ON METAPHORS, MIRRORS, AND MURDERS: THEODORE BUNDY AND THE RULE OF LAW*

MICHAEL MELLO**

** Professor of Law, Vermont Law School. B.A., 1979, Mary Washington College; J.D., 1982, University of Virginia. In the interest of full disclosure, I note that from 1983 to 1986 I worked as an assistant public defender in Florida (first at the office of the state Public Defender in West Palm Beach and later at the office of the Capital Collateral Representative in Tallahassee). All of my clients were death row inmates. During 1987 and 1988 I was an associate with the law firm of Wilmer, Cutler & Pickering, the firm that represented Theodore Bundy in post-conviction litigation. I presently represent three condemned inmates.

This article is dedicated to the memory of the late Judge Robert S. Vance, United States Court of Appeals for the Eleventh Circuit, for whom I clerked (1982-1983). Although we often disagreed about the appropriate role of the federal judiciary in reviewing state-imposed death sentences, Judge Vance always remained a mentor, teacher, and friend.

This, like most scholarly projects, has been a collaborative enterprise. The many students, friends, neighbors, and colleagues who have discussed its ideas with me, suggested articles and other resources, commented on earlier versions, shared personal experiences, or allowed me to glimpse their own fears and angers have collaborated with me on this project and have made its development possible, whether they knew it or not. I owe a large debt to the students of my capital punishment seminar, whose honest and articulate feelings I have drawn on in these pages and whose work often pushed forward my own; to Laura Gillen and Judy Hilts, who typed endless drafts of the manuscript with diligence, patience, grace, and good humor; to Susan Apel, Leslie Bender, Louis Bilionis, Faith Blake, Marie Deans, Donna Duffy, Stephen Dycus, Paul Ferber, Dale Follensbee, Rebecca French, Joseph Giarratano, Karen Gottlieb, Barbara Junge, Kenneth Kreiling, Nancy Levit, Reed Loder, Heather McArn, Rick Melberth, Michael Millemann, Alice Miller, Anthony Paredes, John Pearson, Michael Radelet, Jeffrey Robinson, Ruthann Robson, Richard Rosen, Elliot Scherker, Larry Spalding, Pamela Stephens, Margaret Vandiver, Joan Vogel, and Stephanie Willbanks, who read and commented helpfully on at least one draft of the manuscript. I am especially grateful to pro bono paralegals (and criminologists) Dr. Michael Radelet and Dr. Margaret Vandiver for sharing with me their notes and sometimes painful recollections of our conversations and other events during the final days of Theodore Bundy's life. Peter Hecht, James Maxwell and Carmela Miragula provided helpful research assistance.

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I owe immeasurable gratitude to my colleague Susan Apel, who critiqued six incarnations of the manuscript and whose intellectual camaraderie, friendship, and generosity during this and other undertakings cannot be captured by any metaphor.

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I.
INTRODUCTION

> The power of a metaphor is that it colors and controls our subsequent thinking about its subject[1]
>
> Mirrors are crafty[2]

Lawyers for condemned inmates sometimes take the view that we are litigating for the anthropologists, the sociologists, and the historians, in addition to litigating for the courts.[3] This perspective helps to sustain one emotionally when the chances of success are small. Even though the inmate loses in the courts and the execution occurs, the litigation has still made a record for the future. Taken as a whole, these cases form a historical corpus of information about whom the state is killing and under what circumstances. And that corpus will survive.

Making a record — or setting the record straight — is one task of this article as well. The article tells my version of a story that you probably think you know already: the history of Theodore Robert Bundy's efforts to ward off the Florida executioner.[4] I want to record my thoughts while the memories are still fresh in my mind. This article's principal source is my memory, supplemented where possible by public documents and secondary materials.

I write reluctantly. Too much has already been said about Theodore ("Ted," to the media) Bundy, the serial sexual murderer[5] suspected of raping and then killing dozens of young women during the 1970s.[6] The cottage industry of commentary on Bundy has generated six nonfiction books[7] (with at

1. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1383 (1987).

2. Atwood, *Tricks With Mirrors*, in M. ATWOOD, SELECTED POEMS 1965-1975, at 185 (1976).

3. Mello, *Another Attorney for Life*, in FACING THE DEATH PENALTY: ESSAYS ON A CRUEL AND UNUSUAL PUNISHMENT 81, 83 (M. Radelet ed. 1989).

4. I do not for a moment suggest that mine is the only or the most important account of Bundy's cases. Bundy's chief post-conviction counsel, for example, has written of his experience as Bundy's lawyer. Coleman, *Litigating at the Speed of Light*, 16 LITIGATION 14 (Summer 1990). Telling the story from my perspective and in my voice is all I can do in this article.

5. "Serial murderer" refers to one who kills a number of people over a long time, as opposed to a "mass murderer" who kills a number of people in a single crime. *See* D. LUNDE, MURDER AND MADNESS 47 (1976).

6. In a February 1978 announcement adding Bundy to the Federal Bureau of Investigation's list of the ten most wanted fugitives, the FBI reportedly stated that Bundy "is wanted for questioning in connection with thirty-six sexual slayings which began in California in 1969 and extended through the Pacific Northwest and into Utah and Colorado . . . ." *Quoted in* R. LARSEN, BUNDY: THE DELIBERATE STRANGER 2 (1986).

7. *Id.*; E. KENDALL, THE PHANTOM PRINCE: MY LIFE WITH TED BUNDY (1981); A. RULE, THE STRANGER BESIDE ME (rev. ed. 1989); S. MICHAUD & H. AYNESWORTH, THE ONLY LIVING WITNESS: A TRUE ACCOUNT OF HOMICIDAL INSANITY (rev. ed. 1989) [hereinafter WITNESS]; S. MICHAUD & H. AYNESWORTH, TED BUNDY: CONVERSATIONS WITH A KILLER (1989); S. WINN & D. MERRILL, TED BUNDY: THE KILLER NEXT DOOR (1980). Michaud and Aynesworth, both journalists, conducted extensive tape-recorded interviews with

least one more reportedly in progress),[8] a fiction book,[9] and countless in-depth magazine and newspaper articles,[10] as well as a television mini-series (starring Mark Harmon as Bundy),[11] a dance drama,[12] and media preoccupation at times comparable to coverage of the NASA space exploration program.[13] A

Bundy; I consider their works relatively reliable, because they often quote Bundy in what they purport to be his own words. Larsen's book, like Michaud's and Aynesworth's WITNESS and Rule's work, has been updated to include narratives of the final acts of Bundy's collateral litigation. The Winn and Merrill book, now 10 years old, has not been updated, and it does not discuss many of the legal developments in Bundy's Florida cases relevant here. Kendall, who claimed to have been Bundy's "girlfriend" for six years, did not address Bundy's Florida legal proceedings; her book is therefore not illuminating for purposes of this article.

These secondary sources from the popular press are cited with some skepticism. None of the books provide source notes or other verifiable documentation. Rule and Larsen, both self-styled Bundy "friends," were reporters who covered Bundy's Florida legal proceedings for their respective news organizations. Further, the Rule book has several obvious errors. For example, Robert Graham did not lose the 1986 Florida gubernatorial election campaign (A. RULE, *supra*, at 461), indeed he did not run; he did, however, *win* his race to become United States Senator. The Florida Attorney General's office did not formally estimate that it cost $6 million to execute Bundy (*id.* at 470). *See infra* note 231 (discussing cost of Bundy litigation). The Supreme Court did not deny certiorari review thirty days after the district court denied Bundy's first federal habeas corpus petition in 1987 (A. Rule , *supra* at 470). *See infra* notes 101-103 and accompanying text (discussing Supreme Court's denial of Bundy's certiorari petition). These errors, though relatively minor, do not inspire confidence. However, most of Rule's narrative coincides with events as I understand them.

In any case, these various secondary sources typically are cited only when they confirm my understanding or recollection of the events described.

8. WITNESS, *supra* note 8, at 324.

9. C. CLINE, MISSING PERSONS (1981).

10. *E.g.*, Daly, *Murder! Did Ted Bundy Kill 36 Young Women and Will He Go Free?*, ROLLING STONE, Dec. 14, 1978, at 58; Horwitz, *Ted Bundy — Portrait of a Compulsive Killer*, COSMOPOLITAN, Nov. 1980, at 328; MacPherson, *The Roots of Evil*, VANITY FAIR, May 1989, at 140; Nordheimer, *All-American Boy on Trial*, N.Y. Times, Dec. 10, 1978, § 6, at 46.

11. *The Deliberate Stranger* (NBC television broadcast, May 5, 1986).

12. Klass, *Ted Bundy Serial Murders Inspire New Dance Drama*, Valley News [Vermont], March 13, 1991, at 22.

13. R. LARSEN, *supra* note 6, at 300-01 (describing the "media army" that covered Bundy's first Florida trial); WITNESS, *supra* note 7, at 4, 260-61 (describing television coverage of same trial); A. RULE, *supra* note 7, at 352 (same).

Theodore Bundy continues to preoccupy. Fictional murder mysteries with serial killer plots often mention Bundy. *E.g.*, P. CORNWELL, POST MORTEM 76, 79 (1990); J. GIRDNER, THE LAST RESORT 8 (1991); S. MCCRUMB, IF I RETURN, PRETTY PEGGY-O 211 (1991). A 1991 nonfiction book about the Elizabeth Morgan child sexual abuse/child custody case quoted a lawyer's reference to Bundy. J. GRONER, HILLARY'S TRIAL 148 (1991). Articles in national newspapers which discuss serial killers frequently mention Theodore Bundy; examples from 1991 alone include Gow, *Stopping Murderers*, Chi. Trib., Aug. 15, 1991, at 24 (editorializing that state has "moral right to authorize the executions of sadistics murders like Richard Speck, Ted Bundy, John Gacy and Jeffrey Dahmer"); Squitieri, *Drifter: I Killed 60 People*, USA Today, Aug. 15, 1991, at 1A (author Ann Rule quoted as fearing glamorization of Theodore Bundy and fictional character Hannibal Lecter in film *Silence of the Lambs* may spark imitators); Warren, *Race to Publish Case of Milwaukee Serial Killer Inspires Several Quickie Books*, Chi. Trib., Aug. 11, 1991, Tempo Section, at 2 (Lindy Dekoven of Lorimar Pictures quoted as explaining lack of Hollywood interest in Dahmer case: "Someone like Ted Bundy was a more complex, appealing character"); Montgomery, *FBI Expert Says "Signature" Links 3 Eastside Murders*, Seattle Times, Aug. 8, 1991, at A1 (prosecuters in Seattle serial murder cases reportedly sought testimony of John Douglas, chief of FBI National Center for the Analysis of Violent Crime, who worked for government on Bundy case); Williamson, *The Smell of Death and*

psychiatrist wrote in September 1990, a year and a half after Bundy was executed, that "[d]uring the last annual meeting of the American Academy of Psychiatry and the Law, a panel on the topic of Ted Bundy clearly captured the most attention. An extra loudspeaker was hauled into the hotel corridor

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Indifference, Seattle Times, Aug. 6, 1991, at A8 (in opinion column, writer cited experts who point to common traits among such alleged serial murders as Theodore Bundy, John Gacy and Jeffrey Dahmer); Suplee, *Serial Killers: Frighteningly Close to Normal*, Wash. Post, Aug. 5, 1991, at A3 (forensic phychiatrist Emanuel Tanay, who examined many alleged serial killers including Bundy, quoted as saying they were not copycats but are "very attentive to their predecessors"); Warren, *Walking Papers*, Chi. Trib., Aug. 4, 1991, Tempo Section, at 2 (editor of gay publication argued that lifestyles of reported hetrosexual killers like Bundy tend not to be implicitly questioned as they are when killers or victims are gay); Barron & Tabor, *17 Killed and a Life is Searched for Clues*, N.Y. Times, Aug. 4, 1991, § 1, at 30, col. 3 (some criminal psychologists reported as seeing traits in Jeffrey Dahmer that they studied in Bundy); Germani, *Serial Killers are Rare, But Increasing Sharply*, Christian Science Monitor, Aug. 2, 1991, at 9 (Dr. James Fox of Northwestern University College of Criminal Justice quoted as saying "we make our serial killers into celebrities," noting movie made about Bundy); Johnson, *Microscope on Monsters at Serial Killer Seminar*, Chi. Trib., Aug. 1, 1991, at 1 (describing all-day panel on serial crime sponsored by FBI, including a tape in which Bundy reportedly claimed that "basically, I'm a normal person"); Worthington & McMahon, *Anger Building Over Role of Police in Dahmer Case*, Chi. Trib., July 29, 1991, at 1 (Bundy included in list of well-known serial murder cases); Howlett, *Milwaukee Mass Murder: Jeffrey Dahmer*, USA Today, July 24, 1991, § A, at 3 (contrasting the confused, loner-type serial killer such as Edward Gein with "the cold, calculating Bundy-esque killer"); Okie, *Profiles in Murder: The Art of Psychological Crime-Solving is Evolving Into a Science*, Wash. Post, June 16, 1991, § B, at 3 (describing FBI unit specializing in compiling psychological portraits; quoting sources as saying the man who taught them most was Bundy, who talked with members of the unit repeatedly over several years); Kilian, *The Murdering Mind: FBI Experts Make It Their Business to Know Mass Killers*, Chi. Trib., Apr. 19, 1990, Tempo Section, at 1 ("Buffalo Bill" character in film *Silence of the Lambs* used cast on arm to fool victims, the same ruse was reportedly used by Bundy, the "smooth-talking, clean-cut ladies' man"); Achenbach, *Serial Killers: Shattering the Myth*, Wash. Post, Apr. 14, 1991, Style Section, at F1 (top-grossing movie *Silence of the Lambs* made mass murder a growth industry; noting that in earlier TV, Bundy was played by Mark Harmon, the actor once labelled "the sexiest man alive"); Gelmis, *On the Twisted Trail of the Serial Killer*, N.Y. Newsday, Apr. 1, 1991, at 43 ("Buffalo Bill" character's arm cast in *Silence of the Lambs* reportedly was based on Bundy's method of operation); Roberts, *The Most Baffling Serial Killer Hunt*, Chi. Trib. Mar. 26, 1991, Tempo Section, at 3 (reporting that Bundy wrote from prison offering to help Seattle Police in serial murder investigation); Berson, *A Culture of Violence — Murder and Mayhem are Everwhere, and People Can't Seen to Get Enough*, Seattle Times, Mar. 12, 1991, § B, at B1 (creator of dance performance, *Killer*, reportedly drew on publicized murders of women by Charles Campbell and Theodore Bundy); James, *Now Starring: Killers for the Chiller 90's*, N.Y. Times, Mar. 10, 1991, § 2 at 1, col. 1 (reviewer of *Silence of the Lambs* and Brett Easton Ellis' AMERICAN PSYCHO argued that these works show "an obsession with the criminal mind" and pander to audiences used to reading letters of Son of Sam and seeing Theodore Bundy played on television by actor Mark Harmon); Trebble, *The Manhunter Behind "Lambs,"* USA Today, Mar. 1, 1991, Life Section, at D5 (FBI investigator John Douglas quoted as saying *Silence of the Lambs* is "reality," pointing out that "Buffalo Bill" character in movie used Theodore Bundy's reported cast-on-arm ruse to gain sympathy of victims); Emerson, *"Silence" Is Golden: Hopkins Lands a Role He Can Sink His Teeth Into*, Chi. Trib., Feb. 17, 1991, Arts Section, at 24 (actor Anthony Hopkins quoted as telling interviewer that he started reading a book about Theodore Bundy in preparing for role, but could not finish it: "I'm not interested in these guys"); *Cozying Up to the Psychopath That Lurks Deep Within*, N.Y. Times, Feb. 10, 1991, § 2, at 1, col. 2 (actress Kathy Bates, who plays deranged nurse in movie *Misery*, quoted as telling interviewer that she read books in preparing for the role and learned that psychopaths "are often extremely charming like Ted Bundy").

so that folks could listen to the proceedings."[14] Robert Martinez, the Florida governor who signed Bundy's final death warrant, used Bundy in his unsuccessful 1990 re-election campaign.[15]

This text was written because the current record needs correction in at least two important respects. First, there is a widespread public perception that Bundy received what Margaret Jane Radin termed in another context "super due process"[16] (deliberate, painstaking, individualized judicial review of the legality of his convictions and sentences), and that such process identified and corrected any constitutional error in Bundy's cases. Second, there is a pervasive view that Bundy and his lawyers caused a ten-year "delay" between imposition of sentence in 1979 and execution of sentence in 1989 by manipu-

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14. Lion, *Coming to Grips With Our Fascination With Serial Murderers*, Valley News [Vermont], Sept. 18, 1990, at 14, col. 1. He wrote:

> I was among them, straining to hear about the man who murdered so many coeds in Florida.
>
> I was a little embarrassed by my morbid interest, and most of us avoided glancing at one another, preferring to appear professional, detached and intent on the dialogue. One woman peacefully knit as she listened, Madame DeFarge-like.

Id.

15. The National Law Journal provided the most detailed description of former Governor Martinez's 1990 campaign ad featuring Bundy:

> A guard opens a prison door, walks through and slams it shut behind him. Cut to Florida's Republican Gov. Bob Martinez sitting at his desk, looking severe.
>
> "One of the most serious things that I have to address every day is the whole issue of the death penalty," Martinez says stiffly into the camera. The flag frames him in red, white and blue. A family photo is on the mantle. "I now have signed some 90 death warrants in the state of Florida," he proclaims. "Each one of those committed a heinous crime that I don't want to choose to describe to you."
>
> [The ad then switches to] footage of . . . Bundy, electrocuted in 1989 as a mob outside the prison gates chanted, "Burn, Bundy, Burn." A vague smirk crosses Bundy's face. "I believe in the death penalty," Martinez says over Bundy's freeze-framed image.
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> The camera moves in for a tight closeup of the governor at his desk. "I believe it's the proper penalty for one who has taken someone else's life," Martinez somberly concludes.

Guskind, *Hitting the Hot Button*, Nat'l L. J., Aug. 4, 1990; *see also Ad Features Bundy*, Advertising Age, Mar. 12, 1990, at 23 (describing ad); Spears, *Bob Graham Criticizes Ads for Martinez*, Tallahassee Democrat, Mar. 8, 1990 (Martinez, in his reelection advertising, "declare[d] his support of the death penalty in a 30-second TV spot that also shows a smirking Ted Bundy, who was electrocuted at Martinez's order."); Minzesheimer, *Campaign '90 Notebook*, Gannett News Service, Mar. 5, 1990 (describing ad); Balz, *New Campaign Ads: Grim Focus on Fear of Crime*, Wash. Post, Mar. 4, 1990, at A1, col. 1 (describing ad).

The 1990 election was not the first time Bundy was used in state electoral politics. Bundy's "name — *and* continuing survival — [also had been] subjects raised often in both the [1986] gubernatorial and attorney general races in Florida." A. RULE, *supra* note 7, at 461 (emphasis in original). According to press accounts, Bundy at one point sought a stay of execution in part based on his assertion that Governor (now United States Senator) Robert Graham scheduled Bundy's execution to enhance Graham's campaign for the Senate. *See* Hardy, *Bundy Blames Graham for Pending Execution*, United Press Int'l, June 24, 1986 (Bundy's motion for postconviction relief claimed that "the governor's action in signing this [death] warrant can only be viewed as an attempt to profit politically from taking action against Mr. Bundy.").

16. Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143 (1980).

lating the legal system — in particular by failing to initiate collateral litigation in a timely manner.[17]

Both perceptions are false. Section II of this article, in describing the course of Bundy's postconviction litigation, shows that in fact Bundy's postconviction cases were shoved through the legal system at a speed that can most charitably be characterized as unseemly, and can most accurately be described as periodically frenzied. Further, *all* of the much-vaunted "delay" in Bundy's cases occurred while litigation was pending and proceeding in at least one court. Indeed there was no "delay," as the word is commonly understood. There was a ten-year temporal gap between imposition and execution of sentence in Bundy's cases, but that gap was caused by the courts rather than by Bundy or his lawyers. No time was lost by Bundy's failure to initiate and pursue litigation in a timely fashion.

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17. The three most strident and irresponsible purveyors of this falsehood are G. Kendall Sharp (a federal district judge who heard Bundy's habeas cases), Robert Graham (former Florida governor and now United States senator), and Robert Martinez (former Florida governor).

Judge Sharp, testifying before a congressional subcommittee studying habeas corpus reform, said that he "would like to concentrate on the case of Ted Bundy, which is one that I recently had which points up the problems that we have in the Federal court." Statement of G. Kendall Sharp, Federal District Court Judge, Middle District of Florida, Orlando Division, *Who is on Trial? Conflicts Between the Federal and State Judicial Systems in Criminal Cases, Hearing Before a Subcomm. of the Comm. on Gov't Operations*, 100th Cong., 2d Sess. 62 (1988). After a lengthy recitation of the procedural history of Bundy's cases — in Judge Sharp's courtroom and elsewhere — Sharp's written statement to the subcommittee quoted himself as having commented "that if every death-row inmate 'milked the system' as Bundy has done, then it would shut down the civil side of the courthouse." *Id.* at 78; *see also* Cotterell, *Death-appeals Process Examined*, Tallahassee Democrat, Feb. 27, 1988. This testimony was subsequent to Judge Sharp's denial of Bundy's first habeas petition, but the judge must have been aware that the case would most likely be before him again at some point in the future. Subsequent to Judge Sharp's testimony, Bundy's case did in fact come before him again. *See infra* text accompanying notes 125, 130-132.

Robert Graham similarly used Bundy to illustrate perceived flaws in the habeas statute. As Governor of Florida, Graham reportedly accused Bundy of trying to " 'endlessly manipulate' the legal system to delay his execution." Moline, *Graham and Cabinet Consider Clemency for Bundy*, United Press Int'l, Dec. 19, 1985. The day after Bundy received a federal court stay in 1986, Governor Graham was quoted as stating that " '[a]gain, we've seen a situation where people who have been on death row for many years wait until the last hour to raise claims.' " Hamilton, *Mass Killers Back in Death Row Cells*, United Press Int'l, July 3, 1986. Graham's proposed solution was reform of habeas: " 'I think that we've got to demand some changes at the federal level that say a person only has a reasonable number of years after his trial to bring these claims of constitutional deprivation.'. . . 'It's an abuse of justice to be questioning competency of counsel eight, 10, 12 years after the trial.' " *Id.* When he was elected to the U.S. Senate, Graham proposed just such an amendment to the habeas statute, again reportedly characterizing Bundy's litigation as a " 'typical abuse of the system.' " *Graham Urges Time Limit on Death Appeals*, United Press Int'l, Jan. 26, 1989.

Former Governor Martinez's use of Bundy was described *supra* at note 15. *See also, e.g.*, D. HOOKS & L. KAHN, DEATH IN THE BALANCE: THE DEBATE OVER CAPITAL PUNISHMENT 119 (1989) ("Theodore Robert Bundy was *finally* electrocuted after a decade on Florida's death row.") (emphasis added); Leguire, *Grant Blasts Bundy Delays*, Lake City [Fla.] Reporter, Feb. 22, 1988 ("Saying that convicted murderer Ted Bundy has made a mockery of the law, Congressman Bill Grant, D-[Madison County, Florida], is calling for an overhaul of the judicial system which would hasten executions . . . .").

