

FICTIONAL DOCUMENTARIES AND TRUTHFUL FICTIONS: THE DEATH PENALTY IN RECENT AMERICAN FILM

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When it comes to death, most Hollywood movies cheat. They cheat by tinkering with the truth, because the truth as it actually is is too complex or too disturbing to confront honestly. (The so-called happy ending is the most famous form of such cheating.) They cheat because people generally prefer happiness and simplicity to darkness and complexity, especially where their entertainment is concerned, and filmmakers tend to give people what they want.

Even great movies cheat. For example, last year's Oscar winner for best picture, *American Beauty*, cheats egregiously. The movie (for the one or two of you who have not seen it) deals with modern times: It is about suburbia, men and women who mindlessly pursue meaningless careers, bigotry, and finally, hope and redemption. In the end, the character played by Kevin Spacey is murdered. This is not a surprise ending because the Spacey character narrates the movie in a voice-over, and he tells us as the movie opens that in less than a year he will no longer be alive. We know at the beginning that 110 minutes later Kevin Spacey's character will be dead.

Spacey plays a morally ambiguous character. He is in the midst of a full-blown mid-life crisis. He is a lousy husband and a worse father. For virtually the entire length of the film, he lusts after his daughter's high school classmate. In the end, however, he gently rebuffs a neighbor's homosexual advance and—again

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gently—declines to have intercourse with the high school cheerleader who is lying pants-less on his couch. The message here is not subtle: Spacey redeems himself, in this movie about figurative death and spiritual renewal, and just as he does so, he gets shot.

This bloody ending would be at least a little depressing—*except that the Spacey character is still talking*; he continues the narrative voice-over even after his brains have been blown out and blood is pouring from his head. We see him lifeless but can believe that he is not dead because we hear him still full of life. Through this narrative technique, Spacey stays alive despite having been murdered. He even tells us what it is like to be dead, and thereby blunts the tragedy of his death. In science fiction or fantasy, dead people can keep talking, but in a realist film—and this movie's power is its stark realism; there may not be an untrue or unreal sentence in the entire script—narration from a dead man is cheating.

Death penalty movies cheat as well. Unlike *American Beauty*, they cannot cheat by having an execution victim remain alive (although *The Green Mile*, which I discuss below, comes close to this mode of cheating). Instead, they cheat by featuring an innocent inmate: someone who, by nearly anyone's estimation, deserves to be living. This focus is their mode of distraction, their mode of avoiding moral complexity. Death penalty movies that focus on innocence cheat because they allow the viewer to be certain that the protagonist ought not to be killed; such movies permit viewers to oppose a death penalty without opposing *the* death penalty. In real life, we do not have that indulgence.

When death penalty movies cheat, they obscure the fundamental moral questions that the death penalty involves. One might expect documentaries to be more real and Hollywood productions to be less so, but one would be wrong. Exactly the opposite is true. Documentaries cheat much more than Hollywood movies. Most (though not all) documentaries cheat by focusing almost exclusively on the issue of innocence, whereas many Hollywood movies willingly grapple with moral complexity by featuring at least one guilty inmate.¹ Moreover, although

1. There are notable exceptions to my thesis. In particular, many Hollywood movies, including *To Kill a Mockingbird*, *True Crime*, and *The Chamber*, cheat in the same way I am critical of in this essay: by focusing entirely on innocence. On the other hand, *I Want to Live* and *Last Dance*, also Hollywood productions, do not cheat, nor does the

the focus on innocence might seem innocuous, it is in fact rather pernicious, because it contributes to the increasingly widespread view that there is no great harm in violating a person's rights as long as we are certain that the person is guilty.

My thesis, then, is that fiction is more true than nonfiction, and I will illustrate this thesis by examining four principal films, two documentaries and two Hollywood movies. The documentaries are *The Thin Blue Line* (*TBL*), which deals with a former inmate of death row in Texas named Randall Dale Adams, and *Fourteen Days in May* (*FDM*), which deals with a former inmate of death row in Mississippi named Edward Earl Johnson. Adams was released; Johnson was executed. The two Hollywood films are *Dead Man Walking* (*DMW*) and *The Green Mile* (*TGM*). Both involve fictional murderers, and both are set on Louisiana's death row. *DMW*, though based on a work of non-fiction,² is itself fiction; it centers around an inmate of death row who is a composite of multiple murderers rather than a single accused. *TGM* is based on a work by Stephen King,³ so it should come as no surprise that the film combines realism with supernaturalism, and it is therefore an achievement of heroic proportions that this film does not cheat.

The ironies implicit in my argument are numerous and multi-dimensional. Thus, *The Thin Blue Line* is a movie that cheats because it is the story of an inmate wrongfully accused, yet it literally resulted in the saving of an innocent man's life. *Dead Man Walking* does not cheat in the slightest, but whether it affects the real world to even the slightest degree is open to question. *Fourteen Days in May* cheats by suggesting that the executed inmate is innocent, but without letting us see the supposedly exculpatory witness. *The Green Mile* shows the execution of someone we know is innocent, yet it also shows two other executions where the guilt of the inmate is not in question, as well as showing a particularly hateful criminal get murdered in prison. In this sense, *TGM* simultaneously provokes in the viewers discomfort with the death penalty (we see nonviolent as

documentary *The Execution Protocol*, which addresses the death penalty in Missouri. I do not discuss British films, including *10 Rillington Place* and *Let Him Have It*, the former of which focuses on innocence and the latter of which focuses on youth and mental retardation.

2. Helen Prejean, *Dead Man Walking: An Eyewitness Account of the Death Penalty in the United States* (Vintage Books, 1994).

3. The sixth and final part of the serial novel *The Green Mile* was published in 1996.

well as innocent men get electrocuted) and also satisfaction when we see a vile criminal suddenly shot. This very conflict is as common as it is inexplicable, and *TGM* is the only one of the films to evoke it. In short, the documentaries are false and the fiction is true.

This essay consists of two major sections. In Part I, I address the death penalty regime in America. The discussion combines a summary of recent research as well as anecdotal evidence based on my own experience of representing death row inmates. In Part II, I turn to the films and argue that, although death penalty documentaries are fine and gripping films, the Hollywood productions do a far better job of illuminating the entirety of the death penalty world. The documentaries, like the popular media in the United States, exemplify a transfixion with the problem of executing an innocent man. To be sure, the execution of an innocent man represents the quintessential failure of the justice system; nevertheless, the fact that there are innocent men on death row is a symptom of far more widespread problems, such as ineffective assistance of counsel and inadequate appellate review. The Hollywood films, though fiction, do a far better job at communicating this basic truth.

I. THEORY AND PRACTICE

There are two reasons one might oppose the death penalty. One reason is that it is wrong for the state to kill; the other is that although it is in theory acceptable for the state to execute, it is wrong in practice. The first of these reasons is absolute and categorical; the second is conditional.

Similarly, just as there are both conditional and categorical bases for opposing capital punishment, there are both conditional and categorical bases for favoring it. The categorical argument is typically referred to as retribution; the conditional arguments are grounded in utilitarian considerations. In fact, the utilitarian argument can take several forms, including general deterrence, specific deterrence, even eugenics. In any case, because the validity of the utilitarian argument depends on empirical data, it can be disproved, and someone who supports the death penalty solely on the grounds of utilitarianism might change his or her mind, in view of the data. On the other hand, the retributive impulse is simply that: an impulse, a feeling, an urge one has. The retributive rationale is a moral position that does not depend for its justification on any fact of the matter.

One who supports the death penalty for reasons of retribution essentially maintains that vengeance is a legitimate basis for state action.

Thus, because both the pro- and anti- forces have available to them both absolute and conditional forms of argument, the debate concerning the death penalty can take place at either a theoretical or a practical level. I therefore want to stress that my thesis is *not* that documentaries are practical while Hollywood films are theoretical (or vice versa). My argument, instead, is that documentaries are not simply practical, they are misleadingly and narrowly so. The problem of executing innocent men⁴ is a practical issue, rather than a purely theoretical one, but it is only one of a myriad of practical issues, and it is more properly understood as a symptom of a larger problem rather than as a problem in itself. This point is apprehended by the Hollywood films, though not by the documentaries. The Hollywood movies, moreover, illustrate a much greater willingness to grapple with the theoretical issues, issues that the documentaries studiously eschew.

A. THEORY

Camus once said that the only serious philosophical question is the question of suicide. In death penalty cases, the only serious question is homicide: whether the state ought to engage in it. Every other issue is just a distraction.

