (166) individuals. For the Phonies, it is "unfair" to punish the usually poor violent while not going after non-

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[339] http://blog.sfgate.com/crime/2011/02/28/hammer-murderer-is-latest-to-die-naturally-on-death-row/#ixzz1FM1eK4RU
[340] http://www.americanthinker.com/article/2013/08/fear_not_obamas_prosecutors_are_on_the_job.html
[341] http://nypost.com/2014/08/13/a-mother-a-gun-and-jersey-injustice/
[342] http://www.politico.com/magazine/story/2014/04/a-fish-story-106010.html#.U8K71DgQ671
[343] http://nypost.com/2013/11/04/bernard-kerik-congress-must-reform-prison-system/
[344] http://www.c-span.org/video/?320386-3/washington-journal-criminal-justice
[345] http://www.pennsylvaniacrier.com/filemgmt_data/files/The%20Wetlands%20Gestapo.pdf
[346] http://online.wsj.com/news/articles/SB10001424052970204903804577082770135339442
[347] http://richardminiter.com/pdf/19921214-art-insight.pdf
[348] http://www.democracyjournal.org/28/smart-on-crime.php?page=all
[349] http://cad.sagepub.com/content/19/2/163.full.pdf+html

violent cushy white-collar offenders, who allegedly are not much less damaging[350] (486) than those who are violent. (The Supreme Court has allowed[351] Yates to pursue his case *in forma pauperis*.[352] So much for cases against the non-violent being confined to the cushy!) While protecting the violent, the Phonies have created a "new class"[353] of non-violent "criminals." There probably never has been a time in history when there has been such open warfare against these people – with lives, families, finances and businesses ruined.

For the Phonies, fairness is not a matter of guilt or innocence; it is a matter of protecting those guilty of violence. And the more depraved the violence, the more they rant about "fairness." For them, it is those who have been most law-abiding and hard-working who deserve most to be prosecuted and punished.

FAIRNESS PHONY PARROTS

Those who preach the virtues of convicted murderers have no more attentive congregants than the murderers themselves, who faithfully parrot the sermons they hear. Consider a few examples:

- ***Milton Mathis***, who murdered two and[354] tried to murder a 15-year-old girl, left paralyzed from the neck down, declared[355] that his execution was part of a "mass slaughter [by] people who have no respect for humanity …The system has failed me. This is a miscarriage of justice … Life is not supposed to end this way."
- In order to obtain legislation enabling future murderers to commit their deeds securely and completely comforted that they will not be risking their own lives in robbing others of theirs (above, p. 1), Connecticut Gov. Malloy had to agree not to save past murderers already convicted. This left ***Daniel Webb*** in high dudgeon.[356] (He had merely slain a 37-year-old bank official when she resisted his attempted rape 23 years earlier.) Although Malloy favored death penalty repeal because, in his view, capital punishment is unfair, Webb bitterly complained that Malloy himself was "unfair" in not sparing *him*. Webb looked in the mirror and concluded "I'm still human." Also, he did not deserve his confinement conditions; and he had evolved and grown.
- ***Joshua Maxwell,*** prior to his execution, shared his accumulated capital punishment expertise:[357] "This isn't going to change anything. … This is creating more victims."
- ***Beunka Adams,*** executed for[358] murder (he also committed robbery, rape and attempted murders), authoritatively pronounced himself to be "not malicious," his vicious crimes being mere "real stupid … mistakes." He lectured:[359] "[K]illing of any kind isn't right" (especially, of course, the execution of Adams).
- The disinterested final wisdom[360] of murderer[361] ***Bobby Lee Hines*** was: "I don't believe that taking my life will solve anything. … [I]f I was locked up for the rest of my life, that would be more of a punishment."