The disparity between public perception and legal reality in Bundy's cases raises a separate constellation of intriguing inquiries. The distance between perception and reality can be bridged, and partially explained, by metaphor.[18] Bundy is seen as having received heightened due process, although he actually received minimal post-conviction process of any meaningful kind, because he became a symbol — an emblem for evil and a mirror of the people of the United States' deepest fears and desires. Section III of this article explores why Bundy's notoriety warped the legal system's standards and procedures to an extraordinary extent. The judicial process created a series of "Bundy exceptions" to the rule of law. Despite the outward appearance of hyper due process (a decade of repetitive review; lawyers at trial and beyond), in reality the legal system failed.

This article is as much about cultural perception as it is about legalistic reality. The text certainly is not an attempt to discover the "real" Theodore Bundy or to explain the man or his actions, real or perceived. The historical Bundy is not significant for the purposes of this article. Rather the inquiry focuses on Bundy as a symbol constructed by United States' culture to represent death row and on the legal system's response to and interaction with that symbol/litigant. It is a symbol with which we, as members of that culture, ought to be profoundly uncomfortable, for reasons examined in section III.

This project therefore is not a piece of traditional legal scholarship.[19] The historian Barbara Du Bois coined a term that accurately describes this article's intent: "passionate scholarship."[20] By passionate scholarship Du Bois meant scholarship that integrates experience with logic, subjectivity with objectivity, substance with process, and passion with responsibility. Such scholarship is overtly animated by the values and experiences of the writer — here, by my experience as an advocate on behalf of condemned inmates and as a "commentator" on capital punishment. Those experiences influence one's choice of subject matter, one's willingness to write, and the way in which one conceptualizes the process of research and writing; they so influenced this article.

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18. This article does not attempt a scholarly treatment either of the nature of metaphor or the role of metaphor in law. For brilliant expositions of both, see Winter, *Transcendental Nonsense: Metaphoric Reasoning and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105 (1989); Winter, *supra* note 1.

19. For excellent non-legal scholarly analyses of sexual homicide, analyzed from refreshingly feminist perspectives, see D. CAMERON & E. FRAZER, THE LUST TO KILL: A FEMINIST INVESTIGATION OF SEXUAL MURDER (1989); J. CAPUTI, THE AGE OF THE SEX CRIME (1987).

20. Du Bois, *Passionate Scholarship: Notes on Values, Knowing, and Method in Feminist Social Science*, in THEORIES OF WOMEN'S STUDIES 105-116 (1983). Du Bois was describing the aims of feminist research. *See also* sources cited at *infra* note 196.

II.
BUNDY'S INTERACTION WITH THE CAPITAL PUNISHMENT BUREAUCRACY: WHERE DID THE TIME GO?

> I can't understand your behavior. This case is going to be reversed and sent down there [to federal district court] because of a stupid error.[21]

I first encountered the Bundy phenomenon in 1986 when I was an attorney in a then-newly created Florida state agency,[22] the office of the Capital Collateral Representative (CCR), that had as its statutory mandate the representation of all Florida death row inmates in state and federal post-conviction proceedings.[23] Bundy's cases had not yet been through the state post-conviction or federal habeas corpus processes. Such post-conviction litigation was CCR's mission.

Appreciation of the task facing CCR requires understanding of what capital post-conviction investigation and litigation involve.[24] A former Justice of the Florida Supreme Court was fond of asking at oral argument why, if he could read a trial transcript in a few hours, it took so much time to construct a collateral petition in a capital case. The answer is that reading the transcript is only the first step in the process of preparing for post-conviction litigation.

In addition to mastering the trial transcript and direct appeal and certiorari records, as well as the relevant substantive and procedural law, effective collateral litigation requires a complete factual reinvestigation of the case. This reinvestigation must focus on what is missing from the transcript in order to determine what additional evidence should be investigated.

The post-conviction litigator must locate and review the entire record maintained in the trial court, including all evidence, exhibits, and any notes

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21. Judge Robert Vance, United States Court of Appeals for the Eleventh Circuit, addressing the attorney representing the State of Florida during oral argument in Bundy v. Wainwright, 808 F.2d 1410 (11th Cir. 1987) (quoted in A. RULE, *supra* note 7, at 457-58). Rule's quotations confirm conversations I had with Judge Vance shortly after the *Bundy* argument. Based upon Judge Vance's descriptions to me of what he said and what he meant by lambasting the prosecutor, it appears that Rule's account captured the flavor of the exchanges between judge and counsel. *See also* United Press Int'l, *Smith Blasts Federal Court in Bundy Case*, Oct. 24, 1986 (same); United Press Int'l, Oct. 23, 1986 (quoting Judge Vance as saying "this case is going to be reversed on a stupid error.").

Eleventh Circuit oral arguments are not available to the public, either in recorded or transcript form.

22. *See generally* Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 AM. U. L. REV. 513, 585-93 (1988) (describing the state agency and the counsel crisis that led to its creation).

23. That is, CCR represented all unrepresented Florida inmates who had been condemned by a Florida trial court, whose cases had been affirmed by the Florida Supreme Court, denied certiorari review by the United States Supreme Court, and (explicitly or implicitly) denied executive clemency by the governor and executive cabinet. The statute creating CCR is codified at FLA. STAT. ANN. § 27.702 (Harrison Supp. 1991).

24. *See generally* J. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE (1988 & 1991 Supp.).

made by the court clerk about proceedings not designated as part of the formal record on direct appeal. To prepare thoroughly for post-conviction litigation, the investigator must locate and interview all important witnesses, including co-defendants and prior counsel. All proceedings relevant to co-defendants must be examined. Media coverage must be collected and reviewed.[25] Often, it will be necessary to initiate collateral litigation to obtain discovery of these matters.[26] Most capital cases can benefit from a post-conviction psychiatric examination; collateral counsel must arrange for this examination and monitor it for its reliability.[27] Furthermore, any prior conviction that was introduced at the trial or penalty phase must be reinvestigated for validity and, if invalid, challenged in separate collateral proceedings devoted to the invalid prior conviction.[28]

It is critical that the post-conviction litigator review trial counsel's efforts to investigate and present mitigating evidence.[29] The litigator must then make an informed evaluation of trial counsel's performance, based on a complete background investigation of the inmate's life — literally from embryo to death row.[30] This typically requires counseling with members of the prisoner's family, loved ones, and friends in order to uncover intimate information which could be critical to the litigation. The investigation must cover the inmate's childhood, family life, education, relationships, important experiences, and overall psychological make-up.[31] Crucial witnesses such as childhood friends, teachers, employers, religious advisors, and neighbors may be "scattered like a diaspora of leaves along the tracks of defendant's travels;"[32] nevertheless, they must be located and interviewed in order to determine whether they can provide favorable post-conviction evidence.

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25. *E.g.*, Coleman v. Kemp, 778 F.2d 1487 (11th Cir. 1985) (discussing influence of media publicity on fair trial), *cert. denied*, 476 U.S. 1164 (1986); Isaacs v. Kemp, 778 F.2d 1482 (11th Cir. 1985) (same), *cert. denied*, 476 U.S. 1164 (1986).

26. *E.g.*, FLA. STAT. ANN. §§ 119.01, .011, .07 (Harrison Supp. 1991) (articulating general state policy promoting access to public records); *see* Downs v. Austin, 522 So. 2d 931, 934 (Fla. Dist. Ct. App. 1988) (holding that post-conviction mandamus petition is not a "pending appeal" within the meaning of FLA. STAT. ANN. § 119.011(3)(d)(2), and therefore that state's disclosure provisions apply); Tribune Co. v. P.C.S.O. No. 79-35504, Miller/Jent, 493 So. 2d 480, 482 (Fla. Dist. Ct. App. 1986) (holding that because actions for post-conviction relief do not constitute "pending appeals" as defined by FLA. STAT. ANN. § 119.011(3)(d)(2), related records are not exempt from public disclosure).

27. *E.g.*, State v. Sireci, 502 So. 2d 1221, 1223 (Fla. 1987) (holding that an evidentiary hearing is necessary to address prisoner's constitutional claims arising from failure of psychiatrists appointed before trial to conduct competent and appropriate evaluations).

28. *E.g.*, Johnson v. Mississippi, 486 U.S. 578, 585-86 (1988) (holding that a vacated prior conviction relied upon by capital prosecution had no relevance to sentencing and was therefore prejudicial).

29. Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 345 (1983).

30. The inmate's conduct on death row should also be investigated, as good behavior constitutes admissible mitigating evidence at a resentencing hearing. Skipper v. South Carolina, 476 U.S. 1, 4-5 (1986).

31. Goodpaster, *supra* note 29, at 324.

32. *Id.* at 321.

The investigation described above must be undertaken in every capital post-conviction case. At the time CCR commenced operations in October 1985, approximately 200 people lived on Florida's death row. About half of these had not reached the state post-conviction litigation stage, and therefore they were not yet represented by CCR. Of the approximately 100 cases that were in the post-conviction phases of litigation, thirty or so inmates were represented by volunteer, pro bono counsel. CCR was not directly responsible for those prisoners, although the agency did what it could to help the pro bono attorneys. That left about seventy inmates, divided among three experienced and several less experienced CCR lawyers.

At any given time, execution dates were scheduled for two to four of these prisoners. In Florida, the governor signs a death warrant to trigger an execution date.[33] Unless a stay is obtained prior to the specified execution date, the subject of the warrant will be put to death.

Given the amount of work and emotional energy that capital post-conviction litigation requires,[34] CCR's caseload was staggering. I have never worked so hard in my life and never will again. The office's lawyers, support staff, and investigators routinely worked hundred-hour weeks and fifteen-hour days, and longer hours were required in frequent crises. During an especially frenetic five-week period in 1986,[35] one CCR lawyer seldom left the office except to shower. Maniacal commitment to the clients, and not nearly enough time in the day or night to fulfill that commitment, was the quintessence of the job.[36]

Into this madness called a law office came the Bundy cases,[37] with only four weeks until the scheduled execution date.[38] It quickly became clear that Bundy's cases could overwhelm CCR's paper-thin resources.

Bundy had been convicted of first degree murders by two different Florida juries. The juries had returned non-binding sentencing "recommenda-

33. The executive schedules execution dates only in New Hampshire and Florida. In the remaining thirty-five capital punishment states, *see* NAACP LEGAL DEFENSE FUND, INC., DEATH ROW, USA 1 (Apr. 24, 1991) [hereinafter DEATH ROW, USA], execution dates are set by the state courts.

34. Mello, *supra* note 22, at 530-66 (discussing the complexity and other difficulties of conducting capital post-conviction litigation).

35. Three people represented by CCR were executed during this period: Daniel Thomas (executed April 15, 1986), David Funchess (executed April 22, 1986), and Ronald Straight (executed May 20, 1986). *See* DEATH ROW, U.S.A., *supra* note 33, at 7.

36. The office's crushing caseload raised serious ethical dilemmas, which have led courts and commentators to conclude that such workloads render effective representation impossible. *E.g.*, Cooper v. Fitzharris, 551 F.2d 1162 (9th Cir. 1977), *modified*, 586 F.2d 1325 (9th Cir. 1978); State v. Smith, 140 Ariz. 355, 362, 681 P.2d 1374, 1381 (1984) (en banc); Schwarz v. Cianca, 495 So. 2d 1208, 1209 (Fla. Dist. Ct. App. 1986); State *ex rel.* Escambia County v. Behr, 354 So. 2d 974, 975 (Fla. Dist. Ct. App. 1978), *aff'd*, 384 So. 2d 147 (Fla. 1980); Note, *The Right to Counsel and the Indigent Defense System*, 14 N.Y.U. REV. L. & SOC. CHANGE 221, 221-23, 240-41 (1986).

37. Bundy was the defendant in two capital cases. *See infra notes* 42-45 and accompanying text.

38. Bundy's death warrant had been signed by the governor on February 5, 1986. The killing was scheduled for 7:00 a.m. on March 4, 1986.

tions"[39] that capital punishment be imposed, and the trial judges in both cases had agreed with the jury recommendations and sentenced Bundy to the electric chair. The Florida Supreme Court had affirmed the convictions and sentences on direct appeal.[40] Bundy had fired his appellate lawyer and filed a pro se, out-of-time certiorari petition in the case that was the subject of the death warrant. He was also posturing publicly with the governor about executive clemency.[41]

Like most Floridians, I knew about the Bundy cases—or I thought I did. There were really two Bundy cases, each proceeding on a different litigation track. In one, Bundy was on death row for bludgeoning to death two Tallahassee sorority women, Lisa Levy and Margaret Bowman, in the Chi Omega chapter house[42] at Florida State University.[43] The crime occurred in 1978; Bundy was convicted and condemned in 1979. The direct appeal had been orally argued in the Florida Supreme Court in 1982. The court affirmed the convictions and sentences in 1984 — five years after their imposition.[44] It was for these two murders that Bundy was scheduled to die on March 4, 1986.

In addition to the Chi Omega case, Bundy had been condemned for killing twelve-year-old Kimberly Leach in Lake City, Florida, in 1978. Bundy was convicted and sentenced in 1980. This case had been affirmed on direct appeal in 1985 by the Florida Supreme Court,[45] though the time for seeking United States Supreme Court review had not yet expired as of the time that the death warrant was signed on the Chi Omega case.

Bundy was also suspected of dozens of West Coast crimes, but he had been convicted of only one: the kidnapping in Utah of Carol DeRonch.[46] At the time of the Florida murders, Bundy was an escapee from an Aspen, Colorado, jail where he had been scheduled to stand trial for the kidnapping and murder of Caryn Campbell.

Bundy was palpably hated. He was loathed by the public, despised by the media, and feared (if secretly) by some death penalty abolitionists who felt

39. *See infra* note 115 and accompanying text (discussing Florida's scheme of jury sentencing recommendation).

40. Bundy v. State, 471 So. 2d 9 (Fla. 1985), *cert. denied*, 479 U.S. 894 (1986); Bundy v. State, 455 So. 2d 330 (Fla. 1984), *cert. denied*, U.S. 1009 (1986).

41. R. LARSEN, *supra* note 6, at 351.

42. Several other women were beaten severely that night. *See* R. LARSEN, *supra* note 6, at 245-54; WITNESS, *supra* note 7, at 213-19; A. RULE, *supra* note 7, at 264-80.

43. The sorority house where the killings took place was located about two blocks from CCR's office.

44. Bundy v. State, 455 So. 2d 330 (Fla. 1984), *stay granted*, 475 U.S. 1041 (1986), *cert. denied*, 476 U.S. 1109 (1986).

45. Bundy v. State, 471 So. 2d 9 (Fla. 1985), *cert. denied*, 479 U.S. 894 (1986).

46. For descriptions of the DeRonch case trial, see R. LARSEN, *supra* note 6, at 134-49; WITNESS, *supra* note 7, at 153-71; A. RULE, *supra* note 7, at 187-90. Bundy was sentenced to 1 to 15 years in prison. A. RULE *supra* note 7, at 206. The Utah Supreme Court affirmed the conviction. State v. Bundy, 589 P.2d 760 (Utah 1978), *cert. denied*, 441 U.S. 926 (1979).

uncomfortable explaining why Bundy ought not be killed.[47] Bundy had become synonymous with evil and a personification of whom the United States wanted to execute.

CCR designated a "Bundy room" in which to organize the massive amounts of paper generated by his cases. Mark Olive, the office's chief litigator, was Bundy's lead counsel; my peripheral job in the case was to assist Olive. I read the transcripts of the Kimberly Leach (Lake City) trial, summaries of the Chi Omega (Tallahassee) trial, and endless other documents in the cases.

I learned from my reading that reporters covering the Chi Omega trial thought that the odds of conviction, based on the evidence presented to the jury, were even: fifty-fifty.[48] The sentencing jury initially deadlocked six-six on whether Bundy should die,[49] notwithstanding that (1) the community from which the jury was selected had been saturated for months before the trial

47. *See infra* note 160 and accompanying text. Bundy had been objectified to such an extent that his death was almost secondary.

48. Rule wrote that "[m]oving into final arguments, the press was still wagering even odds on the outcome of the trial," and that as the jury deliberated Bundy's guilt the "odds were still even. Fifty-fifty. Acquittal or conviction." *See* A. RULE, *supra* note 7, at 375, 383; *see also id.* at 365 ("[T]he word was that Bundy might win."). Larsen agreed. *See* R. LARSEN, *supra* note 6, at 306 (Upon trial court's ruling that Bundy's statements made during custodial interrogation must be suppressed because they had been obtained in violation of Bundy's constitutional rights, "suddenly, Ted Bundy's defense had a winnable case."); *id.* at 317 (During jury deliberations, some reporters predicted acquittal and others conviction; "[o]bviously there was 'reasonable doubt' in the state's mostly circumstantial case."). Two *Miami Herald* reporters covering the trial wrote that it took the jury "five votes to reach the decision" of guilty. Bearak & Thompson, *Jurors Have Varied Reasons for Deciding Bundy's Guilt*, Miami Herald, July 31, 1979, at 1A & 14A.

49. Apparently following interviews with at least one juror in the Chi Omega case, two *Miami Herald* staff writers reported:

> It took [the jury] an hour and 40 minutes to decide [Bundy's sentence]. They voted three times. They split 6-6 twice. They prayed.
>
> "I requested that 10 minutes meditation be taken," said jury foreman Rudolph Tremi, 38, a projects engineer for Texaco.
>
> The tie was broken.

Bearak & Thompson, *supra* note 48, at 14A. Rule wrote (without citing sources): "The jury would say later that they had been split at one point with a six-six deadlock, a deadlock that had been broken after ten minutes of 'prayer and meditation.' " A. RULE, *supra* note 7, at 392.

A six-six deadlock would have constituted a recommendation of a life sentence. This legal rule was not evident at the time of Bundy's trial and was a fact about which Bundy's jury was never informed.

Florida jury recommendations of life or death sentences need not be unanimous. This is clear from the statutory language. *See* FLA. STAT. § 921.141(3) (Harrison Supp. 1989). But although the capital statute speaks in terms of a recommendation by a "majority" of the jury, the Florida Supreme Court has held (subsequent to Bundy's sentencing) that a split vote of six-six is to be treated as a recommendation of life imprisonment. *See* Patten v. State, 467 So. 2d 975, 979 (Fla. 1985), *cert. denied*, 474 U.S. 876 (1985); Rose v. State, 425 So. 2d 521, 525 (Fla. 1983), *cert. denied*, 461 U.S. 909 (1983). Bundy's jury was not told that a six-six vote would have been sufficient for a life recommendation.

Bundy's jurors also were not told that a jury "recommendation" of life imprisonment would have been tantamount to a life sentence. *See* note 115 and accompanying text.

with publicity about Bundy as serial rapist/murderer,[50] and (2) by operation of the process by which capital juries are death qualified,[51] all immovable opponents of the death penalty had been culled from Bundy's jury.

Surprisingly, the evidence of guilt presented to Bundy's Chi Omega jury was "not overwhelming."[52] The jury reportedly needed to take five votes "before the jurors were unanimous on guilt."[53] The "scientific evidence was at times equivocal and produced sharply differing opinions among the experts called to testify. No fingerprints were found."[54] Both Florida cases against Bundy relied upon the testimony of eyewitnesses. Yet the critical eyewitnesses had undergone police hypnosis before they testified. Bundy's lawyers challenged the reliability of such hypnotically "refreshed" or "created" testimony. The Florida Supreme Court agreed that hypnosis destroys the reliability of memory and its resulting testimony, and the court held in Bundy's cases that

50. Even after the trial's venue was changed from Tallahassee in north Florida to Miami in south Florida, 450 miles away, Rule thought it "extremely doubtful that Ted Bundy could ever have received an impartial trial in the state of Florida. He was becoming better known than Disney World, the Everglades, and the heretofore all-time media pleaser: Murph the Surf [sic]." A. RULE, *supra* note 7, at 340. According to Michaud and Aynesworth, the Chi Omega prosecutors "were working with a jury sensitized by seventeen months of publicity since the sorority house murders. The men and women selected to judge Ted Bundy might honestly tell the court their verdict would be based upon the evidence, but the overwhelming bulk of what they had been exposed to in the media was suggestive of guilt. Never was Ted Bundy mentioned except in connection with murder and mayhem." WITNESS, *supra* note 7, at 265; *cf.* R. LARSEN, *supra* note 6, at 327 (By the time the Leach trial began in January 1980, "Florida and other states had been saturated with publicity about Ted Bundy, the 'multiple murder suspect,' convicted killer of the Chi Omega" women.).

51. *E.g.*, Darden v. Wainwright, 477 U.S. 168 (1986) (exclusion from the jury in a capital trial of a member of the venire for expressing beliefs in opposition to capital punishment not error; proper test is whether a prospective juror's views on capital punishment would impair performance of her duties as a juror); Wainwright v. Witt, 469 U.S. 412 (1985) (same); *see also* Lockhart v. McCree, 476 U.S. 162 (1986) (process of death-qualification of capital juries held not to violate Constitution). For an analysis of death qualification in Florida, see Winick, Witherspoon *in Florida: Reflections on the Challenge for Cause of Jurors in Capital Cases in a State in Which the Judge Makes the Sentencing Decision*, 37 U. MIAMI L. REV. 825 (1983).

52. R. LARSEN, *supra* note 6, at 296.

This article draws no conclusions about Bundy's factual guilt or innocence, much less about his legal culpability (even assuming that such concepts possess directive content, which here they may well not; *see generally* C. BLACK, CAPITAL PUNISHMENT (2nd ed. 1981)). Popular writers studying Bundy's case, including some ostensibly predisposed to find him innocent, have universally concluded that he was factually guilty of at least several sexual homicides. Much of the material relied upon by these writers was not presented at Bundy's trials, and thus it has never undergone adversarial testing. However, the cumulative weight of the cases made against Bundy by Michaud, Aynesworth, Rule, and Larsen cannot be dismissed for that reason alone. *Cf.* Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L. J. 39 (1985) (questioning the efficacy of the adversarial model as a way of solving problems and ascertaining truth); Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984) (same).

53. WITNESS, *supra* note 7, at 273; *accord* Bearak & Thompson, *supra* note 48, at 1A, 14A.

54. WITNESS, *supra* note 7, at 9. "In fact, in the dozens of cases from Seattle to Florida in which the police have sought to implicate Bundy there has not been a single bit of physical evidence that incontrovertibly demonstrates his involvement in anything more sinister than car theft." *Id.*

such testimony would henceforth be per se inadmissable in Florida courts.[55] The court, however, managed to affirm Bundy's convictions and sentences.[56] This was my first encounter with what some have come to call the Bundy exception to the rule of law. Hypnotically "refreshed" testimony was per se unreliable and thus inadmissable as evidence, except in Bundy's cases.

The prosecutors in both Florida cases had offered Bundy negotiated pleas of life imprisonment in exchange for Bundy's agreement to plead guilty to the charges —[57] due, most likely, to the weakness of the evidence against Bundy. Bundy rejected the plea bargains, acting against the strident advice of his family and his lawyers. Bundy was convinced that he could prove his innocence at trial.[58]

Bundy's trial attorneys were concerned that he was mentally incompetent even to stand trial. This concern resulted in a competency hearing scripted by Kafka, with Bundy and two psychiatrists (asserting that he was competent) pitted against his senior trial lawyer and a third psychiatrist (who questioned whether Bundy was competent).[59] The judge found Bundy competent because Bundy demanded that he be deemed competent and because he looked and sounded competent.[60]

At trial, Bundy had been denied his defense lawyer of choice, Atlanta attorney Millard Farmer.[61] Farmer is one of the best capital defense attorneys in the United States. Because he was a Georgia lawyer and not a member of the Florida bar, however, Farmer was required to seek permission to appear *pro hac vice* in the Florida courts as Bundy's counsel. Such requests are routinely granted, but in Bundy's case it was denied. It was denied in general because Farmer had a reputation of being "disruptive" and in particular because he had an outstanding contempt of court citation in Georgia.[62] That citation[63] was based on Farmer's unrelenting insistence that the prosecutor in

55. Bundy v. State, 471 So. 2d 9, 18 (Fla. 1985), *cert. denied*, 479 U.S. 894 (1986); Bundy v. State, 455 So. 2d 330 (Fla. 1984), *cert. denied*, 476 U.S. 1109 (1986).