I have on my desk a death certificate for a man I represented. There is a space on the certificate where the physician who declared my client dead was required to indicate the cause of death. The cause of death is listed as homicide. Unlike the word murder, which is a technical legal term of art, the word homicide is simply the sum of its parts: homi from homo, meaning man; cide from cidere, meaning to kill or slay. What a murderer does when he murders is commit homicide; what the state does when it executes is commit homicide. Both are killing. The theoretical issue presented by the death penalty is whether the state ought to commit homicide.

Death penalty movies cheat when they substitute the question "Is it permissible for the state to execute someone who is innocent?" for the question "Is it permissible for the state to

4. Because 99 percent of death row inmates are male, I generally use the masculine pronoun when referring to the death row population.

kill?" Virtually no one feels the urge to execute an innocent man, but many feel the urge to execute someone who is guilty. A truthful and honest death penalty film must face that fact. When family members of a murder victim express a desire to see the murderer executed, they are expressing a passion which nearly everyone who has seen a loved one murdered has felt. The Hollywood films show human beings experiencing this powerful passion; the documentaries do not.

Of course, the state itself does not experience passion. The state must act on principle. The theoretical question, therefore, is not whether the state may execute an innocent, but rather whether there is some principle that supports the state's commission of homicide, notwithstanding the moral proposition that killing is wrong. This is the very question that the Hollywood films raise. How is it possible for the state legitimately to carry out an act that is inherently wrong? The Hollywood movies suggest that there is no satisfactory answer to this question; the documentaries avoid it altogether.

In this respect, the documentaries mirror society in their avoidance of complexity. For example, in the typical execution, we attempt to elide the troubling moral concerns by insisting that we are actually saving lives by taking one, or by characterizing the execution victim not as a human being but as a rabid animal. These devices are subterfuges that we employ in an effort to evade the truth. But the truth is a tireless and stubborn thing.⁵ The Hollywood films concede that the retributive impulse is a powerful human emotion, yet they further suggest that it is an impulse we ought to resist. It is not wrong for human beings to experience the desire for vengeance; it is wrong for the state to act on it. The documentaries avoid the subject altogether.

5. See *Ex parte Tucker*, 973 S.W.2d 950 (Tex. Cr. App. 1998) (en banc); I discuss the *Tucker* case in *The Humanity of Karla Faye Tucker*, 90:3 *The Texas Observer* 4 (Feb. 13, 1998), available at <<http://www.texasobserver.org/subjects/editorials/2.13.98.dd.html>>, and in *Tucker's Execution Beggars Revamping of Texas System*, *Houston Chronicle* 23 (Feb. 4 1998), available at 1998 WL 3559625. Many proponents of capital punishment urged mercy in the *Tucker* case, including, perhaps most famously, Pat Robertson, who has since supported a general moratorium on the death penalty owing to the number of innocent men who have been sent there. See Steven A. Holmes, *Look Who's Questioning the Death Penalty*, *N.Y. Times*, *Week in Review* 3 (Apr. 16, 2000).

B. THE PRACTICAL

When it comes to the practical issues, as well, the Hollywood movies are much fuller, and therefore more honest, than the documentaries. There is a sense, of course, in which the problem of executing an innocent man is a practical problem, but the Hollywood movies apprehend that the fact that there are innocent men on death row is actually a symptom of a larger problem. The Hollywood films, unlike the documentaries, address these larger problems.

Many opponents of capital punishment feel the retributive impulse as strongly as the death penalty's most enthusiastic supporters. Yet they are nonetheless against capital punishment. The reason is simply that whatever might be said about the morality of executions in principle, there is nothing that can be said in defense of the system of executions that we actually have. Name a component part of the death penalty apparatus—lawyers, judges, juries, police—and you will have named something that is corrupt. This corruption is well known, and many details of it have been covered elsewhere.⁶ Nevertheless, I will briefly describe three of the most serious defects with the system: inadequate counsel for indigent defendants, racism, and finally, lawlessness and arbitrariness in the courts. I will then argue in Part II that the Hollywood films have managed to capture all of these defects.

1. Counsel⁷

In law, as in life, one gets what one pays for. Calvin Burdine did not have any money to hire counsel when he was accused of capital murder. As a result, the State of Texas was required to appoint one to represent him, because the Sixth Amendment provides that a criminal defendant has a right to be represented by counsel. Burdine's lawyer slept through portions

6. The most assiduous chronicler of the unjustness of the current death penalty apparatus in America—from the arrest stage through ultimate execution—has been Stephen B. Bright. Significant articles of his illuminating the present system include *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L.J. 1835 (1994); *Is Fairness Irrelevant: The Evisceration of Federal Habeas Corpus Review and Limits on the Ability of State Courts to Protect Fundamental Rights*, 54 Wash. & Lee L. Rev. 1 (1997); *Discrimination, Death, and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 Santa Clara L. Rev. 433 (1995). See also Ira R. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 Am. U. L. Rev. 1 (1990).

7. The discussion of counsel incompetence is based in significant part on cases of which I have first-hand knowledge.

of jury selection as well as through portions of the trial itself. Members of the jury as well as the trial judge's law clerk saw him sleeping and subsequently testified under oath as to that fact. A federal district judge set aside Burdine's conviction and ruled that he must receive a new trial.⁸ (Remarkably, a split panel of the Fifth Circuit reversed, holding that Burdine was required to show prejudice and that he could do so only by identifying with specificity the precise moments when counsel was sleeping. See *Burdine v. Johnson*, 231 F.3d 950 (5th Cir. 2000), opinion vacated and rehearing en banc granted by 2000 WL 1785536 (Dec. 5, 2000). The Fifth Circuit has since voted to reconsider the case en banc. If the entire Fifth Circuit upholds the panel's decision, it would not be surprising for the Supreme Court to grant certiorari review.)

What is unique about the Burdine case is that the federal court ruled in his favor. The fact that Burdine was represented by a sleeping lawyer is not a distinctive feature of his case.⁹ It may not be common for lawyers to sleep during capital murder trials, but it was common for the particular lawyer who represented Burdine to sleep. In fact, one of the witnesses who testified that the lawyer was sleeping also stated that it was common knowledge that this lawyer slept during trial proceedings.¹⁰ Yet he was appointed to represent numerous capital murder defendants. At least a dozen former residents of death row—they are former residents because they have been executed—were represented by this single lawyer.

Another death row inmate in Texas, a woman named Pam Perillo, recently prevailed on her legal claim in the Fifth Circuit because her lawyer, while supposedly representing Perillo, was also having a close personal relationship with one of the State's primary witnesses. Moreover, the lawyer appointed to represent Perillo had previously represented a different defendant in connection with the same crime, and his strategy in that prior defense had been to blame all wrongdoing on Perillo.¹¹ The precise contours of the conflict of interest present in the Perillo case are somewhat unusual, but not as unique as one might hope. In

8. *Burdine v. Johnson*, 66 F. Supp. 2d 854 (S.D. Tex. 1999); see also *Burdine v. Johnson*, 87 F. Supp. 2d 711 (S.D. Tex. 2000).

9. See David R. Dow, *The State, the Death Penalty, and Carl Johnson*, 37 B.C. L. Rev. 691 (1996). The Carl Johnson case is referred to in the court's order in *Burdine*, but Johnson had already been executed, in September 1995.

10. 66 F. Supp. 2d at 857.

11. *Perillo v. Johnson*, 205 F.3d 775, 786 (5th Cir. 2000).

fact, one capital murder defendant was represented by a lawyer who was having an affair with the defendant's wife. In the midst of the trial, the defendant was served with divorce papers, and following the conviction of the defendant, the lawyer proceeded to marry the death row inmate's former wife.¹² A defendant who is facing a death sentence is probably better off being represented by a lawyer who does not have designs on that defendant's wife. A capital murder defendant is also best served by having a lawyer who has not traded representation for book rights to the client's story, but the lawyer who represented Betty Lou Beets, the second woman executed in Texas since Reconstruction, did exactly that.¹³

Sexual conflicts of interest are not terribly common, but conflicts of interest in general are rampant. For example, lawyers appointed to represent indigent capital defendants have, in order to justify their claim for greater compensation, at times represented co-defendants—a situation that is ripe with conflict potential. In one notorious case, a single lawyer represented co-defendants even though the excuse of one of the defendants was that the other one had pulled the trigger and fired the fatal shots. In another case, a defendant was convicted and sentenced to death and then prevailed in his appeals and was therefore the beneficiary of a new trial. At his second trial, he was represented by the man who had served as the foreman of the jury at the first trial—in other words, he was represented by someone who had already deemed him guilty and sentenced him to death.¹⁴ Charles Bass, who was executed in 1986, turned himself in to authorities after consulting with a lawyer who, unbeknownst to Bass, had entered into a contract with a filmmaker who was producing a film based on the life of Bass's murder victim; the attorney received \$5000 from the film company in advance and a promise of additional cash if Bass in fact surrendered. When Bass argued on appeal that he had not only received ineffective assistance but had in fact been betrayed by his lawyer, the court of appeals ruled against him, reasoning that

12. *Houston Chronicle Pub. Co. v. McMaster*, 598 S.W.2d 864 (Tex. Cr. App. 1980) (en banc).