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[350] http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1290&context=articles
[351] http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/13-7451.htm
[352] http://www.lectlaw.com/def/i020.htm
[353] http://www.convergencelaw.com/filings_pubs/pdf/The%20New%20Criminal%20Classes%20-%20JVD.pdf
[354] http://www.clarkprosecutor.org/html/death/US/mathis1257.htm
[355] https://www.tdcj.state.tx.us/death_row/dr_info/mathismiltonlast.html
[356] http://bigstory.ap.org/article/ap-interview-death-row-inmate-says-new-law-unfair
[357] https://www.tdcj.state.tx.us/death_row/dr_info/maxwelljoshualast.html
[358] http://www.clarkprosecutor.org/html/death/US/adams1294.htm
[359] http://www.tdcj.state.tx.us/death_row/dr_info/adamsbeunkalast.html
[360] http://www.tdcj.state.tx.us/death_row/dr_info/hinesbobbylast.html
[361] http://www.clarkprosecutor.org/html/death/US/hines1310.htm

- ***Cal Coburn Brown***, already mentioned (p. 19), upon considered reflection, declared[362] prior to his execution: "I only killed one victim. I cannot really see that there is true justice." (If Brown's second victim lived, it was not because he did not try his best to savagely kill her.)
- In his endless fight for parole, interviewed by ABC's Nightline on August 28, 1981, the 1968 murderer of Robert F. Kennedy, ***Sirhan Sirhan***, explained: "My criminal history as compared to other prisoners here is ***totally negligible***. In fact, there is ***none*** other than this incident." He contended that he should be released, not for his benefit, but out of "respect for the American people" and their constitutional mandate of "equal treatment…and justice under the law."[363]

These few examples are more than enough to show how brutal murderers absorb and regurgitate what their advocates spew. First, notwithstanding the views of others,[364] they pronounce themselves to be "human." Second, they see themselves as victims of unfairness and injustice who "deserve" a "second chance." Third, they say committing murder is just a mistake made by a different person, whose execution "won't solve anything." Fourth, mimicking Justices Brennan and Marshall (above, p. 5), they equate their own lawful executions with the unlawful brutality they committed against utterly innocent victims. (One can only wonder if Brennan also equated lawful imprisonment with kidnapping. By such reasoning, if it can be called that, it is wrong to lawfully imprison violent criminal because that is no different from unlawful kidnapping.) Fifth, they say that life without parole is a harsher punishment than execution but do not explain why they fight for decades to avoid execution.

Sixth, showing remorse is a staple of sentence reduction and parole. Well, Sirhan Sirhan repeatedly said he was sorry, yet he could not avoid showing his true feelings; viz., that murdering a major presidential candidate was a "totally negligible" and merely a lone "incident" in an otherwise exemplary life. What could better show the folly of looking for "remorse"? Many surely game the system, saying what others want to hear. If most of them weren't dishonest, they would never have ended up where they did.

Seventh and most importantly, murderers-turned-parrots make clear what is wrong with the focusing upon criminals rather than their crimes and, particularly, the utter unfairness of what anti-death penalty justices call "individualized sentencing."

A QUESTION FAIRNESS PHONIES CAN'T FACE

Sirhan Sirhan and Cal Coburn Brown actually had a valid point. But its significance is not what they thought. If they did commit "only one" murder each, what does that show?

If fairness criteria are confined to comparing punishments of convicted murderers, it always can be

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[362] http://seattletimes.com/html/localnews/2012856652_execution10m.html?prmid=related_stories_section

[363] For their indispensable assistance in obtaining the transcript, the author thanks Nicolette A. Dobrowolski, Head of Public Services and Special Collections Reference Librarian, Syracuse University Libraries; Author and friend William T. Harper; Lyndsey Raney, Library Associate at Texas A&M University; nationally syndicated columnist Cal Thomas; and Cynthia McFadden, ABC-TV Nightline Co-anchor. Obviously, these kind and helpful people are not responsible for the use made of their aid or the views expressed in this article, for which the author is wholly accountable.

[364] http://murrieta.patch.com/groups/cat-burkes-blog/p/victims-families-for-the-death-penalty--1st-anniversary

labeled "unfair" when those guilty of less barbarity are punished more severely than others responsible for greater barbarity. This raises a critical question Fairness Phonies dare not face and cannot answer.

Is there one free murder or rape "on the house"? Why should society sacrifice the lives of unsuspecting innocents to spare those guilty of the worst crimes? Must there be an additional rape or murder before the most severe penalty is imposed? And remember (above, p. 40), five justices have dictated that there can never be capital punishment for rape, no matter how depraved, no matter how severe the injuries, no matter how young the victim and no matter how life shattering.