56. Coleman, *supra* note 4, at 17 (describing hypnotized testimony in Leach case and the court's application of harmless error standard to admission of witness' hypnotically "refreshed" testimony in that case).

57. *See* R. LARSEN, *supra* note 6, at 296-300; WITNESS, *supra* note 7, at 255-58; A. RULE, *supra* note 7, at 343-44.

58. R. LARSEN, *supra* note 6, at 298-300; WITNESS, *supra* note 7, at 255-59; A. RULE, *supra* note 7, at 344.

59. R. LARSEN, *supra* note 6, at 343-46; WITNESS, *supra* note 7, at 250-52, 258-59, 266; A. RULE, *supra* note 7, at 345; *see also* Coleman, *supra* note 4, at 16.

60. Immediately prior to closing arguments in the Chi Omega trial, Bundy's lawyers moved to revisit the competency issue. The court refused. R. LARSEN, *supra* note 6, at 314.

61. A. RULE, *supra* note 7, at 373; *see generally* Bundy v. Rudd, 581 F.2d 1126 (5th Cir. 1978) (finding no federal constitutional error in Florida's refusal to permit Farmer to represent Bundy), *cert. denied*, 441 U.S. 905 (1979); *cf.* R. LARSEN, *supra* note 6, at 294-95 (discussing Farmer's attempts to represent Bundy).

62. WITNESS, *supra* note 7, at 252, 254.

63. Farmer v. Holton, 245 S.E.2d 457, 146 Ga. App. 102 (1978) (upholding contempt citation and describing facts), *cert. denied*, 440 U.S. 958 (1979).

a 1978 Georgia capital trial refer to the Black[64] defendant, George Street, as "Mr. Street" rather than "George," since the prosecutor referred to all other participants in the case (including prospective jurors) as "Mr.," "Miss," or "Mrs." The prosecutor refused, instead referring to the defendant by his first name as did Farmer. The trial judge ruled that this behavior by the prosecutor (racist, in the language code of the South)[65] was fine. Farmer's refusal to permit the trial to proceed under these circumstances[66] earned him the contempt citation that disqualified him from appearing as Bundy's trial lawyer. The attorneys who did represent Bundy at trial were zealous but inexperienced.[67] They also clashed with Bundy over trial tactics.[68] Bundy understandably felt set up; in any event he never got over his anger at being denied the counsel of his choice.[69] Farmer's consummate lawyering skills and experience could well have made the difference between life or death in Bundy's case. Even with the lawyers who did represent him, the sentencing jury was twice divided six-six.[70]

As CCR delved more deeply into the Bundy cases, it became evident that those cases would be a massive job to investigate and litigate. Representing

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64. I capitalize "Black" because in the United States the term connotes more than color, even more than skin color. It defines a heritage, history, culture, and political identity. It is also one of the few instances where a label enhances understanding.

65. *See, e.g.*, R. KLUGER, SIMPLE JUSTICE 223 (1975) (as a lawyer for the NAACP Legal Defense and Educational Fund, Thurgood Marshall was rarely "treated as less than a gentleman in the courtroom, except by an occasional clerk or bailiff who might call him by his first name"); *id.* at 263 (describing Marshall's successful objection to a prosecution's practice of calling Marshall's Black "client by his first name"); King, *Letter From Birmingham City Jail*, in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING 293 (J. Washington ed. 1986) (". . . when your first name becomes 'nigger' and your middle name becomes 'boy' and your last name becomes 'John,' and when your wife and mother are never given the respected title of 'Mrs.'. . ."); *cf.* A. Lewis, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 27 (1991) (During Alabama trial in New York Times v. Sullivan, trial transcript referred to the white lawyers as "Mr." The Blacks "were called 'Lawyer Gray,' 'Lawyer Crawford,' 'Lawyer Seay.' The color of their skin denied them the honorific 'Mr.' "). Clarence Thomas, testifying on the first day of his confirmation hearings, was quoted as recalling watching "as my grandfather was called a 'boy.' " Marcus, *Thomas Mum on Abortion, Backs Privacy Rights*, Valley News [Vermont], Sept. 11, 1991, at 14;

Three decades ago, a courageous Black woman named Mary Hamilton refused to testify when an Alabama trial judge persisted in calling her "Mary." The United States Supreme Court, in a one-sentence per curiam opinion, reversed her conviction. Hamilton v. Alabama, 376 U.S. 650 (1964).

66. To further make his point, Farmer insisted upon calling the judge by his first name.

67. Rule, who was present for the Chi Omega trial, characterized Bundy's lawyers as "all young, all determined to do their best, and all woefully inexperienced." A. RULE, *supra* note 7, at 346; *see also id.* at 360, 375; *accord* WITNESS, *supra* note 7, at 262-63, 269, 270-71. For example, the attorney whom Bundy insisted do closing argument in the Chi Omega case was an appellate lawyer with no previous felony trial experience. R. LARSEN, *supra* note 6, at 316; WITNESS, *supra* note 7, at 262.

68. *E.g.*, R. LARSEN, *supra* note 6, at 296, 298-300, 310, 313-14; WITNESS, *supra* note 7, at 256-58; A. RULE, *supra* note 7, at 335, 344-46, 372-73, 375.

69. A. RULE, *supra* note 7, at 335-38, 373. Bundy continued throughout the trial to request Farmer. *Id.* at 342, 373, 389.

70. *See supra* note 49.

him would have been the equivalent of adding ten cases to CCR's already savage workload.[71]

However, a more immediate problem confronted CCR. Jurisdictionally, the office could not represent Bundy in seeking certiorari review of the Florida Supreme Court's direct appeal decision; CCR could only represent him in the post-conviction stages. To have undertaken his immediate representation would have required bypassing certiorari and going directly into state post-conviction litigation. That avenue appeared unattractive, since at least one direct appeal issue (the hypnotism claim) was ripe for plenary Supreme Court consideration.[72] The posture was further confused because Bundy had fired his direct appeal lawyer and was representing himself in the United States Supreme Court. He had filed a pro se, out-of-time certiorari petition and a handwritten stay application.

CCR began to explore quietly the possibility of placing Bundy's case with a private law firm willing to represent him pro bono, at least as to the immediate certiorari petition. In the past I had consulted on another Florida death case[73] with the Washington, D.C., firm of Wilmer, Cutler and Pickering. The firm had done a superb job on that case. Through a mutual friend I asked James Coleman, a partner in the firm, to consider taking on, without pay, the Bundy certiorari petition. After much freeform negotiation and soul searching, Coleman and an associate, Polly Nelson,[74] agreed on February 19 (sixteen days before the scheduled execution date) to represent Bundy. Initially, the firm made a commitment only to represent Bundy in the United States Supreme Court on the out-of-time certiorari petition and stay application. Gradually, however, Coleman and Nelson were persuaded to take over more and more of the Bundy cases. Eventually the firm became Bundy's sole counsel.

At this point, recall, certiorari review of the Chi Omega case — the one with the scheduled March 4 execution date — had been sought only through Bundy's pro se, out-of-time certiorari petition, which Bundy had supplemented with a handwritten stay application filed soon after the death warrant had been signed. Lewis Powell, Circuit Justice for the Eleventh Circuit (which includes Florida), denied the stay without prejudice and instructed

71. *See supra* notes 34-36 and accompanying text.

72. Soon after denying certiorari in Bundy's case, the Supreme Court granted review in another case to examine the constitutional consequences of hypnotically-affected testimony. *See* Rock v. Arkansas, 483 U.S. 44 (1987) (criminal defendant's testimony on her own behalf cannot be excluded because it was hypnotically affected).

73. The other Florida inmate represented by the firm was Steven Todd Booker. *See* Mello, *supra* note 22, at 581-85 (describing firm's representation of Booker); *see also* Booker v. Dugger 922 F.2d 633 (11th Cir. 1991) (judge's constitutionally erroneous instruction precluding jurors from considering nonstatutory mitigating circumstances held not harmless), *cert. denied sub. nom* Singletary v. Booker, 60 U.S.L.W. 3265 (U.S. Oct. 7, 1991) (No. 90-1778).

74. In 1986 Coleman was a civil litigator specializing in regulatory law. Since 1991 he has been a teacher at Duke University School of Law. In 1986 Nelson was a recent law school graduate. WITNESS, *supra* note 7, at 317; *see also* Coleman, *supra* note 4, at 14.

Bundy to obtain proper legal counsel to file an application complying with the rules of the Court.[75] This was an oblique suggestion that Bundy first seek a stay from the Florida Supreme Court before going to the United States Supreme Court. Thus encouraged, Bundy's lawyers filed for a stay in the Florida Supreme Court, which was summarily denied. The attorneys then filed a stay application in the United States Supreme Court, along with a request to file an amended, out-of-time certiorari petition. The Court granted both on February 26, nine days before the scheduled execution date.[76] The execution was, therefore, stayed until such time as the amended certiorari petition could be filed and decided by the Supreme Court.

For the moment the crisis was over. My role as direct participant in Bundy's cases also was over. Henceforth, Coleman and Nelson would be Bundy's attorneys, and my role would be that of one tangential advisor among many.

In May 1986 the Supreme Court denied certiorari in the Chi Omega case, simultaneously dissolving the stay.[77] That decision was front-page news in Florida. Ordinarily Bundy's lawyers would have been granted some time to react before a new execution date was set.[78] But this was Bundy, and Bundy was different. Seventeen days after the Supreme Court declined certiorari review, the governor signed a second death warrant on Bundy as to the Chi Omega case. The warrant was signed on May 22, and the execution was scheduled for July 2.[79]

It is difficult to capture in words the frenetic activity of that month leading up to the scheduled July 2 execution.[80] Between June 19 and June 31, Bundy's lawyers unsuccessfully sought post-conviction relief (and stay of execution) from the state trial court,[81] the Florida Supreme Court,[82] and the federal district court.[83] The district court denied an indefinite stay without

75. A. RULE, *supra* note 7, at 438.

76. Bundy v. Florida, 475 U.S. 1041 (1986). The events leading up to the stay are described in A. RULE, *supra* note 7, at 438.

77. Bundy v. Florida, 476 U.S. 1109 (1986). The timing of the denial was "all show-biz perfection. The Court's answer [denying certiorari] was announced during a break in a two-part mini-series about Ted. Mark Harmon (PEOPLE magazine's 'Sexiest Man Alive') played Ted .... [H]e played Ted Bundy ... as a young Kennedy clone." A. RULE, *supra* note 7, at 448.

78. Bundy's lawyers unsuccessfully attempted to convince the governor to wait before signing a warrant. Coleman, *supra* note 4, at 18.

79. *Id.*

80. Coleman wrote that he and Nelson "worked feverishly to complete our review of the Chi Omega record and to prepare the state and federal papers for collateral relief." *Id.*; *see also id.* at 18-19 (describing efforts). Rule described that period as "wild. Polly Nelson and Jim Coleman had spent consecutive nights without sleep, racing the clock set by Ted's pending death warrant." A. RULE, *supra* note 7, at 458.

81. Coleman, *supra* note 4, at 18.

82. Bundy v. State, 490 So. 2d 1257 (Fla. 1986) (decided June 26, 1986); Bundy v. State, 490 So. 2d 1258 (Fla. 1986) (decided June 30, 1986).

83. Bundy v. Wainwright, 651 F. Supp. 38 (S.D. Fla. 1986) (decided July 2, 1986), *rev'd*, 808 F.2d 1410 (11th Cir. 1987).

bothering to obtain, much less read, the 15,000 page state court record in the case upon which Bundy's constitutional claims were based. The state court record was in the trunk of the prosecutor's car during the short time that the district court had the case under consideration.[84] The district judge granted a twenty-four hour stay to permit Bundy time to live long enough to appeal his rulings. The United States Court of Appeals for the Eleventh Circuit stayed the execution indefinitely,[85] less than fifteen hours[86] before the rescheduled execution. The court put the case on an expedited briefing and oral argument timetable.[87]

Meanwhile, Bundy's lawyers had, during the summer of 1986, filed a timely certiorari petition asking the United States Supreme Court to grant plenary review in the Kimberly Leach case. On October 14, 1986, the Court refused.[88] Seven days later, on October 21, the governor signed a death warrant as to that case, setting the execution for a month in the future.[89]

Coleman and Nelson repeated the same drill as in the Chi Omega case. If anything, this time it was even more frantic. Bundy was denied stays by *three courts* (the state trial court, the Florida Supreme Court, and federal district Judge G. Kendall Sharp)[90] in *one day*.[91] The Eleventh Circuit stayed the execution the next day.[92] The prosecutors unsuccessfully applied to the Supreme Court to dissolve the stay.[93] The Court upheld the stay less than seven hours before Bundy was to have been electrocuted.[94] So, by late 1986, both Bundy

84. Bundy v. Wainwright, 808 F.2d 1410, 1414 (11th Cir. 1987); Coleman, *supra* note 4, at 18.

85. Bundy v. Wainwright, 794 F.2d 1485 (11th Cir. 1986) (decided July 2, 1986).

86. A. RULE, *supra* note 7, at 451.

87. Coleman, *supra* note 4, at 52.

88. Bundy v. Florida, 479 U.S. 894 (1986).

89. The execution was set for 7:00 a.m. on November 18, 1986. Coleman, *supra* note 4, at 19; *see* Emergency Application for Stay of Execution to Preserve Jurisdiction Pending Filing and Disposition of Petition for Writ of Certiorari, at 2, Bundy v. Florida, 488 U.S. 1036 (1989) (copy on file with author).

90. *See supra* note 17.

91. Letter from Margaret Vandiver to Michael Mello, Aug. 14, 1990, at 3 (copy on file with author). Vandiver wrote:

> We were denied in [state trial] court about 11 in the morning on November 17th. Polly and Jim went on to Tallahassee, and I drove the [federal district court] papers to Orlando. The [Florida Supreme Court denied a stay] sometime in the early afternoon, and I filed the [district court] papers around 2:30. The [district] judge denied the stay at about 10:30 p.m. on the 17th.

Id.; *see also* Bundy v. State, 497 So. 2d 1209 (Fla. 1986) (decided November 17, 1986); Bundy v. Wainwright, 805 F.2d 948 (11th Cir. 1986) (decided November 18, 1986). The federal district court's opinion of November 17, 1986, denying the stay, is unpublished. *See* Order, Bundy v. Wainwright, No. 86-968-CIV-ORL-18 (date-stamped at 10:48 p.m., Nov. 17, 1986) (copy on file with author); *see also* Coleman, *supra* note 4, at 19.

92. Bundy v. Wainwright, 805 F.2d 948 (11th Cir. 1986).

93. Wainwright v. Bundy, 479 U.S. 978 (1986) (summary order).

94. WITNESS, *supra* note 7, at 316 ("Bundy already had been fitted for his funeral suit from Jim Tatum's Fashion Showroom in Jacksonville ($69.95)."); A. RULE, *supra* note 7, at 458.

cases were in the Eleventh Circuit. Both cases were on chillingly expedited briefing and oral argument schedules.

The Eleventh Circuit oral argument in the Chi Omega case sizzled. The judges seemed dumbfounded (a) that the district court could have denied habeas relief (and a stay) without even making a pretense of looking at the 15,000 page record of the state court proceedings upon which Bundy's constitutional claims were based, and (b) that the prosecutors could have led the district court into making such a glaring error. The late Judge Robert S. Vance, no bleeding-heart friend of death row by any stretch of the imagination,[95] reportedly blistered the prosecutor: "I can't understand your behavior. This case is going to be reversed and sent down there [to district court] because of a stupid error. If you had called it to the attention of the [district] judge at the time, it could have been corrected in four days. It's wrong. It's clearly wrong, counsel. It's not arguable by an attorney of integrity."[96] Later in the argument, Judge Vance moderated his frustration a bit and allowed that "[m]aybe the Court has been a little too harsh on you personally, counsel."[97] Still, the handwriting was on the wall. The Eleventh Circuit intended to remand the Chi Omega case. In fact, the court planned to send the Kimberly Leach case back as well.

In 1987 the Eleventh Circuit remanded both Bundy cases to the respective federal district courts for evidentiary hearings on Bundy's mental competency to stand trial.[98] Again, the proceedings were to be truncated. The district judge in the Chi Omega habeas case, who was new to the federal bench[99] (and whose error reportedly had been termed "stupid" by Judge Vance in the appellate oral argument), appeared determined to proceed with extreme deliberation; events in that judge's court progressed at a snail's pace. By contrast, the district judge in the Kimberly Leach habeas case, Judge George Kendall Sharp, moved with lightning speed. He held the evidentiary hearing on Bundy's competency to stand trial[100] and ruled against Bundy.[101] The Leach case therefore returned to the Eleventh Circuit, while the Chi

95. Mello, *Rough Justice: The Capital Habeas Corpus (Anti)Jurisprudence of Judge Robert Vance*, 42 ALA. L. REV. (1991) (forthcoming).

96. A. RULE, *supra* note 7, at 457-58; *see also supra* note 21 (discussing why the quotation possess indicia of reliability).

97. A. Rule , *supra* note 7, at 458.

98. Bundy v. Dugger, 816 F.2d 564 (11th Cir.), *cert. denied*, 484 U.S. 870 (1987) (Kimberly Leach case); Bundy v. Wainwright, 808 F.2d 1410 (11th Cir. 1987) (Chi Omega case).

99. According to Rule, Bundy's was his first capital habeas case since becoming a federal judge. A. RULE, *supra* note 6, at 458.

100. Coleman, *supra* note 4, at 53 (summarizing Bundy's claim of mental incompetency); *see also* WITNESS, *supra* note 7, at 317-23 (same); A. RULE, *supra* note 7, at 462-70 (summarizing Bundy's incompetency claim and the prosecution's counter-arguments).

101. Bundy v. Dugger, 675 F. Supp. 622 (M.D. Fla. 1987), *aff'd*, 850 F.2d 1402 (11th Cir. 1988), *cert. denied*, 488 U.S. 1034 (1989). Rule described Judge Sharp's actions as "swift, impatient and firm." A. RULE, *supra* note 7, at 470. According to Coleman, Judge Sharp was "quoted by a reporter as saying that he thought the proceeding was a waste of time." Coleman, *supra* note 3, at 53.

Omega litigation languished in district court limbo until after the end of Bundy's life.

The Eleventh Circuit accelerated briefing and oral argument in the Leach case. In mid-1988 the court affirmed the district court's denial of habeas relief.[102] In December 1988 Bundy's lawyers filed a certiorari petition asking the Supreme Court to review the decision of the Eleventh Circuit. The justices conferenced on Friday, the 13th of January, 1989—not a good sign. Shortly after 10:00 a.m. on Tuesday, January 17, 1989, the Court released its order denying certiorari in the Leach case.[103] Within minutes,[104] Florida's Governor Martinez signed a seven-day death warrant. The execution was scheduled for Tuesday, January 24, 1989, at 7:00 a.m.

The Supreme Court's decision denying certiorari had been predictable, and Bundy's lawyers were as ready as could have been expected. The day after the warrant was signed, Coleman and Nelson traveled from D.C. to Florida to seek a stay from the state trial court in Lake City, in central Florida. The stay application was filed in the morning of January 18 and was denied the next day.[105] Minutes after the stay was denied, the Florida Supreme Court announced that it would hear oral argument the following morning in Tallahassee.[106] Coleman and Nelson drove from Lake City to Tallahassee and spent the night preparing a brief for the Florida Supreme Court. The brief was filed in the early morning hours of January 20. Oral argument began at 9:00 a.m. The Florida Supreme Court unanimously denied the stay shortly after noon, less than an hour after the conclusion of oral arguments scheduled for the day.[107]

Soon after the Florida Supreme Court denied the stay, Coleman and I happened to have a lengthy and wide-ranging telephone conversation.[108] The initial thrust of the discussion was to explore what Coleman and Nelson ought to do next: Should they go to the United States Supreme Court to seek a stay, or should they go directly to the federal district court? In the course of the conversation, however, it became clear that Bundy's case contained a previously unexplored constitutional issue.[109] It was an issue that had formed the

102. Bundy v. Dugger, 850 F.2d 1402 (11th Cir. 1988), *cert. denied*, 488 U.S. 1034 (1989).

103. Bundy v. Dugger, 488 U.S. 1034 (1989).

104. Emergency Application, *supra* note 89, at 3; *see also* Coleman, *supra* note 4, at 14 (warrant signed less than 15 minutes after certiorari denial); *cf.* WITNESS, *supra* note 7, at 331 (governor signed warrant "within the hour" of the Court's certiorari denial); A. RULE, *supra* note 7, at 473 ("the Supreme Court denied [review], and [Governor] Martinez immediately signed that death warrant").

105. WITNESS, *supra* note 7, at 331-34; *id.* at 333-34 (summarizing issues raised by the stay application).

106. *Id.* at 334.

107. The court's opinion denying the stay is reported as Bundy v. State, 538 So. 2d 445 (Fla. 1989).

108. By this time, I had left Florida, worked at Coleman's law firm for a time, and was living in Vermont and teaching at Vermont Law School.

109. Ordinarily, the late discovery of the issue (following trial, direct appeal, state post-conviction and federal habeas corpus review) would have foreclosed federal judicial considera-

basis of stays in several Florida cases prior to Bundy's,[110] although constitutional developments subsequent to Bundy's execution would have foreclosed Bundy's entitlement to relief under this claim.[111] It was an issue then under active consideration by the United States Supreme Court in another Florida capital case.[112] That other case had been orally argued months before Bundy

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tion of its merits. *E.g.*, Coleman v. Thompson, 111 St. Ct. 2546 (1991); McCleskey v. Zant, 111 S. Ct. 1454 (1991); Lewis v. Jeffers, 110 S. Ct. 3092 (1990); Dugger v. Adams, 489 U.S. 401 (1989); Murray v. Carrier, 477 U.S. 478 (1986); Wainwright v. Sykes, 433 U.S. 72 (1977); Robbins, *Whither (or Wither) Habeas Corpus?*, 111 F.R.D. 265 (1986). The state courts in *Bundy* forgave the procedural default, however, and decided the claim on its merits. *See* Bundy v. Dugger, 488 U.S. 1036 (1989) (Brennan, J., dissenting from denial of stay) (explaining why no procedural bar foreclosed federal judicial review of Bundy's constitutional claim). Still, the untimely discovery of the issue undoubtedly reduced the likelihood of being able to convince a court to grant a stay or more substantive relief based on the claim.

110. *E.g.*, Preston v. Florida, 487 U.S. 1265 (1988) (order granting stay of execution pending the filing and disposition of a timely petition for writ of certiorari) (cited in Bundy v. Dugger, 488 U.S. 1036 (1989) (Brennan, J., dissenting from denial of stay)). The Supreme Court's order granting the stay in *Preston* did not explain the basis of the Court's action. Preston's stay application raised only one issue, however, and that was the claim that subsequently failed to secure a stay in *Bundy*. *See supra* note 109 and *infra* notes 112-144 and accompanying text. The "Question to be Presented" in Preston's eventual certiorari petition was:

> Whether the decision of the Florida Supreme Court refusing to apply this Court's holding in Caldwell v. Mississippi, 472 U.S. 320, [105] S. Ct. 2633 (1985), to the facts of Mr. Preston's case fundamentally and irreconcilably conflicts with the decisions of the United States Court of Appeals in Adams v. Dugger, 816 F.2d 1493 (11th Cir. 1987), *modifying on rehearing* Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), cert. granted Dugger v. Adams, 108 S. Ct. 1106, 56 U.S.L.W. 3601 (1988); Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988) (en banc); and Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988) (en banc).