13. See *Beets v. Scott*, 65 F.3d 1258 (5th Cir. 1995), cert. denied, 517 U.S. 1157 (1996).

14. See *Ex-Jury Foreman Defends Murder Suspect in 3d Trial*, N.Y. Times A20 (Nov. 3, 1988).

the lawyer who betrayed Bass did not ultimately represent him at trial.¹⁵

Sometimes the incompetence of lawyers who represent indigent defendants can be attributed to a conflict of interest, but at other times, it is attributable to nothing other than the sheer ineptitude of the lawyer. Thus, for example, one defendant was represented by counsel who, during his closing argument, said, "You are an extremely intelligent jury. You've got this man's life in your hands. You can take it or not. That's all I've got to say." The lawyer then sat down. He was finished with his closing.¹⁶ Harvey Duffy was represented by a lawyer who had never tried a capital case; the lawyer spent less than a day picking the jury—even though jury selection is perhaps the most critical phase of a capital murder trial.¹⁷ A handful of defendants have been represented by lawyers who did not raise even a single objection throughout the course of the trial.¹⁸ One unfortunate defendant was represented by a lawyer who showed up drunk at the trial,¹⁹ and another defendant, a Hispanic, had his lawyer refer to him during the trial as a wetback.²⁰

Lawyers representing capital defendants do not perform any better on appeal. One appellate lawyer filed a brief that was one page long.²¹ Another lawyer continually failed to meet deadlines for filing the appellate pleadings and was therefore jailed for contempt. The lawyer ultimately filed a brief that was eight pages long, which he wrote from a jail cell.²² A lawyer in Alabama filed a brief for a man named Larry Heath that was one-page long. The lawyer cited a single case—a case that went against his position. The brief had more typographical errors than it had citations to authority. And yet, when Heath was finally fortunate enough to obtain competent counsel, all the issues he might have raised on appeal were deemed to have been defaulted by the previous lawyer.²³

The problem with starting to tell stories about attorney ineptitude is that one can go on telling stories for a long, long time.

15. *Bass v. Estelle*, 696 F.2d 1154 (5th Cir. 1983).

16. *Romero v. Collins*, 884 F.2d 871, 875 (5th Cir. 1989).

17. *Ex parte Duffy*, 607 S.W.2d 507 (Tex. Cr. App. 1980) (en banc).

18. See, e.g., *Ex parte Earvin*, 816 S.W.2d 379 (Tex. Cr. App. 1991) (en banc).

19. *Russell v. Lynaugh*, 892 F.2d 1205, 1213 (5th Cir. 1989).

20. *Ex parte Guzman*, 730 S.W.2d 724 (Tex. Cr. App. 1987) (en banc).

21. See Bright, 103 Yale L.J. at 1835 (cited in note 6).

22. *Nichols v. Collins*, 802 F. Supp. 66 (S.D. Tex. 1992), aff'd in part and rev'd in part *sub nom. Nichols v. Scott*, 69 F.3d 1255 (5th Cir. 1995).

23. Bright, 103 Yale L.J. at 1860-61 (cited in note 6).

But I should add one final point, and that is that even when the lawyers are good—and there are many very fine lawyers appointed to represent indigent capital defendants—they are prevented from mounting a fully effective defense. Two obstacles stand in their way, one concrete and one somewhat more abstract. The concrete obstacle is that they are paid insufficient wages. For example, the two lawyers who represented accused cop-killer Carl Wayne Buntion were awarded \$30,000 less than they had requested.²⁴ The lawyer who represented Federico Martinez-Macias was paid at the princely rate of \$11.84 per hour.²⁵ Once defense lawyers know that their bills will be scrutinized with hyper-zealousness by trial judges who are loathe to authorize the spending of taxpayer dollars for the representation of an accused murderer, defense lawyers will stop doing anything that they think they might not get reimbursed for. Genuinely competent counsel do whatever must be done to represent their clients effectively—witness the efforts of Michael Tigar who represented Terry Nichols in the Oklahoma city bombing trial or any of the members of the O.J. Simpson defense team. Lawyers who are worried about whether they will get paid do less.

Second, and somewhat more abstractly, in many states, including Texas, the trial lawyers are appointed not by a central appointing authority, but instead by the trial judge who will preside over the case. This means, obviously, that the lawyer is serving two masters: the defendant, but also the judge. If the lawyer offends or alienates the judge, the lawyer will not be receiving any more appointments. The same dilemma confronts appellate lawyers, who are appointed by judges who sit on the Court of Appeals. Even lawyers of the firmest moral fiber cannot help but feel the impact of this conflict. Harris County, where Houston is located, sends more men to death row than any single state (other than Virginia and, of course, Texas). In Harris County, there are 22 criminal district court judges with jurisdiction over capital cases. Of the 22, 16 have received campaign contributions from lawyers who have been appointed to represent capital defendants since the beginning of 1998.²⁶ This

24. See Rad Sallee, *Two Buntion Lawyers Threaten To Sue Over Legal Fees, Costs*, Houston Chronicle 20A (Feb. 27, 1991), available at 1991 WL 3905792. See generally David R. Dow, *Teague and Death: The Impact of Current Retroactivity Doctrine on Capital Defendants*, 19 Hastings Const. L.Q. 23, 36 and nn.178, 179 (1991).

25. *Martinez-Macias v. Collins*, 979 F.2d 1067 (5th Cir. 1992).

26. These data are on file with the author. Moreover, of the twenty-two judges, twenty-one are former prosecutors.

cozy relationship may be pleasant for the prosecutors, judges, and defense counsel, but it does not best serve the interests of the capital defendant.

Perhaps the most important quality a lawyer representing capital murder defendants must possess is the willingness to be loathed. Lawyers who represent terrorists or mass murderers, or even simple murderers, must be willing to be reviled by the family members of the murder victims, by demagogic politicians, by the popular media, even by the presiding judges themselves. A lawyer who must count on having his or her bill paid by a judge who is accountable to the electorate will almost never be willing to incur such enmity. The rare lawyer who has such character will probably be appointed to represent only one fortunate defendant; the next time, the judge will find someone who is more compliant.

2. Racism

Over 17,000 executions have occurred in the United States. Of that number, a total of 35 have involved a white murderer and a black victim. In Texas, the death penalty capital of the western world, there has never been a white man executed for the murder of a black person. In 1998, three white men chained James Byrd, a black man, to the back of their pickup and dragged him for miles, killing him. Two of the three were sentenced to death. Until they arrived at death row in 1999, there had never even been a white murderer on Texas' death row whose victim was black.

These data are hardly unique to Texas. In Georgia, for example, blacks represent 60 percent of all homicide victims, yet 80 percent of those executed are executed for killing a white. In Kentucky, over 1,000 blacks have been murdered since 1977, but of the 28 people on death row, not a single one is there for killing a black.

These data have been known for many years. Over a decade ago, a group of researchers, led by David Baldus, examined more than 2,000 homicides in Georgia and, as part of the examination, analyzed more than 200 different variables: race of victim, race of offender, economic status of victim and offender, details of the crime, etc. They determined that although black murderers were significantly more likely than white murderers to be sentenced to death, the truly dramatic variable was the race of the victim: Murderers of whites were between 4 and 5

times as likely to be sentenced to death as murderers of blacks. This essential finding has been replicated in every state in which the study has been conducted.²⁷ Nationwide, whites make up slightly less than half the total number of murder victims, but more than 80 percent of those executed are executed for killing a white.²⁸

Not all scholars agree that the race of the accused plays a significant role in determining which defendants are sentenced to death; nevertheless, it is fair to say that a broad consensus acknowledge the impact of the race of the victim.²⁹ Not even the Supreme Court has denied this fact. Nevertheless, in 1987, in the case of *McCleskey v. Kemp*,³⁰ the Court denied relief to McCleskey, a black man sent to death row for murdering a white victim, on the grounds that McCleskey's statistical showing did not demonstrate that racism had operated *in his particular case*. The dissenting Justices complained that the burden the majority placed on *McCleskey* could never be met; all any death row inmate can show are statistics. At some point, those statistics must be permitted to speak for themselves.