"Fairness" comes easily when one side is ignored. Here, victims – not just past victims but guaranteed future victims – are turned into Soviet style nonpersons. But those who aren't Fairness Phonies will ask: does fairness to those with a proven capacity for barbarity require the inevitable sacrifice of innocent individuals who have never harmed anyone? What about fairness to *them*?

In response, redemption and rehabilitation would be trotted out by those whose prime concern is the welfare of the most violent criminals. It cannot be denied that there have been successful rehabilitations. However, there remains the problem that, pardon the expression, there is no way to "precisely calibrate" rehabilitation, no way to confidently distinguish one who will never repeat his crime from one who will. The most brilliant minds (e.g., Norman Mailer[365] and William F. Buckley, Jr.[366]) have been fooled.

Thus, promoters of rehabilitation should be seen as sophisticated gambling hucksters. But they don't wager anything of their own and the stakes are much higher than anything found in Las Vegas.

Not to put too fine a point on it, rehabilitation gamblers have repeatedly caused decent people they don't know or care about to pay with their lives. Why exactly is that fair?

A CRITICAL CHOICE FAIRNESS PHONIES DISREGARD

The question of fairness comes down to this. Either those capable of rehabilitation must be sacrificed or, to save them, innocent people must be slaughtered. ***It is impossible to save the lives of convicted murderers without avoidably causing additional wholly innocent law-abiding people to be subjected to violence, including murder***.

That presents no problem for those who shed no tears over innocent victims but celebrate[367] the most brutal[368] individuals ever born – biologically human to be sure, but not entitled to be considered human[369] in

[365] http://www.nytimes.com/books/98/05/10/specials/mailer-abbot.html?_r=2&oref=slogin&oref=login
[366] http://open.salon.com/blog/laura_wilkerson/2011/09/23/smart_men_stupid_choices_william_f_buckley_jr
[367] http://nypost.com/2014/10/05/cop-killer-chic/
[368] http://www.philly.com/philly/opinion/20141005_Consider_facts_on_cop_killing.html?c=r
[369] http://murrieta.patch.com/groups/cat-burkes-blog/p/victims-families-for-the-death-penalty--1st-anniversary

any other sense. For example, in May 2014, Prof. Martin E. Marty strongly disagreed[370] "that the death penalty is a deterrent against crimes of the most heinous sort," while condescendingly adding that capital punishment support "is more a matter of faith than reason." George Orwell had the perfect response:[371] "One has to belong to the intelligentsia to believe things like that: no ordinary man could be such a fool." Does one have to be a professor to fail to grasp that executing convicted murderers deters[372] some of ***them*** from new violence against people who have never been convicted of anything? Is such a denial "reason," or itself pure "faith"? And leading death penalty opponents openly prefer the murders of 100 decent, law-abiding victims to the lawful execution of one convicted murderer (above, p. 10). The American Civil Liberties Union also doesn't care. It unashamedly concedes[373] that some murderers murder again and that, indeed, one in 12 on death row had prior homicide convictions , but protests: "the *only way* to prevent all ... recidivism is to execute every convicted murderer - a policy no one seriously advocates ...." (Emphasis added.)

Again, it may be confidently suggested that many law-abiding people, likely a substantial majority, would not require a precision computer to reject this value choice. They would wonder what kind of claimed "moral superiority" dictates that the lives of the innocent must be sacrificed to save the lives of the guilty.

They would have…

ANOTHER VIEW OF FAIRNESS

As noted at the outset, anti-death penalty justices have complained that some are executed for murders similar to those committed by others not executed. Parrots Sirhan and Brown, with "only one" murder each, echoed that it was unjust for them to be treated more severely than others guilty of multiple murders. Although one death penalty opponent still refers[374] to "the most heinous murders [as] the sort that earn the harshest sentences," an anti-death penalty victims' group has objected to capital punishment for "particularly heinous murders," because[375] this implies that "other murders are ordinary … [E]very murder is heinous, a tragedy for the lost one's family. The death penalty has the effect of elevating certain victims' families above others."