Application for a Stay of Execution Pending Review of Petition for a Writ of Certiorari to the Supreme Court of Florida, at 2-3, Preston v. Florida, 487 U.S. 1265 (1988) (No. A-216) (copy on file with author).

The Court granted the stay in *Preston* on September 23, 1988.

111. Sawyer v. Smith, 110 S. Ct. 2822 (1990) (holding case relied upon by Bundy nonretroactive); on retroactivity generally, see Butler v. McKellor, 494 U.S. 407 (1990); Saffle v. Parks, 494 U.S. 484 (1990); Penry v. Lynaugh, 492 U.S. 302 (1989); Blume & Pratt, *Understanding* Teague v. Lane, 18 N.Y.U. REV. L. & SOCIAL CHANGE 325 (1990-91); Goldstein, *Chipping Away at the Great Writ: Will Death Sentenced Federal Habeas Corpus Petitioners Be Able to Seek and Utilize Changes in the Law?*, 18 N.Y.U. REV. LAW & SOCIAL CHANGE 357 (1990-91).; Liebman, *More Than "Slightly Retro,"* 18 N.Y.U. REV. L. & SOCIAL CHANGE 537 (1990-91); Weisberg, *A Great Writ While It Lasted*, 81 J. CRIM. L. & CRIMINOLOGY 9 (1990).

112. The case, decided subsequent to Bundy's execution, was Dugger v. Adams, 489 U.S. 401 (1989).

Soon after Bundy's execution, the Supreme Court decided *Adams*. The Court ruled against the inmate, Aubrey Adams, on grounds of procedural default and thus avoided the merits of the constitutional question presented by Adams as well as by Bundy.

Ironically, Bundy's case was not burdened by the procedural defect that proved literally fatal in *Adams*. *See Bundy*, 488 U.S. at 1036 (Brennan, J., dissenting from denial of stay) (explaining why Bundy's case presented no procedural bars foreclosing federal judicial review of the asserted constitutional defects in his sentence). However, retroactivity decisions rendered by the Court subsequent to Bundy's execution would have had the same effect as the application of a procedural bar. Sawyer v. Smith, 110 S. Ct. 2822 (1990); *see also supra* note 111.

Aubrey Adams was executed several weeks after the Supreme Court's procedural default ruling in his case. DEATH ROW, U.S.A., *supra* note 33, at 8; *see also* Adams v. Dugger, 490 U.S. 1061 (1989) (order denying stay of execution).

raised the virtually identical constitutional claim.

The constitutional issue turned on whether Bundy's jury had been misled as to its central role in Florida's trifurcated capital sentencing scheme. The backdrop of the issue was Florida's hybrid judge/jury sentencing structure. This structure created the danger that no one at the trial stage in Bundy's case, judge or jury, would feel that they had the real responsibility for making the decision that Bundy had lost his moral entitlement to live.[113] The jury did not have the full responsibility for the decision, since in Florida sentencing juries are — and repeatedly are told that they are — "advisory" only.[114] The jury renders a nonbinding "recommendation" of life or death, which the judge theoretically may follow or disregard. But the judge also does not have complete sentencing responsibility. The jury's recommendation of life carries tremendous weight, and it may be overridden by the judge only in those rare instances where "virtually no reasonable person could differ"[115] that death should be imposed in the case. As a result of this division of sentencing responsibility, both jury and judge could look to the other as the *real* decisionmaker responsible for making the hard moral choices about who deserves

113. *See generally* Mello, *Taking* Caldwell v. Mississippi *Seriously: The Unconstitutionality of Capital Statutes That Divide Sentencing Responsibility Between Judge and Jury*, 30 B.C.L. REV. 283 (1989) (analyzing why Florida's three-stage capital sentencing structure might violate the Constitution because it splits sentencing responsibility between judge and jury).

114. *Id.* at 288-90 (describing Florida's jury override statutory scheme).

115. Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975); *see also* Cochran v. State, 547 So. 2d 928, 933 (Fla. 1989). "That the [Florida Supreme Court] meant what it said in *Tedder* is amply demonstrated by the dozens of cases in which it has applied the *Tedder* standard to reverse a trial judge's attempt to override a jury recommendation of life." Mann v. Dugger, 844 F.2d 1446, 1451 (11th Cir. 1988) (en banc), *cert. denied*, 489 U.S. 1071 (1989). *E.g.*, DuBoise v. State, 520 So. 2d 260, 266 (Fla. 1988); Wasko v. State, 505 So. 2d 1314, 1318 (Fla. 1987); Brookings v. State, 495 So. 2d 135, 142-43 (Fla. 1986); Huddleston v. State, 475 So. 2d 204, 206 (Fla. 1985); Lusk v. State, 446 So. 2d 1038, 1043 (Fla. 1984); Richardson v. State, 437 So. 2d 1091, 1095 (Fla. 1983); McCampbell v. State, 421 So. 2d 1072, 1075-76 (Fla. 1982); Goodwin v. State, 405 So. 2d 170, 172 (Fla. 1981); Odom v. State, 403 So. 2d 936, 942-43 (Fla. 1981), *cert. denied*, 456 U.S. 925 (1982); Neary v. State, 384 So. 2d 881, 885-88 (Fla. 1980); Malloy v. State, 382 So. 2d 1190, 1193 (Fla. 1979); Shue v. State, 366 So. 2d 387, 390-91 (Fla. 1978); McCaskill v. State, 344 So. 2d 1276, 1280 (Fla. 1977); Thompson v. State, 328 So. 2d 1, 5 (Fla. 1976); *see generally* Mello, *The Jurisdiction to Do Justice: Florida's Jury Override and the State Constitution*, 18 FLA. ST. U. L. REV. 923, 936-38 (1991); Radelet, *Rejecting the Jury*, 18 U.C.D.L. REV. 1409, 1422 (1985).

Florida's capital statute speaks in terms of the jury's "recommendation" of sentence. FLA. STATS. § 941.141 (Harrison Supp. 1991). I put the word in quotes because the reality of *Tedder* means that a "recommendation" of life imprisonment by a Florida jury is tantamount to a life sentence. As the following table shows, over the decade-and-a-half lifespan of Florida's 1972 post-*Furman* capital statute, *see infra* note 180, life "recommendation" overrides have been reversed in seventy-four percent of the cases:

Year	Direct Appeal Decisions on Life Recommendations	Number Affirmed	Percentage
1974	1	0	0%
1975	6	2	33%
1976	6	2	33%
1977	6	2	33%
1978	2	0	0%
1979	3	0	0%
1980	4	1	25%
1981	15	4	27%
1982	9	3	33%
1983	10	1	10%
1984	9	6	67%
1985	9	6	67%
1986	7	0	0%
1987	5	0	0%
1988	10	1	10%
1989	7	1	14%
1990 (to May)	3	0	0%
TOTAL	112	29	26%

Source: Letter from Dr. Michael Radelet, Associate Professor of Criminology, University of Florida, to Michael Mello, June 13, 1990, at 1 (cited in Mello, *supra*, at 937 n.74).

These figures become even more significant when sorted into three time frames, separated by the pendency in the United States Supreme Court of Spaziano v. Florida, 468 U.S. 447 (1984), the case upholding the facial federal constitutionality of Florida's jury override. From 1974 (when the first override cases reached the Florida Supreme Court) until December 1983 (just before certiorari was granted in *Spaziano* in February 1984), 16 of 62 life overrides were affirmed. In 1984 and 1985 — during the pendency of *Spaziano* in the United States Supreme Court and the year after *Spaziano* was decided —affirmances by the Florida court were significantly more frequent: 12 of 18 (66.7%). But from 1986 through May 1990, only 2 of 32 (6.25%) were affirmed.

Over the past half decade, in other words, life recommendation overrides have been reversed in more than 93% of the relevant cases. Trial judge overrides of life recommendations by the jury thus have survived appellate review in less than 7% of the cases.

The pattern remains unchanged. In 1990 the Florida Supreme Court granted relief in all five jury override cases it decided on direct appeal. *See* Morris v. State, 557 So. 2d 27 (Fla. 1990) (override reversed; life sentence mandated); Hallman v. State, 560 So. 2d 223 (Fla. 1990) (override reversed; life sentence mandated); Carter v. State, 560 So. 2d 1166 (Fla. 1990) (override reversed; life sentence mandated); Cheshire v. State, 568 So. 2d 908 (Fla. 1990) (override reversed; life sentence mandated); Buford v. State, 570 So. 2d 923 (Fla. 1990) (override reversed; life sentence mandated). In 1991, though July 3, the court granted relief in six of the seven jury override cases it considered on direct appeal. *See* Dolinski v. State, 576 So. 2d 271 (Fla. 1991) (override reversed; life sentence mandated); Douglas v. State, 575 So. 2d 165 (Fla. 1991) (override reversed; life sentence mandated); Hegwood v. State, 575 So. 2d 170 (Fla. 1991) (override reversed; life sentence mandated); Downs v. State, 574 So. 2d 1095 (Fla. 1991) (override reversed; life sentence mandated); McCrae v. State, 582 So. 2d 613 (Fla. 1991) (override reversed; life sentence mandated); Cooper v. State, 581 So. 2d 49 (Fla. 1991) (override reversed; life sentence mandated); Zeigler v. State, 580 So. 2d 127 (Fla 1991) (override affirmed).

The Florida Supreme Court has recognized that the *Tedder* standard is rigorous, and that it has become increasingly so in the years since *Spaziano* was decided. Citing figures marginally different from the numbers cited in this article, the court in Cochran v. State, 547 So. 2d 928 (Fla. 1990), reiterated its earlier statements that "during 1984-85, we affirmed on direct appeal trial judge overrides in eleven of fifteen cases, 73%. By contrast, during 1986 and 1987 we have affirmed overrides in only two of eleven cases, less than 20%." *Id.* at 933 (citing Grossman v.

to live—with neither ever doing so.[116] When responsibility for a death sentence is divided, there exists the danger that no one bears the ultimate responsibility for this awesome life-or-death decision (identified by the Supreme Court in *Caldwell v. Mississippi*[117] in a somewhat different, though analo-

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State, 525 So. 2d 833, 851 (Fla.) *cert. denied*, 489 U.S. 1071 (1989)). This "current reversal rate of over 80% is a strong indicator to [trial] judges that they should place less reliance on their independent weighing of aggravation and mitigation." *Id.*

The importance of the sentencing jury's "recommendation" is further underscored by the behavior of the Florida Supreme Court when it finds error in jury proceedings. "If the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, the entire sentencing process necessarily is tainted by the procedure." Riley v. Wainwright, 517 So. 2d 656, 659 (Fla. 1987); *accord* Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989) (It "is of no significance that the trial judge stated that he would have imposed the death penalty in any event [absent error in jury proceeding]. The proper standard is whether a jury recommending life imprisonment would have had a reasonable basis for that recommendation."); *see also* Jones v. Dugger, 867 F.2d 1277, 1280 (11th Cir. 1989) (trial court cannot, by specifically considering nonstatutory mitigating circumstances, cleanse a jury recommendation which was tainted by jury's failure to consider such evidence; error can be cured only by a sentencing proceeding before a new sentencing jury); Magill v. Dugger, 824 F.2d 879, 893 (11th Cir. 1987) ("whether or not the trial court believed it could consider nonstatutory mitigating circumstances, Magill's sentence must be vacated because the jury was led to believe its inquiry was so limited"); Cooper v. Dugger, 526 So. 2d 900 (Fla. 1988); Zeigler v. Dugger, 524 So. 2d 419 (Fla. 1988); Waterhouse v. State, 522 So. 2d, 348, 354 (Fla. 1988); Mikenas v. Dugger, 519 So. 2d 601 (Fla. 1988); Foster v. State, 518 So. 2d 901 (Fla. 1987), *cert. denied*, 487 U.S. 1240 (1988); Morgan v. State, 515 So. 2d 975 (Fla. 1987), *cert. denied*, 486 U.S. 1036 (1988).

> As Eleventh Circuit Chief Judge Tjoflat wrote for the en banc court three years ago: [The Florida] Supreme Court will vacate the [death] sentence and order resentencing before a new jury if it concludes that the proceedings before the original jury were tainted by error. Thus, the supreme court has vacated death sentences where the jury was presented with improper evidence, or was subject to improper argument by the prosecutor. The supreme court has also vacated death sentences where the trial court gave the jury erroneous instructions on mitigating circumstances or improperly limited the defendant in his presentation of evidence of mitigating circumstances. In these cases, the supreme court frequently focuses on how the error may have affected the jury's recommendation . . . . Finally, we note that the Supreme Court of Florida has ordered resentencing in cases where the trial court excused a prospective juror in violation of Witherspoon v. Illinois.

Mann v. Dugger, 844 F.2d at 1452-53 (citations omitted).

Florida has executed three people notwithstanding their jury "recommendations" of life imprisonment: Ernest Dobbert in 1984, Buford White in 1987, and Robert Francis in 1991.

116. This is similar to the Private Slovik phenomenon: the mindset that in a multi-layered system of sequential decisionmakers, someone, somewhere, sometime down the line of the process will make a "saving" decision. In Slovik's case, however, that somewhere/someone never made such a decision, and Slovik was executed. On Slovik's case generally, see W. HUIE, THE EXECUTION OF PRIVATE SLOVIK (1954). On the Slovik syndrome generally, see Paduano & Smith, *Deadly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty*, 18 COLUM. HUM. RTS. L. REV. 211, 213 n.3 (1987) ("perhaps a majority of jurors" refuse to believe that the death sentence they impose will be carried out); *Special Project: Parole Release Decisionmaking and the Sentencing Process*, 84 YALE L.J. 810, 812 (1975) (describing the "Slovik Syndrome" as a juror's expectation that the sentence will not be fully carried out).

117. Caldwell v. Mississippi, 472 U.S. 320 (1985) (prosecutor's and judge's comments to jury regarding appellate review held to constitute violation of eighth amendment). The Court recently held that *Caldwell* is not retroactive. Sawyer v. Smith, 110 S. Ct. 2822, 2827 (1990); *see also supra* note 113.

It does not matter for purposes of this article, however, that ultimate relief under *Caldwell* could have been denied to Bundy based on *Sawyer*. The point is that Bundy was treated differ-

gous,[118] setting as a danger of constitutional magnitude). The judge might defer to the jury and the jury defer to the judge, with the result that the capital defendant falls between the stools.

Thus, the sentencing structure that resulted in Bundy's condemnation divided responsibility between judge and jury. Equally important, Bundy's jury was misled as to the vital importance of its penalty decision. To cite one example of many, during jury selection the following exchange took place between the prosecutor and a prospective juror:

> [Prosecutor]: Do you understand that the judge, Judge Jopling, in this case, as the trial judge, would have the ultimate responsibility for determining which punishment to impose?
> [Prospective juror]: Yes, I do.
> [Prosecutor]: In other words, the jury would render an advisory opinion only, just that, an opinion.
> [Prospective juror]: Yes, sir.[119]

Such admonitions by the prosecutor could well have led reasonable jurors to conclude — incorrectly under Florida law — that their sentencing recommendation would not carry much weight with the trial judge. Further, the prosecutor's statements were reinforced by the judge, who told the prospective jurors that the jury's decision "is a recommendation only. The law places the awesome burden upon the judge to decide what final disposition is made or penalty is imposed in a capital case."[120] The judge's sentencing instructions to the jury cemented the legal misconception that "[a]s you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge."[121]

At no time was Bundy's sentencing jury given the accurate information: that a jury recommendation of life imprisonment must by law be given great weight by the court and indeed must be followed, save in the rarest of cases. Thus, (1) Bundy's sentencing jury was misled as to its role in Florida's three-step capital sentencing scheme, and (2) the misleading information was of a kind that tended to diminish the jury's sense of its own sentencing responsibility.

You may wonder: "So what? Should we really care if Bundy's jury had a diminished sense of the importance of its role or if sentencing responsibility was divided? No reasonable sentencer could possibly have sentenced the infamous Bundy to anything less than death." But recall that the Chi Omega

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ently. Other inmates — such as Preston, *see supra* note 110 — raising *Caldwell* claims received stays. Bundy did not.

118. Mello, *supra* note 113, at 296-303.

119. Emergency Application for Stay of Execution to Preserve Jurisdiction Pending Filing and Disposition of Petition for Writ of Certiorari to the Supreme Court of Florida, at 6, Bundy v. Florida, 488 U.S. 1036 (1989) (copy on file with author); *see also id.* at 6-10 (cataloguing many other examples of the sorts of comments quoted in the text).

120. *Id.* at 9.

121. *Id.* at 9-10.

jury, culled of all strong death penalty opponents and marinated with relentless pretrial publicity, did reportedly for a time split six-six on whether to recommend death for Bundy.[122] Recall that the prosecutors offered life pleas in both the Chi Omega and Kimberly Leach cases. Recall why: the evidence of Bundy's guilt was gossamer.[123]

Now, back to the story. On Friday, January 20, 1989, four days before the scheduled Tuesday morning execution and only hours after the Florida Supreme Court had denied a stay sought on other grounds, Coleman and Nelson decided to investigate seriously the diminished sentencing responsibility issue. I was to dictate a bare-bones statement of the abstract legal claim (devoid of record support, since at that point no one knew the depth of the issue's basis in the trial record), to be included in a federal habeas corpus petition that Coleman planned to file the next morning (Saturday) in the Orlando federal district court[124] before Judge George Kendall Sharp.[125] Meanwhile, Coleman and Nelson would comb the 15,000 page trial transcript[126] to bolster the diminished sentencing responsibility argument. Also on Friday, Bundy began meeting with police detectives from several states, reportedly to confess to crimes[127] and apparently in the bizarre belief (and against Coleman's advice) that confessions would delay the execution. These confessions received substantial national media attention.

On Saturday morning, I received an unexpected telephone call from Dr. Michael Radelet, a criminologist and pro bono paralegal[128] working with Coleman. Bundy had asked, through Radelet, for my thoughts or advice about his case and its likely course over the next few days. My messages to Bundy centered on his reported meetings with detectives and with the atmosphere those meetings were creating in the media. My advice was blunt and threefold: "shut up; shut the fuck up; and shut the fuck up right now." Bundy's reported confessions were devastating his legal case.[129] Significantly,

122. *See supra* note 49 and accompanying text.

123. *See supra* notes 48, 52-55 and accompanying text.

124. It is unclear how this issue could have been raised in the habeas petition, since as of that time the claim had never been presented to the state courts and thus was an unexhausted claim. *E.g.*, Vasquez v. Hillary, 474 U.S. 254 (1986); Rose v. Lundy, 455 U.S. 509 (1979) (exploring exhaustion rules requiring that claims must be presented to state courts before being presented to federal courts). Perhaps the state waived exhaustion. In any event, the federal courts in *Bundy* seemed untroubled by this comity difficulty.

125. This was subsequent to Judge Sharp's congressional testimony focusing on Bundy, cited *supra* at note 17. I do not know if Coleman and Nelson moved for Judge Sharp's recusal, founded on the bias revealed in Sharp's earlier congressional appearance.

126. Emergency Application for Stay of Execution to Preserve Jurisdiction Pending Filing and Disposition of Petition for Writ of Certiorari [to the United States Court of Appeals for the Eleventh Circuit], at 7, Bundy v. Dugger, 488 U.S. 1036 (1989) (copy on file with author).

127. WITNESS, *supra* note 7, at 329, 333-44, 346-52; A. RULE, *supra* note 7, at 474-88.

128. Dr. Radelet, an associate professor of sociology and criminology at the University of Florida, had volunteered his services on Bundy's behalf.

129. Michaud and Aynesworth reported that Coleman had counselled Bundy not to speak with law enforcement representatives. *See* WITNESS, *supra* note 7, at 332. This may not quite be accurate. Coleman did tell Bundy not to confess in the glare of national publicity, regardless

at that moment he *had* a legal case to devastate, a strong constitutional claim that should, in a rational and calm world, result in a stay in his case as it had in others. For a time Bundy ceased the meetings with police, but by the following evening he had resumed them.

Bundy's lawyers filed the stay application and habeas petition in federal district court on Saturday morning. Judge Sharp held an evidentiary hearing on one of Bundy's claims, beginning at 9:00 a.m.[130] The hearing lasted 40 minutes. The court rendered its decision, denying all requested relief, initially from the bench and subsequently in a seventeen-page opinion released at two minutes past noon. The denial was no surprise, given Judge Sharp's previous congressional testimony about Bundy's cases.[131] Coleman and Nelson immediately filed a notice of appeal to the Eleventh Circuit.[132]

The Eleventh Circuit reportedly gave Bundy's attorneys two hours to file a brief.[133] By the magic of fax machines,[134] they filed it on time. The three judges (who had their chambers in three different cities)[135] conferenced by telephone.[136] Bundy seemed safe for the night. He had raised a powerful constitutional claim, and the record was massive. Surely the court would want some time to sort it out correctly.

In fact, the Eleventh Circuit unanimously denied a stay late Saturday

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of the general wisdom of cooperating with the police. Rule was probably closer to the truth when she wrote that "Coleman said he was aware that there was the possibility of a deal to delay — confessions for time — but that he was not involved in it, and would not comment." A. RULE, *supra* note 7, at 474.

Notwithstanding the clear legal advice to Bundy, his question and my answers were unsettling. It seemed as though we were probing the outer limits of the adversarial system. On the one hand, who was a lawyer to tell Bundy not to confess if confession salved his soul and made things right with his deity? And as a citizen, I was pleased that Bundy's statements might be solving cases and, perhaps, giving the victims' families the sense of closure necessary for people to get on with their lives.

On the other hand, such confessions, even if factually untrue, were sabotaging Bundy's case in the courts. The statements, or more precisely the manner in which they were being reported, in the limelight of publicity, were offensive. Bundy appeared to be trading on the bodies of his victims to prolong his own life. Judges are human, I told Bundy through the paralegal, and they will be revolted by the circumstances under which the confessions were being made. Such revulsion must invariably have influenced the judicial decisions affecting Bundy's life.

130. This issue alleged that the state sentencing judge had received improper, ex parte information. WITNESS, *supra* note 7, at 333-34 (discussing arguments raised in stay application); *id.* at 336, 342-43 (discussing evidentiary hearing). The claim was unrelated to the diminished sentencing responsibility issue.

131. *See supra* note 17.

132. The facts outlined in this paragraph come from Emergency Application, *supra* note 126, at 5; *see also* WITNESS, *supra* note 7, at 342-43.

133. WITNESS, *supra* note 7, at 343.

134. *Id.*

135. Judge Thomas Clark has his chambers in Atlanta, Georgia; Judge Frank Johnson in Montgomery, Alabama; the late Judge Robert Vance in Birmingham, Alabama.

136. WITNESS, *supra* note 7, at 343.

afternoon.[137] The Supreme Court was now the last remaining hope, and Bundy's advocates spent Sunday crafting the diminution of sentencing responsibility claim and buttressing it with quotes from the trial transcript as they found them. Full review of the record revealed that the issue was far stronger than suspected — considerably stronger than in the cases that had previously received stays on the basis of the claim. Bundy raised the issue in stay papers filed in the Florida Supreme Court and the United States Supreme Court.[138]

Monday we waited. While Coleman and Nelson were en route to the prison to visit Bundy,[139] I became the contact person for the Florida Supreme Court and the United States Supreme Court. Bundy lost in the Florida Supreme Court at approximately 6:00 p.m.,[140] but on balance the news was hopeful. Although the Florida Supreme Court rejected the diminished sentencing responsibility claim, it did so based on the merits of the issue. The court had not applied a procedural bar. Since the state court had decided the issue on its merits, the federal courts would be expected to do so as well.[141]

At Coleman's direction I activated (and so filed) a previously-lodged stay application in the United States Supreme Court. The only issue before the Supreme Court was the diminished sentencers' responsibility argument. The mood among Bundy's lawyers was guardedly nonpessimistic, but as the night dragged on apprehension increased. The Court was taking too long. A stay would have come early, if Bundy had had the requisite five votes.