As Lon Fuller's hypothetical Justice Keen once put it, there is such a thing as overexplaining the obvious.³¹ The obvious fact is that America has not solved its race problem, and one domain that highlights this problem is the realm of criminal justice. Race is an issue in the capital punishment arena because it is an issue in America. Any truthful portrait of death row, to *be* truthful, must illuminate this inescapable fact, and any supporter of capital punishment must come to grips with it.

27. See David C. Baldus, *Racial Discrimination and the Death Penalty in the Post-Furman Era*, 83 Cornell L. Rev. 1638 (1998); John H. Blume, *Post-McCleskey Racial Discrimination Claims in Capital Cases*, 83 Cornell L. Rev. 1771 (1998); Gen. Gov't Div., U.S. Gen. Accounting Office, Rep. GGD-90-57, *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities* (Feb. 26, 1990) (summarizing data from more than 20 studies); Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. Rev. 26 (2000).

28. Current statistics, as well as links to death penalty sites, both pro and con, can be found at the website of the Death Penalty Information Center, www.deathpenaltyinfo.org.

29. See, e.g., John C. McAdams, *Racial Disparity and the Death Penalty*, 61 L. & Contemp. Prob. 153 (1998).

30. 481 U.S. 279 (1987).

31. Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 Harv. L. Rev. 616 (1949).

3. Arbitrariness

When the Supreme Court struck down all then-existing death penalty laws in 1972, it did so in part because the Justices could make no sense of why some defendants were sentenced to death and others who had committed identical, if not more heinous, crimes were not. Justice Stewart, in an evocative metaphor, complained that the chances of being sentenced to death were akin to the likelihood of being struck by lightning.³² Neither fate is rationally explicable. That type of arbitrariness, the Court ruled, was inconsistent with due process and the rule of law.

Immediately following the Court's decision, most states re-wrote their death penalty statutes with the goal of reserving the death penalty for the most horrific crimes and the most brutal criminals. The past two and a half decades of capital punishment, however, have proven that achieving consistency or rationality is chimerical. Prosecutors retain discretion not to seek the death penalty even where it is legally warranted, and juries retain the power not to sentence defendants to death even when those defendants qualify for the death penalty.³³

In early 1999, Missouri Governor Mel Carnahan commuted the death sentence of Darrel J. Mease to a sentence of life in prison following a brief conversation with Pope John Paul II, who asked Governor Carnahan to show mercy towards Mease. Mease is a triple-murderer who was convicted in 1988 of killing Lloyd Lawrence and his wife Frankie, along with their disabled grandson William.³⁴ It would take an uncommon measure of churlishness for a death penalty foe to begrudge Darrell Mease his victory, but the simple truth is that he got lucky because the Pope mentioned him by name and Governor Carnahan, for whatever reason, was moved by the Pope's appeal. Webster's dictionary defines "arbitrary" as unprincipled or capricious. To the hundreds of men (and the handful of women) on death row in America whose names the Pope does not know, that is the perfect word to describe why they will die even though Mease will not.

32. *Furman v. Georgia*, 408 U.S. 238 (1972).

33. On the role of prosecutorial discretion, see Jeffrey C. Pokorak, *Probing the Capital Prosecutor's Perspective: Race of the Discretionary Actors*, 83 Cornell L. Rev. 1811 (1998).

34. See Gustav Niebuhr, *Pope's Appeal Saves Killer in Missouri*, Portland Oregonian A1 (Jan. 29, 1999), available at 1999 WL 5315052.

If arbitrariness were solely the result of prosecutorial discretion and the behavior of juries, there would be no *legal* basis to complain about it. Ironically, however, the single factor most responsible for perpetuating arbitrariness in the carrying out of the death penalty is the unwillingness of judges to insist that the law be followed in all cases. Judges at every level, state and federal, seem to have grown weary of death penalty appeals, with the consequence that executions proceed apace even in the face of egregious constitutional violations. Thus, through the mid 1980s, 2 out of every 5 death sentences were set aside on constitutional grounds; since the late 1980s or early 1990s, the number has dropped precipitously, and now the percentage of successful death penalty appeals is in the single digits.³⁵

Two recent pairs of cases from Texas illustrate the problem. The first involved Troy Farris, who was sentenced to death in 1983 for killing a police officer. In his appeal to the Texas Court of Criminal Appeals (CCA), he complained that the prosecutors unconstitutionally excluded from the jury a woman who was opposed to the death penalty. Under the *Witherspoon* line of Supreme Court cases,³⁶ prosecutors are permitted to exclude a potential juror who says it would be impossible for him or her to impose the death penalty, but it is not permissible to strike a juror just because he or she is in principle against capital punishment. If the juror swears that she would be able to carry out her legal duty, she cannot legally be excluded. The sound idea of the *Witherspoon* line is that prosecutors cannot be permitted to empanel a jury that is predisposed toward death.

In Farris's case, the court ruled that the exclusion of a certain juror was permissible because she had "vacillated" on the question of whether she could adhere to her oath.³⁷ Four years later, however, Michael Riley raised the same *Witherspoon* issue in the CCA, complaining that prosecutors had wrongfully excluded a juror. This time the Texas court realized that it had previously misapprehended federal law, and the court granted Riley relief;³⁸ moreover, the court in *Riley* expressly overruled its decision in *Farris*.³⁹

35. See David R. Dow, *America's Death Machine*, 10 *Crim. L.F.* 387 (1999).

36. *Witherspoon v. Illinois*, 391 U.S. 510 (1968); *Adams v. Texas*, 448 U.S. 38 (1980); *Wainwright v. Witt*, 469 U.S. 412 (1985).

37. *Farris v. State*, 819 S.W.2d 490 (Tex. Cr. App. 1991) (en banc). The "vacillating juror" problem is associated with *Wainwright v. Witt*.

38. *Riley v. State*, 889 S.W.2d 290 (Tex. Cr. App. 1994) (en banc).

39. *Id.* at 299.

As it turned out, Farris had not yet been executed. So he went back to court—first state and then federal—and argued that the CCA had acknowledged that it had been wrong in his case and that he should therefore obtain the same relief that Riley received. His appeal was rejected, and he was executed in 1998.⁴⁰

In 1999, an even more striking inconsistency occurred in Texas. Two inmates were set to be executed on consecutive days: Danny Barber was set to die on a Tuesday, and Stan Faulder was scheduled for execution on Wednesday, the very next day. Barber's lawyers, believing that they had exhausted their legal claims, were telling their client goodbye. Faulder's lawyers, in the meantime, were persuading a federal judge in Austin that the State's clemency proceedings are constitutionally defective, and the judge therefore granted Faulder a stay.⁴¹ Faulder's lawyers contacted Barber's lawyers and Barber authorized the identical issue to be raised in his case. He too received a stay from the same federal judge.⁴²

The State appealed both cases. On Tuesday afternoon the Court of Appeals for the Fifth Circuit refused to disturb the stay in Barber's case. Yet the next day, a different panel of judges from the same court of appeals did dissolve the stay in Faulder's case. Both inmates had raised the identical legal claim; indeed, the exact same pleadings were used by both sets of lawyers—all that differed was the name of the party seeking relief. The court of appeals added a footnote to its opinion in the *Faulder* case acknowledging that it was aware that a different group of judges had, on the previous day, halted an execution on the same grounds; but the panel did not explain why it was pursuing a different course.⁴³ (The Supreme Court did eventually stay Faulder's execution, though the legal basis for its decision remains unclear.)

So Michael Riley obtained relief when his lawyers persuaded the CCA to overrule the decision in *Farris*, whereas Far-

40. See *Farris v. Johnson*, 967 F. Supp. 200 (N.D. Tex 1997), aff'd 144 F.3d 50 (5th Cir.), cert. denied, 525 U.S. 1004 (1998).

41. See *Faulder v. Texas Bd. of Pardons & Paroles*, 178 F.3d 343 (5th Cir. 1999) (recounting procedural history), cert. denied, 527 U.S. 1017 (1999).

42. None of the opinions relating to the clemency issue in the *Barber* litigation is published. The Supreme Court's denial of relief is located at 525 U.S. 1132 (1999). I have previously criticized the refusal of the courts—both state and federal—to publish their opinions in death penalty cases. See Dow, 37 B.C. L. Rev. at 708 (cited in note 9). The details in the text are based on my first-hand knowledge of the cases.