Although they have a painful element of validity, especially for victims, these oft-repeated objections do not make the case for abolishing capital punishment but for *increasing* its use. The objectors should be asked not why one murderer is treated less harshly but why other murderers should not be treated more harshly. Many suffering victimized survivors of homicide victims might rightfully ask why the

[370] http://www.huffingtonpost.com/martin-marty/death-penalty_b_5270673.html?utm_hp_ref=religion&ir=Religion
[371] http://www.resort.com/~prime8/Orwell/nationalism.html
[372] http://homicidesurvivors.candothathosting.com/wp-content/uploads/2014/06/Sinister.pdf
[373] https://www.aclu.org/print/capital-punishment/case-against-death-penalty
[374] http://www.economist.com/news/united-states/21601270-america-falling-out-love-needle-slow-death-death-penalty
[375] http://www.scribd.com/doc/48515732/VFLetterW-Signatures?autodown=pdf

murderers of their loved ones should receive no death sentence when other murderers do. Why are many murderers *not* executed for murders similar to those for which other murderers *are* executed? Why shouldn't every murder be treated equally harshly rather than equally leniently?

Why shouldn't the burden of justification be shifted from supporters to opponents? Opponents ought to justify *not* executing murderers when others are executed. And this applies all the more powerfully because convicted murderers can only be saved by *knowingly* requiring the murders of new innocent law-abiding victims, in greater numbers than executed murderers. Must a second murder be committed before "death eligibility" is not only established but required? (Of course, thanks to justices, it is now impossible ever to make the death penalty mandatory for any crime including the most savage rapes and murders.)

Penal codes prohibit conduct, period. For example, they do not make murder by those with no criminal record unlawful but exempt from punishment new murders by convicted murderers serving life sentences. Exemption from punishment for a crime effectively renders it lawful and actually not criminal. If specified conduct is unlawful, should punishment depend upon who engages in it?

If the answer is "no," Sirhan Sirhan's complaint cannot be avoided. However, if "equal treatment under the law" dictates that the sentence should be the same for everyone who commits a particular crime, especially a crime that demonstrates a capacity to commit the ultimate and most unfair violence, it does not follow that the treatment should be equally lenient rather than equally severe.

The "only one murder" line suggests reconsideration of placing great weight on a convicted murderer's criminal record. Again, the crux of the problem is its focus upon criminals rather than their crimes. As Justice Rehnquist pointed out and even Justice Blackmun conceded (p. 18), the so-called "individualized sentencing" requirement is not in the written Constitution.

So is it asking too much to punish a criminal for the crime he commits, ***regardless of who he is***?

Justices who take the Constitution and its written words seriously have stressed that it contains absolutely nothing that prohibits the people, through their elected representatives, from making the death penalty mandatory for specific crimes. In one of his various death penalty opinions quoted above (p. 25), Justice White hit the nail on the head: a crime may be "so serious that every person who commits it should be put to death regardless of … his character [or, alternatively] the commission of certain crimes conclusively establishes that the criminal's character is such that he deserves death."

In other words, there are far too few death sentences and executions, not too many.

The problem with the "especially heinous" finding rejected by the justices in the Cartwright case

(above, p. 26) is not that it is too vague. The problem is the judicial "individualized sentencing" concoction, including the requirement that "aggravating factors" be found in order to impose capital punishment (with five justices having the last word as to "acceptability"). Fairness Phonies seek to minimize punishment for the worst depravity, not only by maximizing "mitigation," but also by minimizing "aggravation." Remember (above, p. 27), Indiana Symposium panelist Pokorak sought exclusion of torture and rape as aggravating factors because "almost every murder involves 'torture.'" Admitting evidence of these factors would not serve his anti-death penalty purpose of "narrowing" death "eligibility."

Nevertheless, if almost every murder involves torture, it makes no sense to try to "calibrate" levels of torture in determining punishment. There is …

A Fairness Solution. To achieve fairness to victims, a concept not on the Fairness Phony radar screen, the death penalty should be mandatory for any unlawfully intentional robbery of the life of an innocent, law-abiding person, or for knowingly aiding a violent crime where this possibility is predictable.

If it is futile and hurtful to try to compare the pain and terror suffered by different murder victims or the grief experienced at the loss of loved ones, why shouldn't the death penalty be mandatory for deliberate murders resulting in any level of suffering and grief? This would have at least two salutary consequences:

(1) It would eliminate the heartbreaking belief among some victims' families that others had been elevated above them, that the loss of others' loved ones was greater than the loss of theirs. Agonizing comparisons, which cannot and should not be made, would not need to be made.

(2) There would be no second-chance do-overs for proven killers to repeat their barbarity.