Around 10:30 p.m., I called the clerk's office to check in. The deputy clerk suggested that we remain on the line, since a decision by the Court appeared imminent. The deputy clerk and I made small talk for the next five minutes or so. We talked about the weather in D.C. and Vermont.

After momentarily putting me on hold, the deputy clerk told me that Bundy had been denied a stay by a razor-thin vote of five-four.[142] He read me Justice Brennan's dissent.[143] Bundy had lost by *one vote* in the *Rehnquist* Court, on the claim that had been identified by us a mere three days earlier and meaningfully investigated only one day before—the diminished sentencing responsibility issue.

It was over. There would have been no point in filing a certiorari peti-

137. Emergency Application, *supra* note 126, at 6. The Eleventh Circuit, contrary to its customary practice, never published an opinion explaining its decision to deny the stay.

138. Procedurally, the issue was raised as an original habeas corpus petition in the Florida Supreme Court. The application presented to the United States Supreme Court sought a stay of execution pending the filing and disposition of a certiorari petition requesting review of the Eleventh Circuit's decision.

139. Due to prison miscommunication, Coleman was not permitted to visit Bundy on the eve of the execution. Nelson did meet with Bundy at that time. WITNESS, *supra* note 7, at 355.

140. Atypically, the Florida Supreme Court published no opinion explaining its decision to deny the stay.

141. *E.g.*, Wainwright v. Greenfield, 474 U.S. 284, 289 n.3 (1986).

142. Bundy v. Dugger, 488 U.S. 1036 (1989) (order denying stay of execution).

143. *Id.* (Brennan, J., dissenting from denial of stay). Justices Marshall, Blackmun, and Stevens also voted to grant the stay. *Id.*

tion, which, under the "rule of four," requires four votes to grant (a stay, by contrast, requires five votes). The justices would not have considered a certiorari petition until the Court's next regularly scheduled conference.[144] By then Bundy would already have been dead, and the Court would have dismissed the certiorari petition as moot.[145]

I telephoned the prison with the news but was not permitted to speak with Bundy. Regulations. He was in a meeting. The message presumably was relayed to him, one way or the other.

Bundy was executed shortly after 7:00 a.m. the following morning, on schedule. James Coleman witnessed the killing of his client.[146] Outside the death chamber, much of Florida rejoiced. A reporter described the tailgate party atmosphere:

> Ted Bundy went out with a cheer.
>
> Across Florida, radio stations bade "Bye, Bye, Bundy," while next door to the Chi Omega sorority, where Bundy killed two young women, a campus bar was offering "Bundy fries" and "Bundy fingers" — actually, french fries and strips of alligator meat.
>
> At the Florida State Prison [in the town of Starke, where Bundy was executed], Ted Bundy haters arrived by the hundred as a traffic jam snaked across State Road 16 from Starke. The field across from the prison, where people were hawking pins of the electric chair and offering coffee and doughnuts, had all the trappings of a late-night county carnival.
>
> Except it was a chill dawn morning, and the reason for gathering was darker than any fair. Take the signs.
>
> "Chi-O, Chi-O, it's off to Hell I go," read one, referring to the sorority murders.
>
> "Bundy BBQ," read another.
>
> As the crowd gathered, [radio station] Q-Zoo deejay Cleveland Wheeler was back in Tampa Bay pouring Jolt Cola and playing un-

144. *See generally* Revesz & Karlan, *Nonmajority Rules and the Supreme Court*, 136 U. PA. L. REV. 1067 (1988). According to a media report, in at least one case (decided subsequent to Bundy's execution) even four votes for certiorari did not guarantee the fifth vote necessary to grant a stay of execution and thus to prevent the mooting of the certiorari grant. James Smith was executed on June 26, 1990. DEATH ROW, U.S.A., *supra* note 33, at 8. The Washington, D.C., *Legal Times* reported that hours before Smith's execution "William Brennan indicated that he and three other justices — Thurgood Marshall, Harry Blackmun, and John Paul Stevens — had voted to grant cert." in Smith's case. Mauro, *Death in Texas: Why Cert. Didn't Work*, [D.C.] Legal Times, Nov. 19, 1990, at 10. On the first Monday of October 1990, four months after Smith's execution, the Court dismissed Smith's certiorari petition as moot: "Buried in a grave in Indianapolis, Smith can no longer benefit from the Court's review." *Id.*

145. *Cf.* Mauro, *supra* note 144.

146. Rule, who was not present, wrote that immediately before Bundy's execution "Ted's flat eyes locked onto Jim Coleman and Reverend [Fred] Lawrence and he nodded .... 'Jim ... Fred,' he said. 'I'd like you to give my love to my family and friends.'" A. RULE, *supra* note 76, at 493; *see also* WITNESS, *supra* note 7, at 356-57.

characteristically uncommercial songs for the occasion — including Peter Gabriel's *Shock the Monkey*. Then, when word from the prison arrived, Wheeler put on Eddy Grant's churning *Electric Avenue*. Simultaneously in Starke, revelers set off fireworks and sang a chorus of "Na Na Na Na, Na Na Na Na, Hey, Hey, [Hey,] Goodbye."[147]

Anthropologists Paredes and Purdum, astute observers of the subtexts of executions,[148] viewed the Bundy carnival as a "false catharsis of a classic sort — 'purging ourselves,' in the words of one columnist."[149] The European witchcraze comes to mind, the torture and murder of up to nine million women in the cause of "purifying the body of Christ," as Mary Daly framed it.[150] Dr. Margaret Vandiver, a criminologist who worked as a pro bono paralegal

147. Koff, *Revolted by Bundy's Life, People Celebrate His Death*, St. Petersburg [Fla.] Times, Jan. 25, 1989, at 4A, col. 1; *see also* J. CAPUTI, *supra* note 19, at 446; Paredes & Purdum, *'Bye-Bye Ted . . .:' Community Response in Florida to the Execution of Theodore Bundy*, 6 ANTHROPOLOGY TODAY 9 (April 1990); von Drehle, *Execution Ends Bundy Horror; Macabre Carnival Outside Prison Celebrates Murderer's Death; Slaying Toll May Be As High As 50*, Miami Herald, Jan. 25, 1989, at 1A; Washington Post, Jan. 29, 1989, at A1; N.Y. Newsday, Jan. 27, 1989, at 79.

Criminologist Margaret Vandiver witnessed the events outside the prison and characterized the scene as

> terrible and entirely banal at the same time. It was like being at the county fair, if you didn't know what was going on. There were so many cables crossing the ground that it was hard to walk. Generators made a lot of noise and there were large vans and trucks parked at different angles. There were several satellite dishes, and people were milling around in large groups.
>
> Before the execution and during it I tried to ignore everything, protesters, celebrators, media. I left the crowds and went over to the fence at the east of the field. It was a perfect winter dawn. I noticed one man walking, alone, along the fence. He seemed very sad, and I wondered if he might be a relative of a victim. I saw him again when Dennis [Adams, *see supra*, note 107] was killed a few months later, walking slowly and alone by the fence, with the sun coming up behind him.
>
> When a reporter left the prison and waved a white handkerchief [indicating that Bundy was dead], the crowd began singing and cheering. I tried then to turn myself into a videorecorder. I left the area of the protestors and went to the section where the pro execution crowd gathered, and walked back and forth through the area, trying to remember everything. But it's hard now to remember, and even harder to write. It breaks language. The jeering faces were familiar: Brueghel's painting of the mocking of Christ, some of Bosch's work. People were selling doughnuts and coffee. There were beer cans on the ground. At least one person had constructed a model electric chair, and a full sized effigy of Ted, and was carrying them around in the back of a pick up truck. There were little pins or models of the electric chair being sold. People had signs, sparklers, firecrackers.

Memorandum from Margaret Vandiver to Michael Mello, Apr. 1, 1990, at 1 [hereinafter Memorandum] (copy on file with author). Most of the celebrants were men.

148. *E.g.*, Paredes & Purdum, *Rituals of Death: Capital Punishment and Human Sacrifice*, in FACING THE DEATH PENALTY (M. Radelet ed. 1989).

149. Paredes & Purdum, *supra* note 147, at 10.

150. M. DALY, GYN/ECOLOGY: THE METAETHICS OF RADICAL FEMINISM 178 (1978); *see also* J. CAPUTI, *supra* note 19, at 96-102; C. GINZBURG, ECSTASIES: DECIPHERING THE WITCHES' SABBATH (1991); H.C.E. MIDELFORT, WITCH HUNTING IN SOUTHWESTERN GERMANY, 1562-1684 (1972); H. TREVOR-ROPER, THE CRISIS OF THE SEVENTEENTH CENTURY, ch. 3 (1967).

on Bundy's behalf and who witnessed the scene outside the prison following Bundy's execution, described what she saw as

> something very ancient, and the modern setting only made it more bizarre. The ritual which was being repeated had elements of human sacrifice, of placing the sins of all on one victim and killing him, of celebratory lynching mobs, and of public executions. And all of those probably have their roots in the attempt to control the fear of death through ritually imposing it on one selected victim.[151]

Bundy's story did not quite end with his death. Three days after Bundy was put to death, the Eleventh Circuit stayed by unpublished order a scheduled execution of another Florida death row prisoner. The sole basis of the stay was the diminished sentencing responsibility issue that had come within one vote of securing a Supreme Court stay for Bundy.[152]

Soon after Bundy was executed, his habeas petition in the Chi Omega case was dismissed as moot.[153]

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151. Memorandum, *supra* note 147. Others have commented on the collective madness surrounding public executions, and the insight it provides to fears of death and possible vileness of self. *E.g.*, A. KOESTLER, REFLECTIONS ON HANGING 9 (1957); J. MCCAFFERTY, CAPITAL PUNISHMENT 9 (1973); N. TEETERS, ". . . HANG BY THE NECK . . . " 30-46 (1967).

152. Clark v. Dugger, No. 89-3065 (11th Cir. Jan. 27, 1989) (unpublished order granting stay of execution and certificate of probable cause to appeal, limited to the sentencer's responsibility issue) (copy on file with author). The court's unpublished order reads in its entirety:

> BY THE COURT:
>
> Certificate of [probable] cause [to appeal] is GRANTED but limited to petitioner's claim based on Caldwell v. Mississippi, 472 U.S. 320 (1985).
>
> Briefing is stayed pending the decision of the Supreme Court in Adams v. Dugger, 816 F.2d 1493 (11th Cir. 1987), *cert. granted sub nom.* Dugger v. Adams, 108 S. Ct. 1106 (1988).
>
> The execution of petitioner is ORDERED stayed pending further order of this court.

Id. The court ultimately rejected Raymond Clark's *Caldwell* claim. Clark v. Dugger, 901 F.2d 908 (11th Cir.), *cert. denied*, 111 S. Ct. 372 (1990). Clark was executed on November 19, 1990. DEATH ROW, U.S.A., *supra* note 33, at 8; *see also* Clark v. Dugger, 111 S. Ct. 422 (1990) (order denying stay of execution). Like Bundy, Clark raised the *Caldwell* issue in a successive habeas petition.

Two Eleventh Circuit judges, Vance and Kravitch, sat on both the *Bundy* and *Clark* panels.

153. *Cf.* Mauro, *supra* note 144 (following stay denial and execution of Texas prisoner, Court dismissed inmate's certiorari petition as moot).

III.
THE MIRROR, THE (MIXED) METAPHOR: BUNDY AS CULTURAL CONSTRUCTION, BUNDY AS THE "CRYSTALLIZATION OF CULTURE"[154]

This is the story of how we begin to remember. . . [155]

A Man with Vision. A Man with Direction. A Prophet of Our Times. . . . Bundy: The Man, The Myth, The Legend.[156]

The foregoing discussion suggests that a yawning gap exists between the super due process public perception and the minimal due process legal reality of Bundy's attempts to stay alive. The gap can partially be explained by public ignorance about the workings of the capital punishment system.[157] Lack of information is not a sufficient account, however; the question is how the public processed the information it did have.

This section suggests that the disparity between perception and reality can be explained, at least in part, by the fact that Bundy became a symbol of death row and of the type of person the United States wants to execute. Specifically, this section shows the complexity of answering two related and superficially straightforward questions: Why did Bundy come to symbolize death row, and precisely what does he symbolize? The section makes no pretense of answering these questions completely. Its modest thesis is that the explanations are not as simple as one might expect.

Bundy has become the symbol of death row for the cultural consciousness of the United States.[158] For this generation, Bundy rivals Hitler and Eichmann as personifications of evil and, therefore, as the embodiment of who should be on death row. He touched a nerve.

The mythic Bundy energizes death penalty supporters, and he makes more than a few death penalty opponents squeamish and defensive. Capital punishment advocates gleefully cite Bundy as the ultimate justification for the ultimate sanction. Conversely, Bundy is a recurring nightmare for people advocating abolition of the death penalty. I have heard colleagues, male and female, who stridently believe in the abolition of capital punishment murmur that in their heart they might make an exception for Bundy.[159] Such death

154. The phrase, taken entirely out of context, comes from Bordo, *Anorexia Nervosa: Psychopathology as the Crystallization of Culture*, in FEMINISM AND FOUCAULT: REFLECTIONS ON RESISTANCE 87 (I. Diamond & L. Quinby eds. 1988).

155. P. Simon, *Under African Skies*, on GRACELAND (Warner Bros. Records 1986).

156. This quotation reportedly is from a poster publicizing a program showing a tape of Bundy's final media interview. The tape was presented by a student group at the University of New Mexico in April 1989. The source of the quote and its origin is Caputi, *The Sexual Politics of Murder*, 3 GENDER & SOC'Y 437, 446 (1989).

157. *See generally* Levit, *Expediting Death*, 59 U.M.K.C. L. REV. 55, 68-72 (1990).

158. *See supra* notes 6-15 and accompanying text.

159. Three years before Bundy was executed, I attended a conference of death row's advocates. After several speakers used Bundy as a foil ("in dealing with the media, be sure to show that while the crime in your case was bad, your client was no Bundy," for example), Polly

penalty opponents distance abolitionist sentiments from Bundy, pointing out that most capital cases are not nearly so heinous.[160]

On one level, Bundy appears an unlikely candidate for death row's symbol. Bundy and his cases are strikingly atypical of capital inmates and their cases generally. Unlike most death row prisoners, Bundy was perceived by the culture to be a relatively bright,[161] articulate, middle class, well-educated (college degree and one year of law school),[162] physically attractive[163] and charm-

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Nelson, one of Bundy's postconviction lawyers, brought the assemblage to an uncomfortable silence by reminding the audience that even Bundy had people who cared about him and that it was inappropriate to suggest that Bundy ought to be put to death.

160. *See* Testimony of Dr. Michael Radelet, *Death Penalty: Hearings Before the Committee of the Judiciary of the United States Senate*, 101st Cong., 1st Sess. 201 (Sept. 19, 1989) ("I know many people in Florida who oppose the death penalty but, then, would say except for Ted Bundy"); Coleman, *supra* note 4, at 15 ("If ever the death penalty were warranted, even some lifelong opponents of capital punishment agreed, Ted Bundy would have been an appropriate candidate for execution.").

161. Bundy reportedly graduated from the University of Washington with a 3.51 grade point average. A. RULE, *supra* note 7, at 36. At least some of his teachers thought very well of him. *Id.* at 19 (quoting a letter from a psychology professor placing Bundy in "the top 1% of undergraduate students with whom I have interacted both here at the University of Washington and at Purdue University. He is exceedingly bright, personable, highly motivated, and conscientious."). Bundy won a scholarship to Stanford University to study Chinese for a summer. *Id.* at 15.

Rule consistently referred to him as "brilliant." *Id.* at i, 28, 72, 155, 396. Larsen called him "bright," R. LARSEN, *supra* note 6, at 12, 293, and observed that his academic record in college was erratic. *Id.* at 108-09. Michaud and Aynesworth concluded that Bundy was "only middling bright (IQ 124)," also pointing to Bundy's mixed academic career. WITNESS, *supra* note 7, at 7, 56-60, 65-67, 71. "The image of brilliance owes much to the newspeople who fostered it. Ted made very good copy." *Id.* at 252.

"Brilliant," "bright," or simply cognitively unimpaired, Bundy was different from most death row inmates. *See infra* note 162.

162. Most death row inmates grew up in poverty. Four years ago the American Bar Association calculated that 99% of condemned inmates were indigent. Blodgett, *Death Row Inmates Can't Find Lawyers*, 73 A.B.A. J. 58 (Jan. 1, 1987); *see also* H. BEDAU, THE DEATH PENALTY IN AMERICA 187-88 (1982).

Many death row inmates are illiterate, retarded and/or mentally ill. *E.g.*, Stanford v. Kentucky, 492 U.S. 361, 398 (1989) (noting that a 1988 diagnostic evaluation — the 1988 Lewis, Pincas, et. al study, cited *infra* — of the 14 juveniles on death row in four states revealed that seven were "psychotic when evaluated or had been so diagnosed in earlier childhood; four others had histories consistent with diagnoses of severe mood disorders; and the remaining three experienced periodic paranoid episodes during which they would assault perceived enemies"); Hooks v. Wainwright, 536 F. Supp. 1330, 1337-38 (M.D. Fla. 1982) (more than half of Florida's prison inmates were functionally illiterate, and 22% of the total inmate population had an IQ of less than 80 — which is considered to be borderline retarded), *rev'd on other grounds*, 775 F.2d 1433 (11th Cir. 1985), *cert. denied*, 479 U.S. 913 (1986); Statement of James Ellis, President, American Association on Mental Retardation, *Death Penalty: Hearings Before the Committee of the Judiciary of the United States Senate*, 101st Cong., 1st Sess. 396 (Sept. 27, 1989) ("of the 118 people executed since 1976, at least seven had mental retardation"); Bluestone & McGahee, *Reactions to Extreme Stress: Impending Death by Execution*, 119 AM. J. PSYCHIATRY 393 (1962) (study finding that none of nineteen condemned inmates on Sing Sing's death row had an education beyond the tenth grade and that some were illiterate); Blume, *Representing the Mentally Retarded Defendant*, THE CHAMPION, Nov. 1987, at 32; Blume & Bruck, *Sentencing the Mentally Retarded to Death*, 41 ARK. L. REV. 725, 725 n.4 (1988); Jacob & Sharma, *Justice After Trial*, 18 U. KAN. L. REV. 493, 508-09 (1970) (intelligence and educational levels among prisoners as a group are lower than those of the population at large); Lewis,

ing[164] white man[165] who was apparently not the victim of childhood sexual

*Killing the Killers: A Post-*Furman *Profile of Florida's Condemned*, 25 CRIME & DELINQ. 200, 211 (1979) (estimating that the mean education of Florida's condemned population was approximately a ninth grade level, and that 15% of the inmates had an IQ of less than 90); Lewis, Pincus, Bard, Richardson, Prichep, Feldman & Yeager, *Neuropsychiatric, Psychoeducational and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145 AM. J. PSYCHIATRY 584 (1988); Lewis, Pincus, Feldman, Jackson & Bard, *Psychiatric, Neurological and Psychoeducational Characteristics of 15 Death Row Inmates in the United States*, 143 AM. J. PSYCHIATRY 838, 840-44 (1986) (discussing mental illness among certain death row inmates); Ream, *Capital Punishment for Mentally Retarded Offenders: Is It Morally and Constitutionally Impermissible?*, 19 SW. U.L. REV. 89, 112-13 (1990) ("Current research [as of 1989] indicates that possibly as many as 250 of the [then] 2,000 people on death row in the United States are mentally retarded. Other research shows that since the death penalty was reinstated by *Gregg* in 1976, at least 5 of the 70 people executed [between 1977 and 1986] were arguably retarded"); Reid, *Unknowing Punishment*, 15 STUDENT LAW. 18, 23 (May 1987) (discussing retarded inmates who have been executed); Tabak & Lane, *The Execution of Injustice*, 23 LOYOLA L.A. L. REV. 59, 94 (1989) ("[M]ore than twelve percent of the inmates currently on death row have been diagnosed as either retarded or of borderline intelligence"); Weiner, *Interfaces Between the Mental Health and Criminal Justice Systems*, in MENTAL HEALTH AND CRIMINAL JUSTICE 36 (L. Teplin ed. 1984) ("estimates of the mentally ill within prisons range from 14 percent who are considered psychotic to as high as 50 percent when behavior disorders are included. Between 10 and 29 percent of the prison population is also estimated to be mentally retarded"); Note, *Prison "No Assistance" Regulations and the Jailhouse Lawyer*, 1968 DUKE L.J. 343, 347-48, app. (intelligence and educational levels among prisoners as a group are lower than those of the population at large; one source of data analyzed by Jacob and Sharma, *supra*); *Items of Interest*, 6 MENTAL DISABILITY L. REP. 52, 53 (Jan.-Feb. 1982) ("studies have shown that from 20 to 60 percent of the 142,000 persons in jail on a given day have mental health problems").

163. Larsen wrote that Bundy "had the good looks to be an actor." R. LARSEN, *supra* note 6, at 131; *see id.* at 133. Rule repeatedly called Bundy "handsome." A. RULE, *supra* note 7, at 28, 396.

By portraying the antagonistic characters as physically deformed, the 1990 movie *Dick Tracy* reinforced the idea that Western culture associates badness with unattractiveness. Michaud and Aynesworth referred to the "hunchback" lurking beneath Bundy's facade of normality. WITNESS, *supra* note 7, at 6. Similarly, Carl Sutcliffe, on being told that his brother was the "Yorkshire Ripper" (who killed and mutilated thirteen women in England between 1975 and 1980), remarked: "I imagined [the killer] to be an ugly hunchback with boils all over his face, somebody who couldn't get women and resented them for that. Somebody with totally nothing going for him." D. CAMERON & E. FRAZER, *supra* note 19, at 35.

Cameron and Frazer observed that the powerful popular stereotype of the sexual murderer as physical beast is "an important means by which the extraordinary acts of sexual killers can be slotted into our culture's scheme of things . . . [I]t has profoundly affected our responses to cases of sexual murder." *Id.* The authors' use of "our culture" is explained in their introduction. They "decided to concentrate on our own time and culture . . . twentieth-century England." *Id.* at 2-3.

The lens through which we view attractiveness is distorted by one's own race, gender, class, and appearance.

164. Many encountering Bundy remarked on his urbanity and apparent intelligence. Immediately before pronouncing a sentence of death upon Bundy, Florida judge Edward Cowart said: "Take care of yourself . . . . You're a bright young man. You'd have made a good lawyer. I'd have loved to have you practice in front of me." R. LARSEN, *supra* note 6, at 321; *accord* A. RULE, *supra* note 7, at 394. Judge Cowart then added: "But you went the wrong way, pardnuh." R. LARSEN, *supra* note 6, at 321; *accord* A. RULE, *supra* note 7, at 394.

165. The relevance of Bundy's race and gender are discussed *infra* at notes 175-191 and accompanying text.

abuse.[166]

Bundy *seemed* so . . . relentlessly middle class. He appeared to have a promising future. He had done well in college[167] and poorly in a year of law school.[168] By his late-twenties, Bundy was a rising figure within the Seattle Republican party.[169] He did volunteer work, writing a rape prevention pamphlet for women,[170] and working on a crisis hotline while in college.[171] These majoritarian attributes distinguish Bundy from almost all other people living on death row.