43. The opinion is unpublished; a copy is on file with the author.

ris was struck by lightning. And Danny Barber, who was alerted to the existence of a legal issue by Faulder, had his legal victory upheld on appeal while Faulder's was set aside. (Both Faulder and Barber have since been executed.) The phrase "death penalty law" might not quite be an oxymoron, but Justice Stewart would notice no difference between the system we have today and the regime he condemned 25 years ago. Indeed, it is for this very reason that Justice Blackmun, who voted in favor of the state in death penalty cases throughout the 1970s and 1980s, finally announced in 1994 that he would "no longer . . . tinker with the machinery of death."⁴⁴

One reason that arbitrariness has become so difficult to eradicate is that, in the domain of death penalty law, judges have grown weary of the appellate process. When modern death penalty jurisprudence began to develop in the 1970s, the Supreme Court assumed that appellate judges would, by examining death penalty appeals with assiduous care, eliminate arbitrary sentencing.⁴⁵ For many years, appellate judges did so, with somewhere between 40 and 60 percent of death sentences being set aside by federal courts.⁴⁶ But along the way, judges somehow grew weary of these cases. They became more interested in speeding executions along than in scrutinizing proceedings in capital cases. This weariness has manifested itself in two ways. The first is that judges will occasionally direct angry exasperation toward lawyers representing condemned men.⁴⁷

The second exemplification of this weariness is found in the systematic narrowing of the universe of claims that death row inmates are even permitted to bring. For example, the Court has indicated that a claim of actual innocence is not, standing alone, a cognizable claim on habeas review.⁴⁸ It has held that death row inmates are not entitled to counsel in order to pursue collateral (i.e., habeas) relief⁴⁹—meaning that the Court has sanctioned the execution of men who, at the time of execution, are

44. *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari).

45. See, e.g., *Jurek v. Texas*, 428 U.S. 262 (1976).

46. See Dow, 10 Crim. L.F. at 387 (cited in note 35); *Murray v. Giarratano*, 492 U.S. 1, 24 (1989) (Stevens, J., dissenting) (noting reversal rate in capital post-conviction appeals of 60-70 percent).

47. See, e.g., David R. Dow, *Frontiers of Justice*, 80 *Texas Observer* 9-10 (Nov. 25, 1988) (concerning former death row inmate Walter Bell); *McFarland v. Scott*, 512 U.S. 849 (1994).

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

49. *Murray v. Giarratano*, 492 U.S. 1 (1989).

unrepresented by counsel. Justice Scalia has even implied that lawyers who represent death row inmates in their collateral proceedings were “guerillas,” bent on subverting the will of the majority.⁵⁰ What is extraordinary about Justice Scalia’s tirade—aside from the fact of the tirade itself—is that he delivered it in a case in which the death row inmate argued simply that he was entitled to have the sentencing jury know that he would be ineligible for parole under state law should he be sentenced to life in prison (rather than death).⁵¹ Seven Justices, all but Scalia and Thomas, agreed on the result. As Justice Blackmun put it for the plurality, “The State may not create a false dilemma by advancing generalized arguments regarding the defendant’s future dangerousness while, at the same time, preventing the jury from learning that the defendant will never be released on parole.”⁵² That such a result could prompt Justice Scalia’s outburst is stunning. Of course, there has long been a strain of popular opinion that cares not a whit about constitutional rights if the guilt of the defendant is not in question. This very attitude is what animates lynch mobs. When Justices of the Supreme Court direct such venomous fury against lawyers even in a case in which the death row inmate prevails by a lopsided vote, they sanction and even participate in this lynch mob mentality.⁵³ And when death penalty movies focus on innocence, they let these Justices get away with it.

* * * * *

The simple and inescapable truth of the matter is that the death penalty system we have is illegitimate. Indigent defendants commonly receive incompetent lawyers. Competent lawyers are commonly denied resources necessary to mount effective defenses. Trial judges in most states with the death penalty are elected officials, with the consequence that there is political pressure on them to ensure that capital defendants are convicted and sentenced to death. Black defendants are more likely to receive the death sentence, all other things being equal, than white defendants, and murderers of white victims are more than twice as likely to be sentenced to death as murderers of nonwhite victims. Appellate judges ignore the law. The death penalty may

50. *Simmons v. South Carolina*, 512 U.S. 154, 185 (1994) (Scalia, J., dissenting).

51. *Id.* at 156.

52. *Id.* at 171.

53. *Simmons* is not the only case in which Justice Scalia has expressed this antipathy toward death penalty lawyers. See *McFarland v. Scott*, 512 U.S. 849 (1994) (transcript of oral argument), available at 1994 WL 665012 sub nom. *McFarland v. Collins*.

well be illegitimate even in a noncorrupt world, but that is an argument for philosophers because the world we actually have is one in which the death penalty apparatus is corrupt from head to toe. This truth is hidden in most documentaries. Ironically, however, it is a truth that fiction illuminates rather well.

II. FICTIONAL DOCUMENTARIES AND TRUTHFUL FICTIONS

Let me be clear about one thing at the outset: I am not urging that documentary film-makers and lawyers and journalists cease their efforts to identify individuals who have been wrongfully convicted; I am suggesting that the recent obsession with claims of innocence has obscured the fact that innocence is a symptom of a larger, systemic corruption.

Thus, *The Thin Blue Line*, a film that led directly to Randall Dale Adams's release from death row, has nothing to do with the philosophical issue of the death penalty's moral legitimacy. Similarly, *Fourteen Days in May*, which details the final two weeks of the life of a death row inmate who suffered nearly every injustice that the capital punishment regime can serve up, ultimately elects to focus on the inmate's claim of innocence, thereby blunting the force of, and even obscuring, all else.

Yet to a committed death penalty advocate, executing an innocent man is simply the cost of doing business, the price of an imperfect justice system. Few would say that aloud, perhaps but anyone who supports capital punishment must believe it, for the evidence of wrongful convictions is simply incontestable.⁵⁴ Someone who believes that the death penalty is inherently wrong cheats by focusing solely on innocent inmates. Worse, this cheating tends to legitimate the increasingly entrenched legal doctrine that holds that unless an inmate can prove that he did not actually commit the crime for which he was sentenced, then virtually any constitutional violation can be overlooked.⁵⁵ Surely innocence should matter, but it should not be all that matters. Constitutional values and moral norms are not applicable only to the wrongly accused.

54. See Dow, 10 Crim. L.F. at 387 (cited in note 35).

55. *Calderon v. Coleman*, 525 U.S. 141 (1998).

A. THE PROBLEM OF INNOCENCE.

Death penalty films that focus on innocence are probably both a cause and a result of the recent public fascination with the issue of innocence. Yet although public attention to the issue of innocents being executed has reached new heights, the issue itself is hardly new. Indeed, since Gary Gilmore was executed by firing squad in Utah in 1977, beginning the modern death penalty era, there have been nearly 13 people released from death row in America for every 100 killed. Despite this staggering statistic, popular support for the death penalty increased steadily from the mid 1970s through the late 1980s, and remained at a high level until the last year or two, when support dropped somewhat (though not precipitously).⁵⁶ Part of this drop may well be attributable to the surge in attention paid to wrongful convictions. The most dramatic event to contribute to this focus on innocence was almost certainly the decision by George Ryan, the Republican governor of Illinois, to halt executions in his state. He did so because since the death penalty resumed in Illinois, there have been more men released from death row after being found innocent than have been executed. Subsequently, Senator Patrick Leahy of Vermont introduced a bill, the Innocence Protection Act of 2000, that would make DNA testing available to state and federal inmates, regardless of the amount of time that has transpired since their convictions,⁵⁷ and a similar measure has been adopted in the House.⁵⁸

Everybody is interested in innocence, in other words. The problem is that the issue of innocence has all but obscured the fact that the death penalty system fails, in one sense or another, in nearly every case. And what is particularly extraordinary about this turn of events is that the documentaries have contributed to the obfuscation while the Hollywood movies have grappled with the entire range of issues. I will illustrate this claim by discussing in some detail each of the four principal films.

B. THE MOVIES

The Green Mile

The Green Mile is set in Louisiana during the Depression. The film is based on a work by Stephen King, and King helped

56. See Holmes, *Look Who's Questioning the Death Penalty* at 3 (cited in note 5).

57. *Id.*

58. *Id.*

adapt the work for the screen. It stars Tom Hanks, who plays Paul Edgecomb, the chief guard on death row, and Michael Clarke Duncan, who plays an inmate named John Coffey. There are also magnificent performances from Sam Rockwell, who plays the film's most truly despicable character, a multiple murdered named William "Wild Bill" Wharton; from Doug Hutchison, who plays the film's second most despicable character, a malignant prison guard named Percy Wetmore; from David Morse, who plays Hanks's first assistant, a guard named Brutus "Brutal" Howell; and from Michael Jeter, who plays a truly charming death row inmate named Eduard Delacroix.