Finally, if the people of an ostensibly representative democracy wish to establish a death penalty for other barbaric crimes, such as raping little girls and ruining their lives, that should be mandatory too.

REVIEW AND ANALYSIS: FOLLY OR MACHIAVELLIAN CYNICISM?

To review key points presented above:

While some death penalty opponents may believe what they say, flagrant dishonesty is central[376] to the cause of most of those dedicated to saving convicted murderers. Fairness Phoniness is thus a diabolical brew concocted from cynically disingenuous pretense, bald assertion, rampant hypocrisy and double-dealing.

As noted (p. 6), while death penalty supporters emphatically do not seek conviction of the innocent, which provides neither protection from nor punishment of the guilty, Phonies endlessly make bogus claims[377]

[376] http://ssrn.com/abstract=1346142
[377] http://prodpinnc.blogspot.com/2013/03/the-innocent-exonerated-and-death-row_19.html

of executions of the innocent. Using sleight of hand that would be the envy of the best card sharks, they cite protections that work as evidence that they don't. This involves two extremely specious fast shuffles.

First, they repeatedly but falsely assert[378] that convictions overturned on procedural[379] (16) grounds are the same as "exonerations." All too often, to paraphrase[380] Judge Cardozo, guilty criminals go free because the police blunder. Furthermore, many police acts denounced by some justices are not seen as blunders by other justices. The latter attribute such blunders, if they are blunders at all, to the "utterly senseless"[381] morass created by their colleagues.

Second, the Phonies take a giant leap of illogic by proclaiming that the very safeguards which prevented wrongful executions somehow indicate[382] (14) that wrongful executions occurred. In truth, the Phonies have sought and sought again to establish one actual wrongful execution. They have failed to find their Holy Grail; but if they did, it would prove little.[383] Also, while unconcerned about "acceptable" mistakes that result in easily foreseeable and inevitable numerous recidivist[384] rapes and murders by spared previously-convicted murderers, the Phonies demand 100% perfection[385] in determining guilt.

Disingenuously seeking to exploit the truism that nothing human is perfect, they demand abolition of capital punishment by arguing that it is not perfect. Nevertheless, the Phonies not only ignore all the procedural safeguards that avert wrongful convictions, again, they unapologetically and hypocritically shrug off the gruesome atrocities caused by the many imperfections required to keep indisputably guilty murderers alive.

Thus, as explained in detail elsewhere,[386] it is not supporters but opponents who seek (and cause) death for the innocent. Opponents are well aware – but do not care – that sparing convicted murderers "perfectly" guarantees avoidable death for unsuspecting upstanding new victims.

Of necessity, because they confront a system that provides countless safeguards, for all their media-abetted propaganda about convicting the innocent, the Phonies' main efforts lie elsewhere. In almost all cases, they advocate precise scientific calibration of ***sentences*** for convicts whose barbaric guilt is not in doubt.

Nevertheless, it must be stressed, ***there is a vast difference between protecting the accused and protecting the fairly convicted, between protecting the presumption of innocence and resorting to any***

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[378] http://off2dr.com/modules/cjaycontent/index.php?id=26
[379] http://www.law.cornell.edu/supct/pdf/04-1170P.ZC
[380] http://users.wfu.edu/wrightrf/Aspen-Students/additionalreading_ch06-1.htm
[381] http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=467&invol=431#f7
[382] http://www.law.cornell.edu/supct/pdf/04-1170P.ZC
[383] http://homicidesurvivors.candothathosting.com/wp-content/uploads/2014/06/Red-Herring.pdf
[384] http://homicidesurvivors.candothathosting.com/wp-content/uploads/2014/06/Sinister.pdf
[385] http://homicidesurvivors.candothathosting.com/wp-content/uploads/2014/06/Red-Herring.pdf
[386] http://homicidesurvivors.candothathosting.com/wp-content/uploads/2014/06/Sinister.pdf

ruse to help the clearly guilty to avoid just – or any – punishment.

To achieve the latter, the fairness scam adds insistence upon 100% sentencing perfection to the call for 100% conviction perfection. The added demand is based on the unproven bald assertion that sentences can be precisely calibrated. In turn, this requires denial that sentencing entails inherently imprecise conflicting moral and value judgments not amenable to scientific or mathematical calibration. This is itself a value judgment because any proposed calibrations are based upon values and value judgments.