Part of the explanation for Bundy's symbolizing death row despite his atypicality lies in his savvy ability to attract and manipulate media attention. Bundy knew how to make himself noticed. His jaunty affect before the television cameras,[172] and his intuitive grasp of the sound bite, made Bundy ripe for stardom as a *bête noir*.

Ultimately, however, two facts caused Bundy to stand out as a renowned symbol: Bundy's very atypicality to death row and his recognizability by the dominant culture in this country. Bundy's recognizability as "one of us,"[173] "everyone's son," the "boy next door," made him singularly threatening and feared. This phenomenon is reflected in the titles of books written about him: *The Stranger Beside Me, The Killer Next Door, The Phantom Prince.*[174] Bundy mirrored the United States' worst nightmares because he was so close to images valued by this society.

Race factored into his recognizability by the dominant culture in the United States. It is paradoxical, though unsurprising, that death row's symbol should be white. The pervasiveness of racism in this country requires no citation, and its persistence in the capital punishment system should be expected and has been documented[175] though trivialized by the courts as constitution-

166. My experience was that in addition to poverty, the single most pervasive characteristic of death row inmates was that they were victims of childhood sexual abuse. Some data supports this anecdotal observation. *E.g.*, Lewis, Pincus, Bard, Richardson, Prichep, Feldman & Yeager, *supra* note 162, at 586-87.

167. *See supra* note 154.

168. R. LARSEN, *supra* note 6, at 43; A. RULE, *supra* note 7, at 122, 138.

169. *E.g.*, R. LARSEN, *supra* note 6, at 4-12, 109-10; WITNESS, *supra* note 7, at 61, 67-69; A. RULE, *supra* note 7, at 34, 39; *see also id.* at 101-02 (quoting a letter from the former governor of Washington state to the admissions committee of the University of Utah Law School, summarizing Bundy's "outstanding" performance as a member of the governor's campaign staff); R. LARSEN, *supra* note 6, at 44 (same). Larsen thought Bundy might someday run for public office. *Id.* at 11-12, 127-28.

170. J. CAPUTI, *supra* note 19, at 51.

171. R. LARSEN, *supra* note 6, at 109; A. RULE, *supra* note 7, at 23-32.

172. His trial was the first ever to be televised in Florida. Coleman, *supra* note 4, at 16.

173. The terms "one of us," "our," or "we," refer to the dominant culture, *i.e.*, male gender, white race, heterosexual sexual orientation, comparatively affluent class. *See infra* notes 175-191 and accompanying text (discussing relevance of gender and race in thinking about Bundy the symbol).

174. *See supra* note 7 (for full citations). Caputi wrote in a similar vein of London's Jack the Ripper. *See* J. CAPUTI, *supra* note 19, at 17.

175. Georgia has been the most closely studied United States jurisdiction in this regard. One of the most accessible yet sophisticated treatments of the Georgia data is Gross, *Race and*

ally insignificant.[176] The census reports that Blacks represent 12-15% of the

Death, 18 U.C. DAVIS L. REV. 1275 (1985). For studies of Georgia and other jurisdictions, see D. BALDUS, C. PULASKI & G. WOODWORTH, EQUAL JUSTICE AND THE DEATH PENALTY (1990); W. BOWERS, LEGAL HOMICIDE (1984); S. GROSS & R. MAURO, DEATH AND DISCRIMINATION (1989); Baldus, Pulaski & Woodworth, *Arbitrariness and Discrimination in the Administration of the Death Penalty*, 15 STETSON L. REV. 133 (1986); Baldus, Pulaski & Woodworth, *Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons From Georgia*, 18 U.C. DAVIS L. REV. 1375 (1985); Baldus, Pulaski & Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983); Bowers, *The Pervasiveness of Arbitrariness and Discrimination Under Post-*Furman *Capital Statutes*, 74 J. CRIM. L. & CRIMINOLOGY 1067 (1983); Gross & Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing*, 37 STAN. L. REV. 27 (1984); Jacoby & Paternoster, *Sentence Disparity and Jury Packing: Further Challenges to the Death Penalty*, 73 J. CRIM. L. & CRIMINOLOGY 379 (1982); Keoniger, *Capital Punishment in Texas, 1924-1968*, 15 CRIME & DELINQUENCY 132 (1969); Paternoster, *Prosecutorial Discretion in Requesting the Death Penalty: A Case of Victim-Based Racial Discrimination*, 18 LAW & SOC'Y REV. 437 (1984); Paternoster, *Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 J. CRIM. L. & CRIMINOLOGY 754 (1983); Paternoster & Kazyaka, *Racial Considerations in Capital Punishment: The Failure of Evenhanded Justice*, in CHALLENGING CAPITAL PUNISHMENT (K. Haas & J. Inciardi eds. 1988); Radelet, *Racial Characteristics and the Imposition of the Death Penalty*, 46 AM. SOC. REV. 918 (1981); Radelet & Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 LAW & SOC'Y REV. 587 (1985); Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456 (1981).

These studies quantify the different ways in which the criminal justice system responds to the racial identity of the murder *victim*. The Baldus study of capital sentencing patterns in Georgia, for example, showed that a person of any race who has been convicted of murder is far more likely to be condemned if the victim was white than if the victim was of any other race. Killers of whites received the death penalty in 11% of the cases studied by Baldus and his colleagues, but only 1% of those who murdered Blacks were sentenced to die. If the murderer was a Black and the victim white, the killer received the death penalty 22% of the time. If a Black killed another Black that figure dropped to 1%. Even controlling for 230 other variables, the death sentence was four times more likely to be imposed when the victim was white. Gross put these numbers into common sense perspective: "Smoking cigarettes increases the risk of death by heart disease greatly, but by a considerably smaller amount than the race-of-victim effects" revealed by the Baldus study. Gross, *Race and Death, supra*, at 1308. A recent *New York Times* article also brought the studies' impact home dramatically. "Nearly half a century and at least 1,000 executions since it last happened in the United States, a white person was executed [on Sept. 6, 1991] for killing a black." Margolick, *White Dies for Killing Black for the First Time in Decades*, N.Y. Times, Sept. 7, 1991, at 1, col. 1. When South Carolina executed Donald Gaskins on September 6, the *Times* wrote that not since 1944 "has a white person in the United States recieved the death penalty for killing a black. No white has been executed in South Carolina for such a killing since 1880. The total number of executions in the state is unclear, but 245 people have been sent to the state's electric chair since 1912." *Id.*

The statistics contained in the various studies are important evidence of racism, but they also create a potential danger. There is something numbing about all this ciphering, something clinically obscene about factoring in the color of a victim's skin in deciding life or death. Inquiries like the Baldus study merely quantify what every actor in the criminal justice system worth her salt knows. Race matters in deciding who dies.

176. McCleskey v. Kemp, 481 U.S. 279 (1987) (purporting to accept as valid studies demonstrating discrimination in Georgia capital sentencing patterns, but finding no constitutional significance in the statistical disparities shown by the studies). *McCleskey* was "immediately beset by sharp criticism and, in some instances, outright denunciation." Kennedy, McCleskey v. Kemp: *Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1389 (1987) (collecting examples). For criticisms of *McCleskey* by the authors of the study at issue in *McCleskey* as well as by others, *see e.g.*, D. BALDUS, C. PULASKI & G. WOODWORTH, *supra*

present United States' population; since abolition of the slave trade they have never represented less than 9%. Yet of the 3,589 people put to death for all crimes between 1930 and 1967, 54.6% were Black or members of other racial minority groups.[177] Statistics on execution for rape are even more dramatic. Of the 455 people put to death for the crime of rape between 1930 and 1972, 89.5% were nonwhite.[178]

These execution figures remained relatively constant over time, but their message changed as the culture of the United States redefined their significance. Throughout the history of capital punishment, peaking in the 1930s, few people gave the racial dimension of the death penalty process much thought. The 1960s civil rights movement transformed the culture's awareness of race. The national sense of unease that Blacks were bearing the brunt of executions increased apace.

Such unease manifested itself early in Florida. John Spenkelink, a run-of-the-mill killer if ever there was one,[179] became the first person executed under

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note 175; S. Gross & R. Maruo, *supra* note 175; Carter, *When Victims Happen to Be Black*, 97 YALE L. J. 420 (1988); Holland, McCleskey v. Kemp: *Racism and the Death Penalty*, 20 CONN. L. REV. 1029 (1989); Johnson, *Unconscious Racism in the Criminal Law*, 73 CORNELL L. REV. 1016 (1988); Mikel, McCleskey v. Kemp: *Whether Georgia's Capital Punishment Statute is a Vehicle for Discrimination*, 1988 DET. C.L. REV. 1029 (1988); *The Supreme Court, 1986 Term — Leading Cases*, 101 HARV. L. REV. 119, 153-59 (1987).

177. Wolfgang & Riedel, *Racial Discrimination, Rape, and the Death Penalty*, in THE DEATH PENALTY IN AMERICA 194 (H. Bedau ed. 1982).

178. Wolfgang & Riedel, *supra* note 177; *see also* Partington, *The Incidence of the Death Penalty for Rape in Virginia*, 22 WASH. & LEE L. REV. 43 (1965) (finding that between 1908 and 1964, 41 men, all Black, were executed for rape in Virginia); Wolfgang & Riedel, *Rape, Race, and the Death Penalty in Georgia*, 45 AM. J. ORTHOPSYCHIATRY 658 (1975).

The Supreme Court in 1977 held the death penalty unconstitutionally disproportionate for the crime of rape of an adult woman. Coker v. Georgia, 433 U.S. 584 (1977). An amici curiae brief filed by the American Civil Liberties Union and several women's rights organizations focused on the racial and gender aspects of the issue. Not one of the *Coker* opinions referred to these dimensions of the case, stressing instead matters of proportionality.

179. Professor Streib summarized Spenkelink's case:

> Spenkelink, raised on an Iowa farm, had a traumatic childhood. At the age of twelve, he personally found the body of his alcoholic father who had committed suicide. At age fourteen, his criminal record began with an arrest for driving a stolen car. His record grew to include armed robbery and escape from prison.
>
> In early 1972, Spenkelink began traveling around the country with Joseph J. Szymankiewicz, a hitchhiker Spenkelink had picked up. Having been forcibly sodomized and otherwise mistreated by Szymankiewicz, Spenkelink devised a plan to recover the personal property which Szymankiewicz had stolen from him and to terminate his relationship with his abusive companion. Following his plan, Spenkelink shot Szymankiewicz in the back while he was asleep in their motel room in Tallahassee, Florida on February 4, 1973.
>
> One week later, Spenkelink was arrested in Buena Park, California for armed robbery. A police search of the apartment in which he was arrested uncovered the handgun used in the Florida killing. Soon thereafter, Spenkelink was returned to Florida and tried for first degree murder. Convicted under a felony-murder statute for the robbery-killing of Szymankiewicz, he was sentenced to death on December 20, 1973.

Streib, *Executions Under the Post-*Furman *Capital Punishment Statutes*, 15 RUTGERS L.J. 443, 450 (1984) (footnotes omitted). Larsen characterized Spenkelink's crime as a "cruel, rather

Florida's present-day capital statute.[180] Though the governor reportedly explained that Spenkelink went first because his case had been in the courts the longest,[181] speculation persists that race was an important consideration in Florida's New South governor's decision to sign Spenkelink's death warrant. One Miami attorney involved in Spenkelink's case wrote that "it was a widely-held belief among Mr. Spenkelink's attorneys and others who assisted in the litigation in his case that the extraordinary efforts by the state of Florida to have Mr. Spenkelink executed were prompted by two factors: the relatively non-heinous nature of his crime and the fact that Mr. Spenkelink was white, the theory of the state being that if Mr. Spenkelink could be executed, then everyone on death row would be destined for execution."[182]

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undistinguished murder." R. LARSEN, *supra* note 6, at 295. For views on the Spenkelink execution, see Burt, *Disorder in the Court*, 85 MICH. L. REV. 1741, 1805-16 (1987); Clark, *Spenkelink's Last Appeal*, THE NATION, Oct. 27, 1979, at 385.

180. Five months after Furman v. Georgia, 408 U.S. 238 (1972), invalidated all extant death sentences nationally, a special session of the Florida legislature enacted a revised capital statute that the governor immediately signed into law. FLA. STAT. § 921.141 (1982 & Harrison Supp. 1991). For accounts of the frantic activity that preceded the new statute, see Ehrhardt & Levinson, *Florida's Legislative Response to* Furman*: An Exercise in Futility?*, 64 J. CRIM. L. & CRIMINOLOGY 10 (1973); Note, *Florida's Legislative and Judicial Response to* Furman v. Georgia*: An Analysis and Criticism*, 2 FLA. ST. U.L. REV. 108 (1974); Dyckman, *Our Legislature in Action: The Unwisdom of It All*, St. Petersburg [Fla.] Times, Dec. 3, 1973, at 12-B, col. 1; *see also* Mello & Robson, *Judge Over Jury: Florida's Practice of Imposing Death Over Life in Capital Cases*, 13 FLA. ST. U.L. REV. 31, 70 n.187 (1985) (describing frenzied conference committee discussions of jury override provision of Florida's revised capital punishment statute).

Florida's post-*Furman* statute was upheld in Proffitt v. Florida, 428 U.S. 242, 259-60 (1976). The Georgia and Texas statutes also were upheld. Gregg v. Georgia, 428 U.S. 153, 206-07 (1976); Jurek v. Texas, 428 U.S. 262, 276 (1976). The Florida, Georgia, and Texas statutes attempted to guide the capital sentencing decision by establishing a procedure to be followed in determining what penalty should be imposed upon conviction of a capital felony. *Gregg*, 428 U.S. at 196-98; *Proffitt*, 428 U.S. at 253; *Jurek*, 428 U.S. at 268-74. The Supreme Court invalidated the post-*Furman* statutes of North Carolina and Louisiana, which made the death penalty mandatory upon conviction of specified offenses. Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Roberts v. Louisiana, 428 U.S. 325, 335-36 (1976); *see generally* Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305 (analyzing 1976 cases deciding constitutionality of capital punishment).

Gary Gilmore submitted to execution by waiving legal challenges to his convictions and sentences. Gilmore was executed in Utah in 1977. *See* Streib, *supra* note 179, at 447-49, 451-53; *see also* N. MAILER, THE EXECUTIONER'S SONG (1979). Spenkelink, executed in 1979, thus was the first non-consensual execution in the post-*Furman* era. W. BOWERS, LEGAL HOMICIDE 427 (1984); W. WHITE, THE DEATH PENALTY IN THE EIGHTIES 55 (1987); DEATH ROW, U.S.A., *supra* note 33, at 6.

181. Sherrill, *Death Row on Trial*, N.Y. Times, Nov. 13, 1983, at 108-09 (Magazine).

182. Letter from Karen Gottlieb to Michael Mello (July 31, 1990) (copy on file with author). In 1979, Gottlieb, today one of the most highly respected appellate attorneys in Florida, was employed as an assistant state public defender in Miami. She "had an opportunity many times to consult with the lawyers who represented Mr. Spenkelink in post conviction proceedings, including his attorneys in the litigation which immediately preceded his execution in May of 1979." *Id.*

Additional anecdotal evidence is sparse, but what little is known tends to reinforce Gottlieb's perceptions. For example, a journalist in 1983 quoted an anonymous central Florida lawyer as saying:

"I'll tell you why they wanted to kill him [Spenkelink]. He was white. No one in the

In the same way that execution of whites insulates a criminal justice system susceptible to charges of being racist, so too does designation of Bundy as death row's symbol. Bundy's race reinforced his identification as a member of the dominant culture.

Beyond his physical attributes and background, Bundy was a creation of the culture in more subtle and troubling respects. The Bundy symbol is inseparable from matters of gender — those characteristics imposed upon biological sex by acculturation and socialization.[183] This is because maleness is the one obvious trait shared by all known serial sexual killers.[184] The remainder of this section draws upon feminist[185] scholarship,[186] notwithstanding its contro-

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South wants to kill a black man first. They don't want to be labeled racist. I think the next person who gets it will also be white. And then it's watch out blacks."

Sherrill, *supra* note 181, at 109; *cf.* Zeisel, *supra* note 175, at 465-66 (observing that Florida prosecutors altered charging decisions in apparent attempts to influence results of statistical studies of racism in the capital punishment process).

183. Gender is a complex amalgam of meanings which society creates and attaches to biological sex. Gender is usually spoken of by researchers and theorists as socially constructed, not biologically determined. *E.g.*, J. BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (1990); G. Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY (C. Vance ed. 1984); *see also* R. BLEIER, SCIENCE AND GENDER (1984); L. DAVIDSON & L. GORDON, THE SOCIOLOGY OF GENDER 1-33 (1979); S. DE BEAUVOIR, THE SECOND SEX 1-47 (1953); A. FAUSTO, MYTHS OF GENDER (1985); E. KELLER, REFLECTIONS ON GENDER AND SCIENCE (1985); S. KESSLER & W. MCKENNA, GENDER (1978).

184. "[T]here has never been a female [Yorkshire Ripper]. Women have committed very brutal murders; they have killed repeatedly; they have killed at random. But in all the annals of recorded crime, no woman has done what [the Yorkshire Ripper] did." D. CAMERON & E. FRAZER, *supra* note 19, at 1. "Only men, it seems, are compulsive lone hunters, driven by the lust to kill — a sexual desire which finds its outlet in murder." *Id.*; *see also id.* at 23-26, 144-48.

No such serial sexual murderers occur in Ann Jones' history of female killers in the United States. *See* A. JONES, WOMEN WHO KILL (1980). Jones documented that "unlike men, who are apt to stab a total stranger in a drunken brawl or run amok with a high-powered rifle, we women usually kill our intimates: we kill our children, our husbands, our lovers." *Id.* at xv; *see also* J. LEVIN & J. FOX, MASS MURDER: AMERICA'S GROWING MENACE 53 (1985) ("It is obvious that certain types of mass killings — for example, serial raping and murdering — are the sole province of men"); R. MORNEAU & R. ROCKWELL, SEX, MOTIVATION, AND THE CRIMINAL OFFENDER 223 (1980) (advising police that "the sadistic murderer is almost always male. Generally, do not waste time looking for a female").

Interestingly, a series of apparently random Florida murders of men have been linked to a woman. *Femme Fatale*, N.Y. Times, Feb. 2, 1991, at 22 (Editorial); Holmes, *8 Men Slain, and Now a Suspicion that the Killer Is a Woman*, N.Y. Times, Dec. 17, 1990, at B8, col. 1. No evidence has yet emerged suggesting a lust murder dimension to these killings, however.

185. To paraphrase Kaufmann's characterization of existentialism, feminism is less a unified philosophy than a label for several different revolts against traditional modes of thought — including revolt against labeling. W. KAUFMANN, EXISTENTIALISM FROM DOSTOYEVSKY TO SARTRE 11 (1975).

The following string cite includes an enormously diverse selection of texts written by people of widely disparate political philosophies, sexual orientations, races, classes, cultural contexts, and personal backgrounds. The list includes works of philosophy, theology, mythology, linguistics, history, sociology, visual art, science, aesthetics, weaving, sociology, social theory, poetry, politics, political theory, literary criticism, law, jurisprudence, prose (novels and short stories), and educational theory. This loads quite a bit upon a single "*see, e.g.*," citation, and such is intentional. The point is to show the omnipresence of feminism. *See, e.g.*, M. ATWOOD, THE HANDMAID'S TALE (1985); M. BEARD, WOMAN AS A FORCE IN HISTORY (1946); M.

BELENKY, WOMEN'S WAYS OF KNOWING (1986); E. BRONER, A WEAVE OF WOMEN (1982); K. CHERNIN, REINVENTING EVE: MODERN WOMAN IN SEARCH OF HERSELF (1987); P. CHESSLER, ABOUT MEN (1978); P. CHESSLER, WOMEN AND MADNESS (1981); J. CHICAGO, THE DINNER PARTY: A SYMBOL OF OUR HERITAGE (1979); J. CHICAGO, THE BIRTH PROJECT (1985); R. COWARD & J. ELLIS, LANGUAGE AND MATERIALISM: DEVELOPMENTS IN SERIOLOGY AND THE THEORY OF THE SUBJECT (1977); A. CROSS, DEATH IN A TENURED POSITION (1981); T. DAHL, WOMEN'S LAW: AN INTRODUCTION TO FEMINIST JURISPRUDENCE (R. Craig tr. 1987); M. DALY, BEYOND GOD THE FATHER: TOWARD A PHILOSOPHY OF WOMEN'S LIBERATION (1973); M. DALY & J. CAPUTI, WEBSTER'S FIRST NEW INTERGALACTIC WICKEDARY OF THE ENGLISH LANGUAGE (1987); M. DALY, PURE LUST: ELEMENTAL FEMINIST PHILOSOPHY (1984); A. DAVIS, WOMEN, RACE AND CLASS (1981); E. DAVIS, THE FIRST SEX (1971); FEMINIST SCHOLARSHIP: KINDLING THE GROVES OF ACADEME (E. DuBois ed. 1985); A. DWORKIN, OUR BLOOD: PROPHECIES AND DISCOURSES ON SEXUAL POLITICS (1976) (*see* also *infra* notes 183, 185); THE FUTURE OF DIFFERENCE (H. Eisenstein ed. 1980); H. EISENSTEIN, CONTEMPORARY FEMINIST THOUGHT (1983); J. ELSHTAIN, PUBLIC MAN, PRIVATE WOMAN: WOMEN IN SOCIAL AND POLITICAL THOUGHT (1981); S. FIRESTONE, THE DIALECTIC OF SEX: THE CASE FOR FEMINIST REVOLUTION (1970); B. FRIEDAN, THE FEMININE MYSTIQUE (1963); J. GALLOP, THE DAUGHTER'S SEDUCTION: FEMINISM AND PSYCHOANALYSIS (1982); C. GILLIGAN, IN A DIFFERENT VOICE (1982); C. GILMAN, WOMEN AND ECONOMICS: A STUDY OF THE ECONOMIC RELATIONSHIP BETWEEN MEN AND WOMEN (1898); C. GILMAN, HERLAND (1915); S. GRIFFIN, WOMAN AND NATURE: THE ROARING INSIDE HER (1978); S. GRIMKE, LETTERS ON THE EQUALITY OF THE SEXES AND THE CONDITION OF WOMEN (1838); C. HEILBRUN, TOWARD A RECOGNITION OF ANDROGYNY (1980); C. HEILBRUN, WRITING A WOMAN'S LIFE (1988); C. HEILBRUN, HAMLET'S MOTHER AND OTHER WOMEN (1990); C. HEILBRUN, REINVENTING WOMANHOOD (1979); A. HOCHSCHILD, THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME (1989); M. HUMM, DICTIONARY OF FEMINIST THEORY (1990); E. JANEWAY, MAN'S WORLD, WOMAN'S PLACE: A STUDY IN SOCIAL MYTHOLOGY (1971); MEN IN FEMINISM (A. Jardine & P. Smith eds. 1987); GENDER AND THEORY: DIALOGUES ON FEMINIST CRITICISM (L. Kauffman ed. 1989); U. LE GUIN, THE DISPOSSESSED: AN AMBIGUOUS UTOPIA (1974); G. LERNER, THE WOMAN IN AMERICAN HISTORY (1971); G. LERNER, THE CREATION OF PATRIARCHY (1986); A. LORDE, THE BLACK UNICORN (1978); S. MAITLAND, A MAP OF THE NEW COUNTRY: WOMEN AND CHRISTIANITY (1983); J. MITCHELL, PSYCHOANALYSIS AND FEMINISM (1974); J. MITCHELL, WOMEN: THE LONGEST REVOLUTION: ESSAYS ON FEMINISM LITERATURE, AND PSYCHOANALYSIS (1984); E. MOERS, LITERARY WOMEN (1976); FEMINISM/POSTMODERNISM (L. Nicholson ed. 1990); Noclin, *Why Have There Been No Great Women Artists?*, in WOMAN IN SEXIST SOCIETY: STUDIES IN POWER AND POWERLESSNESS (V. Gornick & B. Moran eds. 1971); M. O'BRIEN, THE POLITICS OF REPRODUCTION (1981); T. OLSEN, SILENCES (1965); C. OZICK, METAPHOR AND MEMORY: ESSAYS (1989); R. PARKER & G. POLLACK, OLD MISTRESSES: WOMEN, ART, AND IDEOLOGY (1981); R. PARKER, FRAMING FEMINISM: ART AND THE WOMEN'S MOVEMENT (1987); M. PIERCY, PARTI-COLORED BLOCKS FOR A QUILT (1982); M. PIERCY, BRAIDED LIVES (1982); M. PRATT, CRIME AGAINST NATURE (1990); D. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW (1989); A. RICH, YOUR NATIVE LAND, YOUR LIFE: POEMS (1986); A. RICH, THE FACT OF A DOORFRAME: POEMS SELECTED AND NEW, 1950-1984 (1984); A. RICH, COMPULSORY HETEROSEXUALITY AND LESBIAN EXISTENCE, THE SIGNS READER: WOMEN, GENDER AND SCHOLARSHIP (E. Abel & E. Abel eds. 1983); A. RICH, OF WOMEN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION (1973); R. ROBSON, THE EYE OF THE HURRICANE (1989); S. ROWBOTHAM, HIDDEN FROM HISTORY: 300 YEARS OF WOMEN'S OPPRESSION AND THE FIGHT AGAINST IT (1973); S. ROWBOTHAM, BEYOND THE FRAGMENTS: FEMINISM AND THE MAKING OF SOCIALISM (1979); P. SANDAY, FEMALE POWER AND MALE DOMINANCE: ON THE ORIGINS OF SEXUAL INEQUALITY (1981); M. SHERFEY, THE NATURE AND EVOLUTION OF FEMALE SEXUALITY (1972); E. SHOWALTER, A LITERATURE OF THEIR OWN: BRITISH WOMEN NOVELISTS FROM BRONTË TO LESSING (1977); B. SMITH, TOWARD A BLACK FEMINIST CRITICISM (1980); D. SPENDER, MAN MADE LANGUAGE (1980); D. SPENDER, WOMEN OF IDEAS AND WHAT MEN HAVE DONE TO THEM: FROM APHRA BEHN TO ADRIENNE RICH (1982); G. SPIVAK, THE POST-COLONIAL CRITIC: INTERVIEWS, STRATEGIES, AND DIA-