Coffey is convicted of a double murder. He is black, and he is huge. With the Herculean Coffey standing next to him, Hanks looks like a pygmy. We eventually learn that Coffey is not dim-witted, but he seems as if he might be. Coffey speaks slowly and tentatively, giving the impression of mild retardation or, as he is characterized by one of the guards, a simpleton. His first words in the movie are "Yes sir, boss. I can talk." He is a character who embodies three distinct stereotypes. Initially, he is the fearsome Negro: supernaturally strong and intellectually lame. Then he transmogrifies into a second stereotype: preternaturally strong and perfectly meek, the gentle giant. And at last we learn that Coffey in fact possesses supernatural powers; he becomes the Jesus figure: a man who, with his touch, can heal illness; a man who can see into the hearts of his fellow human beings and know whether they are evil; a man of pure, unadulterated goodness; a man who is killed not because he has done anything wrong, but because he is feared, because killing him will satisfy an appetite that will otherwise not be sated.

We do not see any of Coffey's trial, but we do not need to. Two young white girls were found dead in Coffey's arms. In Louisiana in the 1930s, that was all the evidence the State needed. The father of the girls notices them missing, then discovers blood and torn clothing. Fearing the worst, he calls the sheriff, who assembles a posse. Dozens of men armed with rifles and shotguns fan out through the Louisiana countryside. At last the men come upon Coffey, who is sitting with his arms around the girls, sobbing hysterically, saying over and over that he had come too late. At the time we do not know what this means; we later discover that Coffey had been unable to revive the girls, who had been murdered by Wild Bill. The sheriff stands by for several moments while the girls' father punches Coffey repeatedly about the head and face. Coffey offers no resistance. The

scene is Louisiana in the 1930s, and we watch the scene tensely, knowing that Coffey could easily have been lynched.

Coffey is convicted of abducting and murdering the two young white girls and sent off to death row. We do not see his lawyer's performance, but we can be certain that it was worse than perfunctory, for when we later meet the lawyer, we meet a man who never believed in his client and had no sympathy for him or his fate. We meet a lawyer who thinks of his former client as sub-human, as unworthy of a defense. In short, we meet the typical, southern death penalty lawyer that an indigent defendant would have.

Coffey arrives at the prison and the guards are awestruck—literally mesmerized—by his size. They warn Hanks to be wary, but Hanks does not fear him. Coffey puts up no resistance, just as he showed none when he encountered the posse. He steps into his cell and it is as if he has donned a tee shirt that is several sizes too small.

In the course of the film, we see a total of four inmates on death row: Coffey, Wharton, Delacroix, and an Indian named Arlen Bitterbuck (played by Graham Greene). There does not appear to be any question as to whether the latter three in fact committed the crimes for which they were sentenced to die. Coffey, however, is a different story. He is a Christ-like figure with mystical, supernatural powers. He caresses a dead mouse in his huge hands and brings the mouse (Delacroix's pet, who is named Mr. Jangles), back to life. He heals Hanks' bladder infection by grabbing Hanks' crotch through the iron bars of his cell and squeezing. He sucks a life threatening brain tumor out of the head of the warden's wife. He can see into the hearts of men. When Wild Bill first arrives at death row, Coffey whispers "be careful," and moments later, Wild Bill attacks the guards.

Towards the end of the film, in the scene immediately preceding the execution, Coffey channels a portion of his power into Hanks and allows Hanks to see into the past: to see that Wild Bill committed the double murder for which Coffey was sentenced to death. Hanks knows that he will be executing an innocent man, and he asks Coffey whether he wants him to foster an escape. Coffey demurs. Hanks is pulled between justice and order, and, in the end, he embraces order.

Virtually every disgraceful dimension of the modern death penalty regime makes an appearance in this film. Coffey is convicted because he is a black man and the victims are young white

girls. Coffey's own lawyer compares Coffey to a rabid dog, saying that the only thing to do with him is to kill him. Most of the death row guards are amiable, though one is a malignant sadist. Like the documentaries, *The Green Mile* does have a central character who is innocent, but the difference between this film and either of the documentaries is that we know that Coffey ended up on death row because his lawyers were inept and because racism is a potent force. We see an innocent man die, but it is not all we see. We see how the execution of an innocent is a result of a myriad of lesser evils.

Coffey's jailers know beyond any doubt that Coffey is innocent. Yet they carry out the execution anyway, in a tension-filled death chamber where one of the many witnesses, the father of the two murdered little girls, shouts "kill him twice." Hanks cannot bring himself to order the executioner to throw the switch. God will want to know how Hanks could have killed one of His miracles, and what will Hanks say? That he was just doing his job? And yet, though he must be prodded by his assistant to give the order to carry out the execution, in the end Hanks does so. He shuffles over to Coffey and clandestinely shakes his hand. Then he gives the order, and Coffey is electrocuted.

Fourteen Days in May

Gary Gilmore and Harold Lane are the answers to trivia questions: Gilmore, of course, was the first person executed in America following the reinstatement of the death penalty by the Supreme Court in 1976. Lane was the one-hundredth execution victim in the belt buckle of the death belt, the State of Texas. Edward Earl Johnson has no trivia question associated with his death. Were it not for a single accident, he would be all but forgotten, for he was the second person executed in Mississippi following resumption of the death penalty (and the seventy-third nationwide). Instead, however, Johnson's memory survives because the BBC commissioned a documentary about the last two weeks of his life at the Parchman Farm, in the Yazoo Delta in Sunflower County, Mississippi.

In 1979 in a rural Mississippi town, an elderly woman named Sally Franklin was attacked in the boarding house she operated. One of her boarders heard the commotion and called the police. J.T. Trest, the town marshall, responded to the call. Trest was shot first with a small caliber pistol and then with his own gun. One witness believed that he had seen a Buick speed-

ing away from the scene. Edward Earl Johnson was arrested because he owned a Buick.

From the outset Johnson denied any involvement in the crime and said he had been at a bar when the crime occurred. No physical evidence connected Johnson to the crime. Franklin, the female victim of the assault, had known Johnson all his life, and when Johnson was arrested, she said he was not the criminal. The attacker, she said, was heavyset and bearded. Johnson was lean and without facial hair. He was eighteen years old at the time. After being questioned, Johnson was released.

Several weeks later, however, with the case still unsolved, Johnson was arrested again. He continued to protest his innocence. Asked whether he would take a polygraph, he agreed to do so. As he was being driven by Mississippi troopers to Jackson, Mississippi, where the test was to be administered, Johnson confessed to the murder.

He subsequently recanted and insisted that he had been coerced. Johnson's story was that the troopers had told him that he would confess or they would shoot him and say that they had done so as he tried to escape. Johnson said that the troopers asked him, "Who is going to be around to contradict us, to say that it didn't happen the way we said?" None of the troopers makes an appearance in the film. In any case, although no physical evidence corroborated Johnson's guilt, neither did any physical evidence exonerate him. He was executed on May 20, 1987, in the Mississippi gas chamber. The warden announced that he had lost consciousness within one minute after the cyanide hit the acid. The doctor announced that cardiac arrest, the proximate cause of death, did not occur until twelve minutes had gone by.

FDM is mostly about Edward Johnson, but not exclusively. It is also about his family, and about the officials at the Parchman Farm who must carry out the execution. In this respect, though not as real as *The Green Mile*, it is substantially fuller than *The Thin Blue Line*, a film in which we meet no prison officials and no members of the death row inmate's family. In *FDM*, we meet Johnson's mother, his uncle, and his nieces who, in one excruciating scene, sing him songs that their church choir has been practicing. We meet his lawyer, Clive Stafford Smith, and see Smith move back and forth between comforting Johnson and pursuing last-minute appeals. We see Johnson sitting with his family when the Supreme Court rejects his final appeal,

hours before his execution. We see him eating his final meal. We see him, in short, as a human being, as someone who loves and is loved.

We also meet the prison personnel who know Johnson and who are charged with carrying out the execution. The prison warden, Donald Cabana, is a larger than life figure. He is a Vietnam veteran who, upon his return from the war, began a career in law enforcement that has taken him to the top position in the Mississippi criminal justice system. He is interviewed several times, and after being asked whether he supports the death penalty, Cabana pauses and then "gives a qualified yes."⁵⁹ The camera follows Cabana around the prison as he tends to details of the execution. We see him preside, for example, over several meetings at which he insists that his staff conduct themselves with decorum; he tells members of his staff that he worries about people who are eager to stand in line to kill someone; we hear Cabana say that he will terminate any guard who fails to comport himself with appropriate gravity. We see him making sure that Johnson has a comfortable place to lie down in the holding cell adjacent to the execution chamber. We see him asking Johnson what he wants for his final meal. We watch him as he tells Johnson what the final twenty-two minutes of his life will consist of.