Thus, it is sheer fiction to say that it is possible to "finely tune" depravity and "calibrate" it "scientifically" so as to determine "culpability" with "moral accuracy."

Simultaneously, the Phonies oppose and anti-death penalty justices prohibit mandatory capital punishment for any crime, imposing a totally fabricated unconstitutional substitute requirement: "individualized sentencing." Once a sentence depends on an individual and not his crime, it is not necessary to attend an Indiana Symposium to understand the inevitability of convicts being sentenced differently for similar crimes and harm done. When the Phonies make a u-turn to proclaim "unfair" any sentence greater than the lowest sentence for a criminal act, the result must be ***no punishment whatsoever for any violent offender***.

At bottom, the calibrate-with-moral accuracy clarion call for fairness is a Trojan horse. Justice Blackmun, Indiana Symposium participants and many others have contended that, without precise calibration, the death penalty should be abolished altogether. It cannot be stated too often that, notwithstanding all the sophistry, outright abolition is the obvious ultimate goal of pretend-aspirations for fairness.

Short of that goal, the Phonies' fallback option is to assure that death penalty is "narrowly constrained" and "rare" **(**a result of their own unconstitutional and duplicitous machinations, which they then turn around and use to contend that rarity itself proves unfairness**)**. Yes, a few token long-delayed executions to avoid galvanizing a public that supports capital punishment. But this version of fairness means that most barbarians have the luxury of knowing they can commit their "heinous" brutality with little fear of risking their own lives.

This "achievement" has resulted from …

(A) ***The Fairness Phony Two-Step***

In 1972, five justices suddenly decided to prohibit unrestricted jury death-sentencing discretion, thereby ending existing capital punishment and producing a fierce and swift negative reaction. Because public support was too strong to end capital punishment completely, justices resorted to slow evisceration, so that few would notice and each particular case would be insufficient to rouse significant opposition. In 1976, they restored discretion but hamstrung it by requiring "reasoned moral decisions" involving limited

"aggravating" and unlimited "mitigating" factors to assure that "death eligibility" was extremely "narrow."

Justices' fancy footwork thus essentially involved two steps: (1) shift attention from the victim to the crime by requiring but limiting "aggravating" factors; and (2) shift focus from the crime to the criminal by requiring unlimited consideration of "mitigating" factors, no matter how irrelevant and far-fetched.

(1) ***From the Victim to the Crime.*** No criminal should be punished more than any other convicted of the same act, regardless of the level of harm and suffering inflicted upon victims. What counts here is "moral culpability" of the criminal act, as Justice Stevens and Alan Dershowitz contended (pp. 20, 23). Punishment should not depend upon who the victim was or how many others were affected. To promote this position, justices ordered juries to find "aggravating" factors to show requisite culpability, as though intentionally committing unlawful murder were not sufficiently aggravating in itself. At the same time, justices sharply limited any aggravating factors that could be presented to juries and seized for themselves the power to second-guess adverse jury findings. For four years, victim impact evidence was banned.

Because the Phonies want punishment assessed in a vacuum, based on an abstraction, "moral culpability" of criminal acts, without considering the results of those acts, evidence of actual harm to actual victims must be avoided; any sentence greater than the lowest sentence for any criminal act is "unfair."

In other words, murderers who commit acts causing the greatest harm to victims should be rewarded because other murderers committing the same acts failed to "accomplish" as much harm.

(2) ***From the Crime to the Criminal.*** Although one goal is to avoid weighing actual harm done by focusing upon the abstract "moral culpability" of the criminal act, the Phonies also about-face to shift attention from the crime to the criminal. Thus, anti-capital punishment justices "demanded" sentences based on the "uniqueness" of the individual murderer regardless of the similarity of his murder(s) to other murders and then complain when the sentences are not "similar for similar crimes." Based solely on their own personal morality, justices ordered that convicted murderers be permitted to introduce anything under the sun to "mitigate" murders "too heinous to be explained." Knowing that focusing on criminals rather than crimes inevitably must result in differing sentences for essentially identical crimes, the Phonies again deem it unfair to mete out a sentence greater than the least severe for a given crime. No punishment for a given act should be greater than the lowest and most lenient sentence any criminal anywhere received.