LOGUES (S. Harasym ed. 1990); G. SPIVAK, IN OTHER WORLDS: ESSAYS IN CULTURAL POLITICS (1987); E. STANTON, THE WOMAN'S BIBLE (1895-98); STARHAWK, THE SPIRAL DANCE: A REBIRTH OF THE ANCIENT RELIGION OF THE GREAT GODDESS (1979); G. STEINEM, OUTRAGEOUS ACTS AND EVERYDAY REBELLIONS (1983); Taub & Schneider, *Perspectives on Women's Subordination and the Role of Law*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 42 (D. Kairys ed. 1982); Vickers, *Memoirs of an Ontological Exile*, in FEMINISM IN CANADA: FROM PRESSURE TO POLITICS (A. Miles & J. Finn eds. 1982); A. WALKER, THE COLOR PURPLE (1983); M. WITTIG, LES GÜERILLERES (D. LeVay trans. 1971); M. WITTIG, LESBIAN PEOPLES: MATERIAL FOR A DICTIONARY (1976); V. WOOLF, THREE GUINEAS (1938); V. WOOLF, TO THE LIGHTHOUSE (1927); V. WOOLF, ORLANDO (1928); Colker, *Feminist Litigation: An Oxymoron? A Study of Briefs Filed in* William L. Webster v. Reproductive Health Services *(109 S. Ct. 3040)*, 13 HARV. WOMEN'S L.J. 137 (1990); Coombs, *Crime in the Stacks, or a Tale of a Text: A Feminist Response to a Criminal Law Textbook*, 38 J. LEG. ED. 117 (1988); Dalton, *Where We Stand: Observations on the Situation of Feminist Legal Thought*, 3 BERKELEY WOMEN'S L.J. 1 (1987); Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U.L. REV. 1065 (1985); Heilbrun & Resnik, *Convergences: Law, Literature and Feminism*, 99 YALE L.J. 1913 (1990); Homer & Shwartz, *Admitted But Not Accepted: Outsiders Take an Inside Look at Law School*, 5 BERKELEY WOMEN'S L.J. 1 (1989-90); Karst, *Woman's Constitution*, 1984 DUKE L.J. 447 (1984); Kline, *Race, Racism and Feminist Legal Theory*, 12 HARV. WOMEN'S L.J. 1115 (1989); Littleton, *In Search of a Feminist Jurisprudence*, 10 HARV. WOMEN'S L.J. 1 (1987); Matta, *On Teaching Feminist Jurisprudence*, 57 REVISTA JURIDICA DE LA UNIVERSIDAD DE PUERTO RICO 253 (1988); Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. MIAMI L. REV. 29 (1987); Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education*, 38 J. LEG. ED. 61 (1988); Minow, *Feminist Reason*, 38 J. LEG. EDUC. 47 (1988); Mossman, *Feminism and Legal Method: The Difference it Makes*, 3 WISC. WOMEN'S L.J. 147 (1987); Phinney, *Feminism, Epistemology, and the Rhetoric of Law: Reading* Bowen v. Gilliard, 12 HARV. WOMEN'S L.J. 151 (1989); Rhode, *Gender and Discrimination*, 56 U. CINN. L. REV. 521 (1987); Robson, *Lifting Belly*: Privacy, Sexuality and Lesbianism, 12 WOMEN'S RIGHTS L. REP. 177 (1990); Robson, *Lavender Bruises: Intra Lesbian Violence, Law, and Lesbian Legal Theory*, 20 GOLDEN GATE L. REV. 567 (1991); Robson, *Lesbianism in Anglo and European Legal History*, 5WISC. WOMEN'S L.J. 1 (1990); Robson, *Winning and Losing in Las Vegas: The Politics of Lesbian Literary Awards*, 19 GAY COMMUNITY NEWS, No. 3, July 22-28, 1990, at 1; Scales, *Militarism, Male Dominance and Law: Feminist Jurisprudence as Oxymoron?*, 12 HARV. WOMEN'S L.J. 25 (1987); Scales, *Towards a Feminist Jurisprudence*, 56 IND. L.J. 375 (1981); West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988); Williams, *Alchemical Notes: Reconstructing Ideals From Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987); Wishik, *To Question Everything*, 1 BERKELEY WOMEN'S L.J. 64 (1985); *see also supra* note 183, and *infra* notes 189, 190, 192, 194, 196, 202. This citation does not include a vast body of writings which are not self-defined as "feminist" but which "evince a feminist sensibility." Robson, *Evincing a Feminist Sensibility: Reviews of Women's Fiction and Women's Poetry*, 5 KALLIOPE, No. 1, at 65 (1983).

Feminism is everywhere, but it is not monolithic. Professor Bender is correct that labels and categorization should be resisted as divisive. Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEG. ED. 3, 5 n.5 (1988). "As soon as labels are imposed, stereotypes and preconceived ideas become fixed instead of remaining fluid and growing." *Id.* This article thus does not subdivide feminism into radical feminism, Black feminism, Latina feminism, liberal feminism, Marxist feminism, socialist feminism, lesbian feminism, etc.

186. There is, of course, much traditional literature on these and related topics. *E.g.*, R. RESSLER, A. BURGESS & J. DOUGLAS, SEXUAL HOMICIDE: PATTERNS AND MOTIVES (1987); J. LEVIN & J. FOX, *supra* note 184. This mainstream literature has not proven helpful in illuminating the themes developed in this article. As discussed in the text, any intelligible discussion of sexual murder or serial murder must bring questions of gender to the fore. Traditional literature all but ignores gender. To disregard gender buries the most salient issue of who is doing the killing and who is doing the dying.

versial reputation[187] and notwithstanding some hesitation.[188] First and most importantly, only such scholarship recognizes the centrality of gender to any meaningful inquiry into serial sexual murder. To ignore or minimize gender, as virtually all traditional scholarship in this area does, disregards the critical point of who is killing whom. Second, feminism employs the mirror as a metaphorical device in ways similar to its use here. For example, Virginia Woolf in *A Room of One's Own*[189] powerfully described how women serve as mirrors reflecting back to men a magnified view of masculinity rather than acting for themselves, existing in their own right, and defining themselves on their own terms.[190] Third, feminist scholarship is useful because it tends to be interdisciplinary and inclusive rather than insular.[191]

187. Bender wryly observed that "feminism is a dirty word. I never fail to be amazed at the strength of the hostility the word generates.... Professor Lucinda Finley likens it to the 'F' word." Bender, *supra* note 185, at 3 & n.2.

188. The hesitation arises because of my male gender and because feminist learning is grounded so strongly in the experiences of women. When writers who are men appropriate the writings of women, readers should be on their guard. For a particularly offensive example of appropriation wearing the mask of sensitivity, see Fraser, *What's Love Got to Do with It? Critical Legal Studies, Feminist Discourse and the Ethic of Solidarity*, 11 HARV. WOMEN'S L.J. 53 (1988).

189. V. WOOLF, A ROOM OF ONE'S OWN 35 (1929) ("Women have served all these centuries as looking-glasses possessing the magic and delicious power of reflecting the figure of man at twice its natural size"). Woolf's metaphor has roots in M. WOLLSTONECRAFT, THOUGHTS ON THE EDUCATION OF DAUGHTERS (1787), and M. WOLLSTONECRAFT, A VINDICATION OF THE RIGHTS OF WOMEN (1789).

Feminists, of course, are not alone in their use of the mirror as metaphor. *E.g.*, R. GASCHÉ, THE TAIN OF THE MIRROR: DERRIDA AND THE PHILOSOPHY OF REFLECTION (1986); R. RORTY, PHILOSOPHY AND THE MIRROR OF NATURE (1979); Vision, *Veritable Reflections*, in READING RORTY: CRITICAL RESPONSES TO PHILOSOPHY AND THE MIRROR OF NATURE 47 (A. Malachowski ed. 1990); Yoltom, *Mirrors and Veils, Thoughts and Things: The Epistimological Problematic*, in READING RORTY 58 (A. Malachowski ed. 1990).

190. This is one manifestation of the culture's definition of woman as other, inessential, deviate, abnormal to the male. The idea of woman as other seems to have originated with Simone de Beauvoir, who argued in THE SECOND SEX, *supra* note 183, that in patriarchal culture the masculine is set up as the positive norm and the female or feminine is defined negatively, in terms definitionally non-masculine — in terms of otherness. The concept of other is prominent in feminist discourse. *E.g.*, N. CHODOROW, THE REPRODUCTION OF MOTHERING (1978); A. DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN (1981); S. GRIFFIN, PORNOGRAPHY AND SILENCE 156-99 (1981).

Polarity is the seed crystal of gender definition and of the self/other dichotomy. Each gender is constructed as the opposite of the other. Contrast is the point. Opposition, contrast, negative definition, are the sources of the definition of the other. The concept of otherness underlies categories of contrasting characteristics labeled masculine or feminine.

Again, this article does not suggest that otherness is central only to feminist thinking. For example, "at the heart of [Michel] Foucault's work is, finally, the variously embodied idea that always conveys the sentiment of otherness." Said, *Michel Foucault, 1926-1984*, in AFTER FOUCAULT 5 (J. Arac ed. 1988); *see also* R. BOYNE, FOCAULT AND DERRIDA: THE OTHER SIDE OF REASON (1990); J. SARTRE, BEING AND NOTHINGNESS (1956); Harootunian, *Foucault, Genealogy, and History*, in AFTER FOUCAULT, *supra* at 110. On feminism and Foucault, *see* FEMINISM AND FOUCAULT (I. Diamond and L. Quinby eds. 1988).

191. Cameron and Frazer, for example, wrote: "One further sign of our commitment to feminism is the consciously interdisciplinary focus of *The Lust to Kill* and the fact that we have felt able to venture into academic territory where we have no special claims to expertise. Femi-

Feminist learning typically employs gender as a fundamental organizing category[192] of human experience, stressing that men and women have different perceptions or experiences in the same contexts, the male perspective having been dominant if not exclusive in fields of knowledge; and that gender is not a natural biological fact but a social construct, a learned quality, an assigned status — and that it is therefore subject to identification by humanistic disciplines. Feminist theory often "begins by describing, defining, and exposing patriarchy. 'Patriarchy' is the feminist term for the ubiquitous phenomenon of male domination and hierarchy."[193] The word is a wide conceptual umbrella that covers systems of male dominance which oppress women through social, political, and economic institutions. Feminism resonates here because most of the people who represented Bundy and judged him were male.

In the criminal law area, feminists have demonstrated convincingly that "what is perhaps the most paradigmatic expression of patriarchical force — rape — is not, as the common mythology insists, a crime of desire, passion, frustrated attraction, victim provocation or uncontrollable biological urges."[194] Feminist theory defines rape not only as a violent act, but also as a

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nists are notorious for not respecting the 'proper' boundaries of academic disciplines, and in our opinion that is all to the good." D. CAMERON & E. FRAZER, *supra* note 19, at xv.

192. Some poststructuralists, reacting to feminism's traditional focus on the experiences of white, middle class, heterosexual women, question the preeminence of gender. They posit that there is no essential womanness; "no woman but many women." For treatments of the debate, see D. FUSS, ESSENTIALLY SPEAKING (1989); E. SPELLMAN, INESSENTIAL WOMEN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT (1988); Harris, *Race and Essentialism in Feminist Thought*, 42 STAN. L. REV. 581 (1990); for an accessible discussion of how poststructuralist thought might influence feminist jurisprudence, *see* Ashe, *Mind's Opportunity: Birthing a Poststructuralist Feminist Jurisprudence*, 38 SYRACUSE L. REV. 1129 (1987).

These writers do not appear to reject gender as a frame of reference. Rather they claim that gender cannot be understood in isolation; experiences based on gender cannot be separated from experiences based on race, class, sexual preference, cultural identity, and the like. *E.g.*, Combahee River Collective, *A Black Feminist Statement*, in ALL THE WOMEN ARE WHITE, ALL THE BLACKS ARE MEN, BUT SOME OF US ARE BRAVE 13 (G. Hull ed. 1982). These poststructuralists have as their goal the crafting of "a synthesis of class, race and gender perspectives into a holistic and inclusive feminist theory and practice." Zinn, Cannon, Higginbotham, & Dill, *The Costs of Exclusionary Practices in Women's Studies*, in MAKING FACE, MAKING SOUL: HACIENDO CARAS: CREATIVE AND CRITICAL PERSPECTIVES BY WOMEN OF COLOR 35 (1990).

Their challenge goes to the heart of the matter of gender. Thornhill, for example, demands that white feminists re-edit their work in a way that the "experiences of Black women are not 'merely tacked on as window dressing, diminished in parentheses, or hidden in footnotes.'" Kline, *Race, Racism, and Feminist Legal Theory*, 12 HARV. WOMEN'S L.J. 115, 117 (1989) (quoting Thornhill, *Focus on Black Women*, 1 CAN. J. WOMEN & L. 153, 160 (1985)). For other critiques of white feminist theory and practice, *see, e.g.*, COMMON DIFFERENCES (G. Joseph & J. Lewis eds. 1981); HOME GIRLS: A BLACK FEMINIST ANTHOLOGY (B. Smith ed. 1983); B. HOOKS, AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM (1981); B. HOOKS, FEMINIST THEORY: FROM MARGIN TO CENTER (1984).

193. Bender, *supra* note 185, at 5-6.

194. J. CAPUTI, *supra* note 19, at 3. Feminist scholarship has explored the topic of rape in some depth. *E.g.*, S. BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE (1976); L. CLARK & D. LEWIS, RAPE: THE PRICE OF COERCIVE SEXUALITY (1977); S. ESTRICH, REAL RAPE (1987); N. GAGER & K. SCHURR, SEXUAL ASSAULT: CONFRONTING RAPE IN AMERICA (1976); S. GRIFFIN, RAPE: THE POLITICS OF CONSCIOUSNESS (1986); C. MACKIN-

social institution that perpetuates patriarchal domination. The perpetrators are thus not "an aberrant fringe. Rather, rape is a social expression of sexual politics, an institutionalized and ritualized enactment of male domination, a form of terror which functions to maintain the status quo."[195] Caputi further (and more problematically) reasoned that, like rape, "sexual murder is not some inexplicable explosion/epidemic of an extrinsic evil or the domain only of the mysterious psychopath. On the contrary, such murder is an imminently logical step in the procession of patriarchal roles, values, needs, and rule of force."[196] One need not subscribe to Caputi's entire worldview[197] to appreci-

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NON, TOWARD A FEMINIST THEORY OF THE STATE 171-83 (1989); A. MEDEA & K. THOMPSON, AGAINST RAPE (1974); K. MILLETT, SEXUAL POLITICS 44, 184, 335 (1970); D. RUSSELL, RAPE IN MARRIAGE (1982); D. RUSSELL, THE POLITICS OF RAPE: THE VICTIM'S PERSPECTIVE (1975); C. SMART, FEMINISM AND THE POWER OF LAW 26-49 (1989); Estrich, *Rape*, 95 YALE L.J. 1087 (1986).

Susan Brownmiller, in AGAINST OUR WILL, *supra*, asserts that sexual violence against women is culturally condoned and widespread. Because of the possibility of rape as well as its pervasive actuality, Brownmiller described rape as "nothing more or less than a conscious process of intimidation by which *all men* keep *all women* in a state of fear." S. BROWNMILLER, *supra*, at 5 (emphasis in original). She included all men because any man could be a rapist, and because even men who do not rape are the beneficiaries of the climate of coercion created by men who do. She defined rape as an institution, because the weight of patriarchal culture conspires with the rapist. Rape and the threat of rape serve as the main agents of the "perpetuation of male domination over women by force." *Id.* at 17. She thus viewed rape as an insidious form of social control, because rape is a constant reminder to all women of their vulnerable condition.

Andrea Dworkin, in A. DWORKIN, WOMAN HATING (1974), and A. DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN (1987), argued that the driving engine of male history is male violence. In A. DWORKIN, INTERCOURSE (1987), she contended that pornography (*see infra* note 196) underpins male supremacy.

195. J. CAPUTI, *supra* note 19, at 3.

196. *Id.* Some feminist writers, including Caputi, see a connection between pornography and violence against women, including rape. They argue that the pervasive pornographic dimension of United States' culture creates enduring images that glorify (or at least condone) sexual violence against women — up to a point. *E.g.*, K. BARRY, FEMALE SEXUAL SLAVERY 174-214 (1984); A. DWORKIN, PORNOGRAPHY, *supra* note 194; Z. EISENSTEIN, THE FEMALE BODY AND THE LAW 162-74 (1988); S. GRIFFIN, PORNOGRAPHY AND SILENCE: CULTURE'S REVENGE AGAINST NATURE (1981); C. MACKINNON, *supra* note 194, at 195-214; C. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987); C. SMART, *supra* note 194, at 114-137 (1989); TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY (L. Lederer ed. 1980); *cf.* L. LOVELACE & M. MCGRADY, ORDEAL (1980) (describing Linda Lovelace's experiences as a pornography star).

The pornography debate is complicated, divisive, and easily oversimplified. MacKinnon, Griffin, and Dworkin do not argue that there are direct, objective, empirically demonstrable causal relationships between pornography and rape. Feminists, particularly critics in science, contend at the outset that concepts such as "objectivity," "empiricism," and "neutrality" are themselves suspect. *E.g.*, N. CHODOROW, THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER (1978); D. DINNERSTEIN, THE MERMAID AND THE MINOTAUR: SEXUAL ARRANGEMENTS AND HUMAN MALAISE (1976); M. EICHLER, THE DOUBLE STANDARD: A FEMINIST CRITIQUE OF FEMINIST SOCIAL SCIENCES (1980); Z. EISENSTEIN, *supra*, at 42-51 (1988); FEMINIST PRAXIS: RESEARCH, THEORY, AND EPISTOMOLOGY IN FEMINIST SOCIOLOGY (L. Stanley ed. 1990); S. HARDING, THE SCIENCE QUESTION IN FEMINISM (1986); E. KELLER, REFLECTIONS ON GENDER AND SCIENCE 67-115 (1985); THE PRISM OF SEX: ESSAYS IN THE SOCIOLOGY OF KNOWLEDGE (J. Sherman & E. Beck eds. 1979); *see also* DOING FEMINIST RESEARCH (H. Roberts ed. 1981); C. MACKINNON, *supra* note 194, at 120-24, 162-63, 183; C. MACKINNON, *supra* at 54-55; Mies, *Towards a Methodology for Femi-*

ate her insight that sexual murderers, like rapists, are not so different from the rest of us as we might like to believe.[198]

Bundy's typicality as an all-American guy was hammered home to me early in his post-conviction litigation. A man who had observed Bundy closely saw parallels between Bundy and the masculine characters created by Norman Mailer[199] (who transparently identified with his literary creations). The comparison between Bundy's persona and Mailer's characters shocked me at first, but as I reflected I gradually began to appreciate its haunting logic. I had forgotten the comparison until recently I read Cameron's and Frazer's excellent feminist study of sexual murderers.[200] Cameron and Frazer analyzed Mailer's 1957 essay *The White Negro*[201] as a highly articulated expression of the psychopathic killer as ultimate individualist,[202] existential rebel,

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nist Research, in THEORIES OF WOMEN'S STUDIES (G. Bowles ed. 1983); Minow, *Supreme Court Forward: Justice Engendered*, 101 HARV. L. REV. 10 (1987); Reinharz, *Experimental Analysis: A Contribution to Feminist Research*, in THEORIES OF WOMEN'S STUDIES (G. Bowles ed. 1983); Scales, *The Emergence of a Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986); Stanley & Wise, *Back Into the Personal, or Our Attempt to Construct 'Feminist Research,'* in THEORIES OF WOMEN'S STUDIES (G. Bowles ed. 1983). According to Mies, for example, identification with the research subject is essential to feminist research. Such conscious partiality contrasts with "objective" spectator knowledge, which purports to take a "neutral," independent attitude toward the research subject.

As to pornography itself, MacKinnon, Griffin and Dworkin contend that the images created by pornography shape desires by making available certain objects and meanings, given that desire itself is to some degree a cultural construct. *E.g.*, Coward, *Introduction*, in DESIRE: THE POLITICS OF SEXUALITY (A. Snitow ed. 1984). Even terms like "censorship" are not clear cut. MacKinnon, Griffin, and Dworkin see pornography itself as a form of censorship, arguing that it silences the authentic voices of women.

Other feminists find the anti-pornography efforts of Dworkin, Griffin, and MacKinnon distracting and diffusing. Dunlap, for example, claimed that the important issue is the reality of rape, not the image of rape contained in pornography. "If we take on pornography as the image of rape, and we destroy it, we will have destroyed, I suspect, nothing more than the image of rape.... Let us end rape." DuBois, Dunlap, Gilligan, MacKinnon & Menkel-Meadow, *Feminist Discourse, Moral Values, and the Law — A Conversation*, 34 BUFFALO L. REV. 11, 81 (1985).