In one especially unusual scene, we see Cabana and his assistants as they test the functionality of the Mississippi gas chamber, which, at the time of Johnson's execution had not been used in a number of years. To check its operation, a cage with a rabbit is placed on the chair to which the execution victim will be strapped, and cyanide pellets are dropped into acid. The rabbit twitches violently, hurling itself about its cage, before expiring. (An edited version of the film was shown on HBO in the early 1990s. Not a single person called the station to complain about the execution of Edward Johnson, but several dozen called to complain about the killing of the rabbit.)

The documentary, for all its balance, nevertheless fails to focus on the real problems that Johnson's execution exemplifies. Two-thirds of the death row population in Mississippi are poor, uneducated, black males. These inmates lack the resources to hire competent counsel. The lawyer who represented Johnson at

59. Cabana has since changed his mind and has written a book in which he expresses his opposition to capital punishment. See Donald A. Cabana, *Death at Midnight: The Confessions of an Executioner* (Northwestern U. Press, 1996).

trial made no effort to locate the alibi witness. When Johnson finally obtained zealous and competent lawyers to pursue his collateral appeals, it was too late. The Mississippi Supreme Court determined that it would not address the merits of Johnson's claim of ineffective assistance of counsel because it was waived by not having been raised previously. In all, of the ten claims that Johnson's lawyers presented, including a claim of a coerced confession, nine of the claims were disposed of on procedural grounds, without examining the merits.⁶⁰

One of the insidious canards in death penalty law, perpetuated not only by members of the media, who might not know better, but also by federal judges, who surely must, is that death row inmates receive an inordinate number of appeals. What is meant by that criticism is that judges review the merits of a death row inmate's claims time and time again. The truth, of course, is quite different. Most appeals are disposed of as was Johnson's: on procedural grounds, where the court never reaches the merits of the claim. Because trial lawyers appointed to represent indigent defendants are typically marginal, the result is that most of a defendant's cogent constitutional claims are procedurally defaulted as a consequence of the original lawyer's ineptitude; there is simply nothing that the subsequent lawyer can do. Edward Earl Johnson was executed despite having had no merits review of the principal issues on his appeal. This fact, however, cannot be gleaned from the film; the only way to learn it is to read the reported decision.⁶¹

Instead, the film waters down even its strengths by its treatment of innocence. Johnson always claimed that he had an alibi. Several prison guards are interviewed, and one of them says that he as well as several others believe that Johnson is innocent. Warden Cabana, on the other hand, although his tone lacks conviction, does say that he thinks Johnson did the crime. (He also says that although Johnson might deserve to die, he does not deserve to be first in line; he should be about number 15 or 16, in Cabana's estimation.) After Johnson's execution is confirmed, we learn that his lawyers subsequently located the witness who could have supported Johnson's alibi: a woman he had met in a pool hall. She reportedly claims that she went to police when Johnson was arrested to tell them that Johnson could not be the guy, but, she says, she was instructed to go

60. *Johnson v. State*, 508 So. 2d 1126, 1127-28 (Miss. 1987).

61. *Id.*

home and mind her business. Unfortunately, this information is communicated by subtitle, just before the film's credits roll. We never see the woman or hear her voice. Not only, then, is the exculpatory evidence not truly shown to us, but the strongest evidence of innocence—the only evidence that does not come directly from either Johnson or his lawyers—is thrown at us literally as the film is ending, thereby coloring everything that has come before with the overlay of innocence.

The Thin Blue Line

Randall Dale Adams may have been released from death row even had this film never been made, but he might also have been executed. Adams spent twelve years on death row after being convicted by a Dallas jury of the murder of Robert Wood, a Dallas police officer.

From the moment of his arrest, Adams denied any involvement in the crime, and his story remained consistent and constant in every detail. He said that he had recently moved to Dallas to look for work, and had managed to find it. One night, on Thanksgiving weekend, he had run out of gas on the highway and pulled over to the side of the road. He was picked up by a young man named David Harris, whom Adams had never before met. Harris told Adams that he was out of work and was basically just passing through town. Adams, grateful for the assistance, told Harris that he should stay in Dallas and look for work at the place where Adams worked as a laborer. The two men got something to eat and went to see a drive-in movie, but Adams was not interested in it and asked Harris drive him back to his hotel, where he was staying with his brother. According to Adams, he was back at his hotel before ten o'clock and was asleep before eleven.

Shortly after midnight, Officer Wood and his partner noticed a car without its headlights on. Wood turned on his patrol car's flashing lights and signaled the car to pull over. As Wood approached the driver's window, the car's occupant fired five shots, all of which struck Officer Wood, who bled to death on the side of the road.

When police get shot on the job in Texas, and indeed in any state, no expense is spared in pursuing their killers. *FDM*, which also involves the murder of a peace officer, does not emphasize this salient fact; *TBL* does. Investigatory zealotry is not necessarily a bad thing, but it can become so, when zeal outpaces judgment. Fifty investigators began an intense search for

Wood's killer. Unfortunately, several weeks and hundreds of man-hours were squandered because Wood's partner had told investigators that the car that had been pulled over was a blue Chevy Vega. In fact, the car had been a Mercury Comet. Police and other law enforcement officials tracked down virtually every blue Vega in the State of Texas looking for a bullet-riddled vehicle. This investigative feat was an impressive achievement, but one that had only a negative impact on the investigation, because it meant that officers were not pursuing leads that had a chance of proving relevant.

Aside from her mistaken description of the vehicle, Wood's partner also told investigators, originally, that the car that had been pulled over had only a single occupant. She said that the car's single occupant had been wearing some type of jacket with a fur collar. Only later did she say that there might have been two occupants after all. David Harris turned out to have been wearing that night a parka with a fur collar. Adams remembered this detail, and Harris's parka was later recovered. Randall Adams's only jacket, the one he wore that evening, was made of blue denim.

In December, with Officer Wood's murder still unsolved, Harris was arrested for stealing a car in Vidor, Texas. Harris was well-known to local law enforcement authorities, and in the preceding weeks, he had been boasting to local residents about having shot a policeman in Dallas. Following his arrest for automobile theft, however, Harris said that he hadn't killed the Dallas officer after all but knew who had. At the time, Harris was ineligible for the death penalty because he was only sixteen. Adams was twenty-eight. The film implies that authorities were pleased to have a suspect they could lawfully execute. Adams was arrested on December 21st.

Adams was not a career criminal. In fact, at the time he was tried for the murder of Officer Wood, Adams had never been convicted of, or even charged with, any crime. There was not a jot of physical evidence to connect him to the murder. There was not the faintest hint of a motive. Indeed, the evidence against Adams was remarkably thin: testimony from a reward-seeking, attention-hungry, unemployed mother; and testimony from a sixteen-year-old career criminal. In exchange for providing this damning testimony, Harris, who was ineligible for the death penalty due to his age, was not charged with anything—and charges pending against him in another state were mysteriously dropped.

In many respects Adams's case is unremarkable and just like Edward Johnson's case, but in one important regard Adams's case was quite unusual and radically different from Johnson's: Adams had competent trial counsel. His lawyers believed in him and fought aggressively. They were confident they would secure an acquittal, but they made two mistakes: first, they overestimated the importance of a lack of evidence in a case where a police officer has been killed, and second, they underestimated the persuasive effectiveness of David Harris's magnetic charm.

The one witness who supported Harris's story was Emily Miller, a woman who had been recently fired from her job as a gas station cashier for stealing. Miller testified that she had seen a bushy-haired man shoot Officer Wood as she sat in the passenger seat of a car that her husband was driving past the spot on the highway where the shooting occurred. Miller's husband, the driver, was black. Unlike his wife, he testified that he had seen nothing. Although Miller's husband was unable to verify his wife's story, Miller had an explanation for that: "Black people," she said, "they don't like getting involved." (It's hard to say whether her being married to a black man makes that statement less or more offensive.) Miller herself had come to the attention of the Dallas police after she was arrested for disorderly conduct and taken to the police station for booking. While there she volunteered that she knew something about the Wood murder. The disorderly conduct charge was dismissed, as were pending robbery charges against Miller's daughter.