In sum, for Fairness Phonies, it's any port in a storm. They pursue any stratagem that will result in the lowest possible sentence. No sentence should be given that is greater than the lowest sentence for any criminal act, regardless of actual harm suffered by victims. Those who inflict the greatest suffering should

benefit from similar criminal acts resulting in the least suffering. Moreover, those who have the least "mitigating" evidence to offer should benefit from the lowest sentences given to those with the most such evidence because, after all, there should be "similar sentences for similar crimes."

(B) ***It Never Ends***

Fairness Phony cynicism and hypocrisy never end. Consider a few other examples:

- Unmoved by the horrendous and protracted torture inflicted by murderers, the Phonies demand that the latter not suffer for a second if executed. One at a time, they find fault with each execution method while promising an "acceptable" alternative. When the alternative is adopted, they not only protest it, they do everything to make sure that it cannot be effective.
- It takes no little chutzpah for Phonies to exert pressure on physicians not to participate, as well as on drug manufacturers and sellers not to provide the most effective and painless drugs for lethal injections, and then protest that less than the best personnel and drugs result in "suffering" for brutal murderers who heartlessly inflict immense suffering upon victims – and often enjoy doing so!
- Generally, Phonies demand a reward for abuses they themselves perpetrate – going so far as to seek abolition of capital punishment because of delays they create solely to create delay.
- Phonies do all they can to add unnecessary costs to capital punishment and then contend that it should be abolished because of the unnecessary costs they themselves caused.
- Phonies utilize all available chicanery and abuse of the legal system, imposing severe mental anguish upon homicide survivors by needlessly and unjustifiably stretching out death penalty cases for decades. Then with a straight face, they insist that an execution should not take place because the delay was inhumane to the very convicted murderer who sought countless delays.
- Phonies assert that every murderer is a "human being" with "human dignity" equal to that of his victims, but turn around and treat the victims as not human, not worth mentioning or remembering and, hence, as "faceless strangers" deserving of no dignity.
- Phonies contend that, in order to "narrowly constrain" capital punishment, death sentences should be reserved for the "worst of the worst"; but in seeking to abolish capital punishment, they reward the "worst of the worst," already serving life sentences, with a special privilege: to commit further violence, including rape and murder, secure in the freedom from fear of any new punishment whatsoever.
- Phonies justify abolition of the death penalty by selling "life without parole" as a viable substitute punishment. But once they secure the substitution of a "life without parole" option, they turn on a dime to argue that that, too, is unjust cruel and unusual punishment which also should be made unlawful or declared unconstitutional. In other words, a punishment which should be banned should replace a punishment which should be banned.
- Judicial Phonies have provided special protections for career criminals unavailable to first-time offenders. Thus, New York State's highest court judges have thrown out murder convictions of the "overwhelmingly guilty" if they are represented by lawyers in cases involving prior *unrelated* crimes they have committed.
- Phonies seek precisely calibrated "moral accuracy" in sentencing even those proven guilty by overwhelming evidence. But their accuracy obsession does not apply to the verdict of guilt itself. Judicial Phonies who have tied the legal system in frivolous knots, not remotely required by the Constitution, would rather turn the clearly guilty free – to further prey upon the law-abiding – not because they are innocent, but because convicted in violation of fantasized "rules of the game."
- Phonies demand avoidance of jury consideration of the full extent of the harm done, including reference to the victim, but instead seek to confine consideration to "moral culpability" of the criminal's act. However, if a victim lives through a murder attempt, why then, the harm done by the same acts becomes very important: a violent criminal whose victim survives despite his best efforts to commit murder can only be charged with attempted murder.

- To Phonies, a tiny number of executions of convicted murderers is shocking, but hundreds of thousands of murder victims should not be given a second thought (or even a first thought).
- Phonies manipulate numbers. To disparage capital punishment, they talk about a falling homicide "rate," ignoring the real number of victims. But when alleging the "horrors" of capital punishment, they refer to the actual number of executions and occupants of death rows, concealing the tiny percentage of all murderers that that really constitutes.
- Phonies repeatedly, loudly and falsely proclaim that executions of the wrongly convicted are rampant. At the same time Phonies protest executions of the clearly guilty are too rare for the few executions of the guilty that do occur to be fair.
- Prominent Phonies have argued that DNA should be used to prove innocence but is unreliable when DNA conclusively establishes guilt. In other words, no proof of guilt can ever be conclusive and therefore no murderer should ever be executed.