197. I prefer to be agnostic at the moment.

198. A 1990 *Newsweek* magazine cover story on rape suggested that sexual violence "may now be an emblem of the American way." Gelman, *The Mind of the Rapist*, NEWSWEEK, July 23, 1990, at 52. "After two decades of the newly 'sensitive,' nurturing male, the macho stud seems to have come back in magnum force." *Id.*

199. For an illuminating treatment of Mailer's position in the literary culture of the United States, *see* K. MILLETT, *supra* note 194, at 9-16, 314-35. Millett's book also has interesting discussions of D.H. Lawrence, Henry Miller, and Jean Genet. *Id.* at 237-313, 336-61.

200. D. CAMERON & E. FRAZER, *supra* note 19.

201. Mailer, *The White Negro*, in N. MAILER, ADVERTISEMENTS FOR MYSELF 337 (1959).

202. In literature, "the male metaphor, and the male travail, is individualist." Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 586 (1986); *see also* M. ELLMAN, THINKING ABOUT WOMEN (1968); J. FETTERLEY, THE RESISTING READER: A FEMINIST APPROACH TO AMERICAN FICTION (1978); S. GILBERT & S. GUBER, THE MADWOMAN IN THE ATTIC: THE WOMAN WRITER AND THE NINETEENTH CENTURY LITERARY IMAGINATION 67 (1979); Baym, *Melodramas of Reset Manhood: How Theories of American Fiction Exclude Women Authors*, in THE NEW FEMINIST CRITICISM: ESSAYS ON WOMEN, LITERATURE, AND THEORY 63, 71 (E. Showalter ed. 1985).

and cultural hero — a social outlaw who celebrates murder as a liberating event and who sees the murderer as catalyst of social change.[203] He begins to resemble a latter-day incarnation of Nietzsche's *Übermensch*,[204] or Dostoyevsky's Raskolnikov:[205] a Faust or Superman who transcends conventional morality in the cause of his own liberation.[206]

Misogyny, grounded in the dominant culture, combined with the Mailer paradigm of masculinity, also rooted in prevailing culture, meld to make possible the serial sexual murderer in the United States. Cameron and Frazer observed that such a murderer is peculiarly a North American invention. Other societies have had their serial killers and have developed a discourse within which to define them. But "the real reason why the concept of serial murder has arisen in North America and not elsewhere is its dependence on a certain representation of North America itself, its culture, its symbols, its heroes. The serial killer . . . is the American counterpart of [Jean] Genet's[207] or [Colin] Wilson's existential rebel."[208] Indeed, "the sort of figure who is celebrated in Mailer's essay — hip, cool, psychopathic — has in fact become a touchstone of American masculinity. "He is an up-to-date exemplar of the 'outlaw' tradition which appears in a variety of representations in North

203. D. CAMERON & E. FRAZER, *supra* note 19, at 36, 160; J. CAPUTI, *supra* note 19, at 110; S. GRIFFIN, *supra* note 196, at 90-91, 94 (discussing N. MAILER, THE AMERICAN DREAM (1965)); K. MILLETT, *supra* note 194, at 9-16 (same). On Mailer generally, *see* K. MILLETT, *supra* note 194, at 314-35; Greer, *My Mailer Problem*, in G. GREER, THE MADWOMAN'S UNDERCLOTHES 78 (1986).

204. F. NIETZSCHE, BEYOND GOOD AND EVIL (R. Hollingdale trans. 1981); F. NIETZSCHE, ECCE HOMO (R. Hollingdale trans. 1979).

Attempts to emulate Nietzsche's superman apparently played a role in the notorious Leopold and Loeb "thrill killing" trial in 1924. Clarence Darrow represented Leopold and Loeb. In one of the first modern capital sentencing proceedings (Darrow pled his clients guilty and made penalty the main event of the trial), Darrow argued that Leopold had been strongly influenced by reading Nietzsche's philosophy, which Leopold learned at the University of Chicago. *See* C. DARROW, THE STORY OF MY LIFE (1932); C. DARROW, ATTORNEY FOR THE DAMNED 70 (A. Weinberg ed. 1957); H. HIGDON, THE CRIME OF THE CENTURY 341 (1975); I. STONE, CLARENCE DARROW FOR THE DEFENSE 387-88 (1941); K. TIERNEY, DARROW: A BIOGRAPHY 341 (1979).

205. F. DOSTOYEVSKY, CRIME AND PUNISHMENT (1866) (D. Magar-Shack trans. 1951).

206. D. CAMERON & E. FRAZER, *supra* note 19, at 160-61.

207. For a thoughtful discussion of Genet in this regard, *see* K. MILLETT, *supra* note 194, at 336-61.

208. D. CAMERON & E. FRAZER, *supra* note 19, at 158. Cameron and Frazer discuss in fascinating detail existentialism and the theme of murder as the ultimate act of transcendence (and will and freedom and defiance) of the material constraints which normally determine human destiny. *Id.* at 58-66. They trace the theme of sexual murderer as rebel/hero from the writings of the Marquis de Sade, whom they denote as the father of the sexual murderer. "The aspect of Sade's life and work which has converted the Western imagination is the idea that the individual who transgresses [man-made laws] is a rebel, in search of a freedom and pleasure — a 'transcendence' — which society, in its ignorance and repressiveness, denies him. Thus the way is paved for the sexual murderer to become the quintessential modern hero." *Id.* at 58. Cameron's and Frazer's treatment of Sade's modern interpreters among the existentialists — Sartre, Beauvoir, Genet, Gide, Wilson — as well as their thoughtful critique of the existentialists' account of (and celebration of) the murderer, are particularly interesting. *Id.* at 58-66.

America."[209] The serial killer therefore becomes a "transformation of the traditional loner on his unending journey, a perverse incarnation of the 'Man with no Name.' Traditional North American individualism sorts well with the existentialist theme of the free man's right to transcend ordinary constraints on behavior."[210] Cameron and Frazer concluded that this quest for transcendence through lust murder, combined with misogyny reinforced and validated by societal norms, best accounts for serial sexual murders.[211]

Whereas Cameron and Frazer were describing the murderer-as-rebel/hero generally, Caputi and others made the point as to Bundy particularly. While Bundy was awaiting trial in Aspen, Colorado, for the kidnapping and murder of Caryn Campbell, he twice escaped[212] and eventually made his way to Florida. Prior to the escapes, Bundy had been convicted of kidnapping and publicly connected with many sexual murders in the Pacific Northwest.[213] Yet when he escaped, particularly the second time, much of the Aspen public rooted for him. Caputi accurately noted that "[a]ll observers concur: 'In Aspen, Bundy had become a folk hero.' 'Ted achieved the status of Billy the Kid at least;' or 'Aspen reacted as if Bundy were some sort of Robin Hood instead of a suspected mass murderer.' "[214] T-shirts proclaimed "Bundy is a one night stand;" a radio station adopted a Bundy request hour, playing songs such as "Ain't no way to treat a lady;" a restaurant advertised a Bundyburger, a plain roll because, the sign explained, "the meat has fled."[215] He was even memorialized in doggerel:

> So let's salute the mighty Bundy,
> Here on Friday, gone on Monday.
> All his roads lead out of town.
> It's hard to keep a good man down.[216]

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209. *Id.* at 161. A male novelist opined recently that "America's greatest contribution to pop literature is the tough-guy hero, that hard-punching, hard-drinking, hard-loving macho *mensch* who can't help annoying the bad guys, even while he makes every woman swoon." Kent, *The Governor Did It*, N.Y. Times, Aug. 19, 1990, at 22 (Book Rev.) (reviewing S. PETT, SIRENS (1990)).

210. D. CAMERON & E. FRAZER, *supra* note 19, at 161.

211. *Id.* at 166-70.

212. R. LARSEN, *supra* note 6, at 206-21, 242-43; WITNESS, *supra* note 7, at 178-200; A. RULE, *supra* note 7, at 434.

213. R. LARSEN, *supra* note 6, at 94 (describing media coverage); WITNESS, *supra* note 7, at 153 (same).

214. J. CAPUTI, *supra* note 19, at 51 (footnotes omitted).

215. *Id.*; *see also* R. LARSEN, *supra* note 6, at 210-11, 221; WITNESS, *supra* note 7, at 187; A. RULE, *supra* note 7 at 238, 255-56.

216. J. CAPUTI, *supra* note 19, at 46, 47, 50; A. RULE, *supra* note 7, at 255-56. Cameron and Frazer noted a similar reaction in England to the Yorkshire Ripper. "Many women reported casual comments from men that implied they shared the Ripper's pleasure in female fear. In Leeds, football crowds adopted 'Jack' as a folk hero and chanted at one stage 'Ripper eleven, police nil'." D. CAMERON & E. FRAZER, *supra* note 19, at 33. While this information refers to events involving the Yorkshire Ripper, the term "Jack" indicates the legacy left by "Jack the Ripper." "Several later killers have been called after him [Jack the Ripper]." *Id.* at 181.

It is especially interesting that this outburst of enthusiasm occurred following Bundy's escape from custody.[217]

Viewed through the lens of gender provided by writers such as Caputi and Cameron and Frazer, one sees that Bundy remained part of the culture precisely because of — not in spite of — his crimes. The very acts we *want* to think set him apart in fact reinforced his definition as one of us. He thus remains a symbol of evil, although not of evil alone. He represents something far more insidious and therefore far more frightening. He can best be understood as a multiprismed symbol or a mixed metaphor: a demon, but a demon that also is an all too recognizable societal construct of masculinity, albeit a construct perhaps containing aspects bordering on caricature. Perhaps.

Yet precisely because Bundy was recognized as part of the dominant culture, one might expect him to have been exempt from capital punishment. The psychological distancing, and hence the dehumanizing essential to the determination that a fellow human deserved to die, was less apparent here than in most capital cases. Still, *he* became *the* symbol of death row.

The easy and comfortable explanation is that Bundy committed horrible crimes against helpless white[218] women. That answer rings false, however. Conviction of awful crimes is perhaps a necessary, but certainly not a sufficient, condition for designation as the symbol of whom we want to execute — for the creation of a symbol as enduring as Theodore Bundy.

Consider as a cautionary tale the comparison of Gerald Stano,[219] another accused serial killer on Florida's death row. Like Bundy, Stano is a man alleged to have murdered many women during the 1970s. Have you ever heard of Gerald Stano? If not, you are in good company. Most people have never heard of Stano, not even most Floridians.[220] Stano's cases have resulted in no

217. "After his first escape, the male identification was with Bundy as outlaw rebel-hero. But subsequently, Bundy did the supremely unmanly thing of getting caught." Caputi, *supra* note 150, at 447. Similarly, a partial explanation for Jack the Ripper's unparalleled ability to generate mythology, *see* J. CAPUTI, *supra* note 19, at 50-55, can be attributed to the fact that he never was caught.

218. *See supra* notes 175-182 and accompanying text.

219. *See generally* Stano v. State, 520 So. 2d 278 (Fla. 1988); Stano v. State, 497 So. 2d 1185 (Fla. 1986); Stano v. State, 473 So. 2d 1282 (Fla. 1985); Stano v. State, 460 So. 2d 890 (Fla. 1984). *See also* Stano v. Dugger, 901 F.2d 898 (11th Cir. 1990) (en banc) (remanding for evidentiary hearing).

I emphasize that Stano maintains his innocence, a fact underscored by a panel of the Eleventh Circuit's decision (albeit short-lived) mandating a new trial in one series of Stano's cases. *See* Stano v. Dugger, 889 F.2d 962 (11th Cir. 1989) (remanding for issuance of habeas corpus writ commanding retrial), *vacated pending reh'g en banc*, 897 F.2d 1067 (11th Cir. 1990) (en banc), *rev'd in part and remanded to panel for further consideration*, 921 F.2d 1125 (11th Cir. 1991) (en banc).

220. Interestingly Bundy and Stano were at one time scheduled to be executed on the same day in 1986. A. RULE, *supra* note 7, at 450; *see also supra* notes 79-86 and accompanying text (discussing Bundy's successful efforts to avoid this execution date). Former Florida Governor (now United States Senator) Robert Graham often signed death warrants in pairs, sometimes adopting warrant "themes." The Bundy/Stano theme apparently was serial killers. On another occasion, Graham signed simultaneous warrants on two inmates with the last name Thomas: Daniel Thomas and Edward Thomas. Daniel Thomas was executed; Edward Thomas received

books, no movies, comparatively little media attention. Even scholarly studies of serial murder tend to dwell on Bundy and to ignore Stano.[221] This is curious, given the similarities between Stano's and Bundy's alleged crimes. Stano would respond that he differs from Bundy because he is innocent. But, as was suggested above, the evidence of Bundy's guilt presented at trial was also far from overwhelming.[222]

The difference may be that Stano lacks the qualities of stardom. Stano is overweight, whereas Bundy was viewed as trim and attractive. Stano is balding, where Bundy was viewed as rakish and photogenic. Stano is undereducated, inarticulate, quite possibly crazy, whereas Bundy the former law student[223] was viewed as eloquent and artful in his use of the mask of sanity.[224] Stano is one of "them." Bundy was one of "us."

The Stano comparison underscores that Bundy's notoriety did not result from public revulsion over what he did to women, that Bundy did not become death row's symbol because of his peculiar contempt for women. It is true that Bundy's victims were comparatively valued by the dominant society (college students rather than prostitutes,[225] white women rather than women of

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a stay. Graham's apparant cuteness was lost on the family of Edward Thomas, whose life had been spared. Media coverage that "Thomas" had been executed in Florida prompted frantic calls to CCR from Edward Thomas' sister to determine if the executed Thomas was *their* Thomas.

The contrast between the media coverage of the impending Bundy and Stano executions was revealing. Every event and nonevent in Bundy's litigation received the coverage of Armageddon. The Stano litigation, when mentioned at all, was usually discussed as an appendage to the Bundy case.

221. For example, the index to the Caputi book listed a single reference to Stano and 24 to Bundy, and one of the book's introductory epigrams contained a reference to Bundy. *See* J. CAPUTI, *supra* note 196, at 1, 239, 245. The Cameron and Frazer work had no references to Stano but only one to Bundy. *See* D. CAMERON & E. FRAZER, *supra* note 196, at 204, 207. This may reflect the latter authors' interest in cases arising in the United Kingdom.

222. *See supra* notes 52-56 and accompanying text.

223. Rule wrote that Bundy's "I.Q. alone nearly equalled Stano's and [another condemned inmate's] combined." A. RULE, *supra* note 7, at 434. This is hyperbole, but it illustrates the public perception that Bundy was brilliant while Stano is not.

224. This evocative term originated in H. CLECKLEY, THE MASK OF SANITY: AN ATTEMPT TO CLARIFY SOME ISSUES ABOUT THE SO-CALLED PSYCHOPATHIC PERSONALITY (5th ed. 1976). Cleckley, a psychiatrist, reportedly examined Bundy and testified at his pretrial hearing that Bundy was competent to stand trial but that he exhibited antisocial behaviors. R. LARSEN, *supra* note 6, at 345-46; A. RULE, *supra* note 7, at 345.

Caputi devilishly switched Cleckley's terms and referred to the psychopath's mask of *insanity*, deftly making her insightful point that Cleckley's designation obscures the real similarities between sexual killers and "normal" men in the United States. J. CAPUTI, *supra* note 19, at 109.

One of my male faculty colleagues insists that Bundy can only be explained by mental illness: Bundy must have been crazy to have done those things. To the extent that this view is widespread, it says more about our fears (or our hopes) than it says about Bundy's actual mental condition.

225. Cameron and Frazer surveyed the criminology literature and concluded that the "callous treatment of prostitute murder victims, which excuses — or rather, *erases* — male sadism, recurred in practically every source we looked at." D. CAMERON & E. FRAZER, *supra* note 16, at 31-33 (emphasis in original); *see also* J. CAPUTI, *supra* note 19, at 46-47.

color),[226] while Stano's alleged victims were women marginalized by society (prostitutes, run-aways). Still, the identities of Bundy's victims provide little meaningful insight into the culture's reaction to Bundy.

Again feminist learning illuminates, and again the image emerges of Bundy as a Norman Mailer character carried a bit too far — a difference of degree rather than kind. Few men would do what Bundy did, but more men than we want to admit share Bundy's lusts. Or as one writer who contributes often to horror magazines phrased it (satirically?): "Most men just hate women. Ted Bundy killed them."[227]

It should go without saying that I am not excusing Bundy's crimes by putting them in cultural context. To the contrary, this article's reasoning condemns the culture for being more like its image of Bundy than it wants to realize.

The reasons Bundy came to symbolize death row, as well as the identification of precisely what he *does* symbolize, thus are matters both complex and paradoxical. This article does not attempt to resolve such questions in any satisfactory way. It need not do so for the purposes here. The fact remains that regardless of the explanations Bundy does personify death row. That personification helps explain both the legal system's actual treatment of his cases as well as popular misconceptions about that treatment.

IV.
CONCLUSION: BUNDY AS OTHER, BUNDY AS US

> Over and over, the chauvinist draws a portrait of the other which reminds us of that part of his own mind he would deny and which he has made dark to himself . . . . The chauvinist cannot face the truth that the other he despises is himself. This is why one so often finds in chauvinist thinking a kind of hysterical denial that the other could possibly be like the self.[228]

> You don't like these metaphors?
> All right:
> Perhaps I am not a mirror.
> Perhaps I am a pool.
> Think about pools.[229]

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226. *See supra* notes 175-182.

227. McDonough, *I Can Teach You How to Read the Book of Life*, 3 BILL LANDIS' SLEAZOID EXPRESS, No. 7, at 3-5 (1984) (quoted in J. CAPUTI, *supra* note 19, at 1). For Caputi's description of McDonough, see *id.* at 61-62. Actor Sean Penn, who has the reputation as Hollywood's most hostile star, recently was quoted as saying "I live on the idea that we've got to have compassion for the mass murderer, because he is us and we are him." Weber, *Sean Penn, Human Tempest, Settles into the Auteur's Life*, N.Y. Times, Sept 15, 1991, at § 2, p. 13, col. 3.

228. S. GRIFFIN, *supra* note 196, at 161, 162.

229. Atwood, *Tricks With Mirrors*, *supra* note 2, at 186.

Despite the hype about "10 years of repetitive judicial review," the legal system failed in Bundy's case. At the time of his execution, dozens of people on Florida's death row had been there longer than Bundy;[230] it cost the Florida taxpayers millions of dollars to execute him.[231] We had failed as attorneys by failing to identify the critical constitutional issue sooner. The courts had failed as well. Judging metaphors is as hard as being their advocates. The fact that Bundy had become a myth made it difficult for judges to judge.[232]

Since Bundy was so atypical of the death row population (because seen as attractive, comparatively smart, white, recognizably middle class), how is it that he came to be the emblem of death row, the symbol for capital punishment itself? The paradoxical explanation, suggested in section III, is that he came to represent death row precisely because he was so atypical of the condemned — and so typical of, and therefore recognizable by, the dominant culture in the United States. He was "one of us."[233]

It may well be that Bundy was executed because his crimes set him apart although, as section III suggests, Bundy's offenses may simply fall along the continuum of masculine violence at a point that society cannot explicitly tolerate. Regardless, he became death row's symbol not because he was different from the usual violent male offender but rather because he was similar.[234] The manic festival celebrating Bundy's execution reflected what Griffin termed "the hysterical denial that the other could possibly be like the self."[235] By

230. One reporter wrote that as of 1988 there were 55 prisoners on Florida's death row who had been there longer than Bundy. *See* von Drehle, *End Nearing For Death Row's No. 1 Killer: Ted Bundy Makes His Last Stand*, Miami Herald, Dec. 11, 1988, at 1A; *see also* DEATH ROW USA, *supra* note 33. This means that more than one-sixth of Florida's condemned population had been there longer than Bundy.

231. The media quoted an unidentified prosecutor's estimation that executing Bundy cost the State of Florida approximately $6 million. Stott, *No Way to Tell if Bundy's a True $6 Million Man*, Florida Times Union [Jacksonville], Jan. 13, 1988, at B1; Crawford, *Trying to Kill Bundy Costs Millions More Than Life in Prison*, Orlando Sentinel, Dec. 18, 1987, at A14. The state attorney general's office declined an academic's request to estimate officially the cost of killing Bundy. *See* Letter from Walter Meginniss, Director, Criminal Appeals, Office of the [Florida] Attorney General, to Dr. Michael Radelet, Associate Professor, University of Florida (Dec. 30, 1987) ("You are advised that a study of the costs in the Bundy case has not been conducted in this office and consequently, your request for a copy must be declined.") (copy on file with author).

232. The public outrage over judicial invalidation of capital sentences can be intense, as is evidenced by the events surrounding the successful recall of California Supreme Court Chief Justice Rose Bird and her two colleagues. *See* Tabak, *The Death of Fairness*, 14 N.Y.U. REV. L. & SOCIAL CHANGE 797, 847 (1986); *see also, e.g.*, Robson & Mello, *Ariadne's Provisions*, 76 CAL. L. REV. 87, 92 n.17 (1988) (describing the public reaction to an Eleventh Circuit decision invalidating Georgia convictions and death sentences).

233. Remember that "one of us," "we," or, "our" refers to the dominant culture, *i.e.*, male, heterosexual, white, comparatively affluent.

234. *Cf.* S. GRIFFIN, *supra* note 196, at 174.

235. *Id.* at 162.

Similarly, and ironically given Bundy's apparent preoccupation with pornography (*see* A. RULE, *supra* note 7, at 494-95; WITNESS, *supra* note 7, at 65, 105, 107, 117; Bullough & Kuntz, *On Ted Bundy, Pornography, and Capital Punishment*, 9 FREE INQUIRY, No. 9, at 54 (Spring 1989)), a functionally similar process of cultural deletion permitted him to become defined as

"inventing a figure different from self," here our image of death row, we construct "an allegory of self" that contains the values the culture defines as positive.[236] This construction, however, depends on difference and distance. The other can never be permitted to resemble the self. The line between self and other must remain distinct. Bundy hit an exposed cultural nerve, and the culture needed not merely to kill him but to dance on his grave,[237] because Bundy blurred the line between self and other, between us and them.

Because he was so recognizably "one of us," Bundy was a mirror for each of us — but only because we were looking. He unflinchingly and remorselessly reflected our deepest fears. We have seen the enemy, to paraphrase Walt Kelly's *Pogo*, and he is us. We hated seeing the things he made us see in ourselves. So we shattered the mirror in our attempt to destroy the image it contained. *We* still look the same. *Our* ignorance and fear and hatred remain unchanged. But with Theodore Bundy dead, we are no longer forced to see ourselves.

Or are we?

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other, negated, killed. Writing of women but also true of Bundy and other condemned people, Cameron and Frazer observed that "[w]hat turning persons into objects is all about, in our culture, is, in the final analysis, killing them." D. CAMERON & E. FRAZER, *supra* note 19, at 176.

Martin Luther King wrote along similar lines in *Letter From Birmingham City Jail* when he described segregation as wrong in part because it "ended up relegating persons to the status of things . . . . To use the words of Martin Buber, segregation substitutes an 'I-it' relationship for the 'I-thou' relationship . . . ." King, *supra* note 62, at 293. For an interesting discussion of Buber's I-Thou idea as it might apply to law, see Ciampi, *The I and Thou: A New Dialogue For the Law*, 58 U. CINN. L. REV. 881 (1990).

236. S. GRIFFIN, *supra* note 196, at 162.

237. This may reflect an almost pornographic revelry, enabled by the endless televised coverage.