CONCLUSION

(A) A Rigged Shell Game

Because most Americans are instilled from childhood with a sense of fair play, they are rightly sympathetic to unfairness claims. The Phonies take advantage by defining fairness in such a way that no punishment for murder – or any violent crime – can ever be considered fair.

"Fairness" is a shibboleth wielded by Phonies to perpetrate a fraud. Knowing that nothing in life is perfect, they bellow shrill cries of "unfairness" as a ruse to end capital punishment by trying to fool the public into imposing impossible conditions for capital punishment:

- perfect fact-finding
- perfect sentencing
- perfect executions.

Every step of the way, the Phonies make impossible demands, including those they know cannot be met simultaneously. And where demands can be met, as in the case of lethal injections, they seek to stack the deck by exerting pressure to make executions worse than they need be. One is reminded of terrorists who blow up people on their own side so that they can falsely accuse the other side of attacking them.

In other words, when all else fails, the Phonies just plain outright lie. They should be asked two questions:

- If you are so morally superior and so fair, and if what you seek is so morally superior and so fair, why is it necessary for you to resort to blatant hypocrisy, chicanery and deceit?
- And why do you torture the tortured?

(B) Fairness: A Synonym for Desecration and Torture

It is shockingly clear that, for activist death penalty opponents, including the most arrogant and powerful judges, the concepts of "fairness" and "compassion" exclude victims. On the contrary, these opponents are shameless in their open disdain for victims and their agony – agony inflicted not only by criminals but by activists, propagandists, lawyers and judges ruthlessly devoted to the welfare of the ruthless.

- They desecrate the memory of murder victims, including those raped and tortured.
- They viciously defile and defame murder victims' survivors, who are also victims, mostly unnoticed.
- They callously and heartlessly torture the survivors with needless dragged out legal proceedings.

(C) A Time for Victims to Blast Their Own Trumpet

One pro-death penalty organization is called *Justice for All*. It does good work but is misnamed. Among other things, it posts remembrances of murder victims. Well, to be a victim of murder is to be a victim of the grossest injustice. How can there be justice for *all* when there can really never be justice for *them*? Yes, a few murderers can be executed, which is a tiny measure of justice. But a token execution can never undo being an innocent victim of the ultimate injustice in the first place.

Far more significantly, ***there never can be justice "for all" because there never was, is not, and never will be agreement by "all" as to what is justice***. There will always be disagreement about what constitutes fairness. People addicted to convicted murderers and hostile to victims will always attack those who seek what *they* consider that barbarians justly deserve – capital punishment. They will always attack because, for reasons that must surely be incomprehensible to others, murderer advocates place a far greater value on the lives of the most savage murderers than on the lives of their victims.

Let them deny it; their words and deeds conclusively give the lie to that denial.

The critical question, therefore, is this: Whose concept of justice is going to prevail? The concept of a small but vocal well-financed minority with influence and power out of all proportion to its numbers, or that of the large but poorly financed and disorganized majority. In recent decades, the former have dominated.

Tragically, compared to media-dominant murderer advocates, victims have been virtually voiceless. Yes, five justices have allowed them to speak in court, for which victims pay heavy prices in unfairly having to make countless unnecessary court appearances, each more excruciating than the last.

But victims have not been heard loud and clear by judges, politicians, the media and the public. Instead, the only sound seemingly heard is the noise from the "unfairness" trumpet blasted by the Phonies.

The time has come for victims to blast *their* trumpet – with such might as to reverberate through the din of the roaring flames to penetrate the blocked ears of even the most unwilling listeners in the deepest recesses of Fairness Phony Hell.[387]

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[387] Hopefully, this endeavor will be aided by *The Homicide Survivors' Fairness-for-Victims Manifesto* [http://homicidesurvivors.candothathosting.com/wp-content/uploads/2014/10/MANIFESTO-1.pdf]. Also, in his next – and last – article, the author will analyze in detail why, in his judgment, victims have been so successfully abused by murderer advocates and what they must do to reverse course to confront what has been presented in this article: horrific unfairness in the name of fairness.