In Texas, capital trials proceed in two phases.⁶² In the first, the jury determines whether the accused is guilty of the offense: in Adams's case, the intentional murder of a police officer. The jury found him guilty on May 4th. The second stage is the punishment phase. By answering so-called special issues, the jury determines whether the defendant should be sentenced to life or death. At the time of Adams's trial, the jury was asked to answer two questions: first, whether he had acted deliberately; and second, whether he would pose a reasonable probability of being dangerous in the future. (Following the Supreme Court's decision in *Penry v. Lynaugh*,⁶³ the Texas legislature added a third question: if the jury answers the deliberateness and future danger questions in the affirmative, it must then consider whether,

62. Tex. Code Crim. Proc. § 37.071 (2000).

63. 492 U.S. 302 (1989).

in view of all the mitigating evidence proffered by the defendant, he should be sentenced to life rather than death.)⁶⁴

The first question is nearly always answered in the affirmative because the jury has, in effect, already answered it at the guilt-innocence phase of the trial by concluding that the defendant acted intentionally. In modern death penalty litigation, the critical question is probably the third one, but when Adams was tried, the critical question was the second. If the defendant could show that he would not be dangerous in the future, then the jury would answer the second question in the negative, and the sentence would be life rather than death.

In order to persuade a jury to return a "yes" answer to the future dangerousness question, Texas prosecutors (as prosecutors elsewhere) introduce so-called expert psychiatric testimony. In Adams's case, the devastating testimony came from one Dr. James Grigson, a man who, it is fair to say, is a discredited charlatan. His behavior in the Adams case was typical of his *modus operandi*: he spent fifteen or twenty minutes interviewing Adams, a man to whom he had never before spoken. He then testified for more than two and one-half hours, asserting that Adams was a psychopath and would undoubtedly kill again. (The Texas Court of Criminal Appeals (the highest state court for criminal matters) has noted that Grigson is always one hundred percent certain of his opinion that the defendant against whom he is testifying will kill again.)⁶⁵ One thing Grigson is is certain; the other thing he is is persuasive. The jury sentenced Adams to death.⁶⁶

Adams, who has long since been released from prison, has not killed again, or, for that matter, committed any crime at all. But if he had been executed, there would have been no way to say that Grigson was wrong. Indeed, one of the difficulties with disproving Grigson's claims is that he has been so effective a witness. Juries believed him and therefore sentenced everyone against whom he testified to death, making it difficult to establish that had the accused not been sentenced to death, no harm would have come about.

When the Supreme Court set aside the Texas death penalty in 1972,⁶⁷ however, one consequence was that many people

64. Tex. Code Crim. Proc. § 37.071.

65. *Fuller v. State*, 829 S.W.2d 191 (Tex. Cr. App. 1992) (en banc).

66. *Adams v. State*, 577 S.W.2d 717 (Tex. Cr. App. 1979) (en banc).

67. *Branch v. Texas* was the companion case from Texas when the Court held, in

against whom Grigson had testified had their death sentences transformed into life sentences, and many such inmates were subsequently paroled, providing a number of murderers each of whom, according to Grigson, would kill again if ever released. In the late 1980s, an assistant Dallas area district attorney instructed an investigator to track down the paroled murderers against whom Grigson had testified to see what had become of them. Most were living law-abiding lives; none had committed additional homicides, though one had committed a robbery; those that had never been released from prison were leading model inmate lives: following official orders and behaving peacefully. In other words, there is no empirical evidence of Grigson's predictions ever coming true, but substantial evidence of their not.

People often wonder how it is possible for so many innocent men to be sent to prison at all, much less death row. Adams's case provides a typical answer: first, there is a murder that the police desperately want to solve. A man (in Adams's case, a boy, really) who himself risks a long term in prison sees an opportunity to trade a lie for freedom. An unemployed woman with a daughter facing prison sees an opportunity to cash in on reward money while also getting charges against her daughter dismissed. Police and prosecutors see an opportunity to prosecute someone who is eligible for the death penalty instead of a juvenile, who is not. A quack physician for pathological reasons of his own persuades an ingenuous group of jurors that a man with no history of violence is a disaster waiting to happen. And last of all, prosecutors stack the jury with people disposed toward the death penalty. All these details of the death penalty regime are present in nearly all cases, but *TBL* does not emphasize them because it instead focuses with relentless single-mindedness on Adams's innocence.

Almost everything that happened in the Adams trial, as offensive to notions of justice as the trial may have been, was legal. Almost everything—but not quite. The state in a death penalty case is not permitted to stack the jury. In *Witherspoon v. Illinois*,⁶⁸ the Supreme Court held that a state could not remove for cause a potential juror just because that potential juror expressed moral qualms with the death penalty. Even such a juror,

Furman v. Georgia, that the death penalty, as then applied, was unconstitutional. 408 U.S. 238 (1972).

68. 391 U.S. 510 (1968).

the Court held, must be permitted to serve on the jury if he or she could swear an ability to obey the oath that jurors take to uphold and enforce the law, as instructed by the trial judge. Any other rule, the Court reasoned, would create a death-qualified jury, one predisposed toward death.

A decade after *Witherspoon*, Texas prosecutors were still violating it.⁶⁹ In Adams's case, prosecutors, in accordance with a then-extant statute, excluded jurors who were unable to swear that the potential death sentence would not "affect" their deliberations.⁷⁰ Following his defeat in the Court of Criminal Appeals, Adams, through his lawyers, appealed to the Supreme Court of the United States, arguing principally that this Texas practice violated the rule of *Witherspoon* by creating a jury predisposed toward death. The Supreme Court, by a vote of eight to one, with only then-Justice Rehnquist dissenting, agreed.⁷¹ After twelve years on death row, Adams had his death sentence set aside.

Following the Supreme Court's decision, Adams's lawyers went back to the state courts, to try to win his release. However, in the interim, Governor Bill Clements had commuted Adams's death sentence into a life sentence, so the Court of Criminal Appeals determined that Adams should not be released from prison, because the only thing the Supreme Court had held was that the death sentence itself was unlawful; it had not set aside Adams's conviction.⁷² Adams had won in the Supreme Court, but the State of Texas still refused to allow him to go free.

In the meantime, David Harris had not reformed. This fact should not have been a surprise. He had served time in a military stockade, as well as in correctional facilities in Texas and California. His lengthy criminal record included violent assault and armed robbery. At last he broke into a couple's home and attempted to abduct the girlfriend of Mark Mays. When Mays retrieved his own gun and tried to protect himself and his girlfriend, Harris shot him to death. Harris was arrested, convicted of capital murder, and sentenced to death.

Errol Morris did not begin filming *The Thin Blue Line* until Harris was on death row himself. In the final interview with Harris, Harris is asked "What do you think about whether or not

69. See *supra* notes 37-40 and accompanying text (discussing *Farris* and *Riley*).

70. Tex. Penal Code § 12.31 (1973) (repealed).

71. *Adams v. Texas*, 448 U.S. 38 (1980).

72. *Adams v. State*, 624 S.W.2d 568 (1981) (en banc).

[Adams] is innocent?" "I'm sure he is," Harris answers. "How can you be sure?" asks the interviewer, and Harris replies, "Cause I'm the one that knows."

Finally, in the late 1980s, following the release of *The Thin Blue Line*, Adams's lawyers commenced state habeas corpus proceedings. The Court of Criminal Appeals eventually ordered a new trial.⁷³ Adams was ordered released from prison. The State of Texas elected not to retry him, and Adams was at last a free man.

Dead Man Walking

The title of the movie comes from the book of the same name, written by Helen Prejean, a nun who has ministered to death row inmates in Louisiana for more than ten years.⁷⁴ Although Prejean's book is nonfiction, the murderous character in the movie, Matthew Poncelet, is not a particular person; he is instead a composite of a number of different murderers, not all of whom are in Prejean's book.⁷⁵

At one level, the movie is, as it must have been, about Sister Helen Prejean. Prejean, played by Susan Sarandon, is a woman from an affluent Louisiana family who lives in the Saint Thomas projects, an inner city neighborhood where she stands out, even though she does not wear a habit, because she is white. The other women who work with her at the Hope House, where Helen teaches adults to read, warn her against her visit to death row; "they're all con men," she's told. Prejean opposes the death penalty not because Catholic doctrine requires such opposition, but because she believes that executions erode the dignity of the executioner.

At another level the movie is about a murderer and his family. In a brilliant performance, Sean Penn plays Matthew Poncelet, a hate-filled, recidivistic, thoroughly unappealing character. During his first meeting with Prejean, Poncelet chastises her for living in a neighborhood where "every nigger carr[ies] a gun." Later, after a night when two black men were executed, Poncelet

73. *Ex parte Adams*, 768 S.W.2d 281 (Tex. Cr. App. 1989) (en banc).

74. Prejean, *Dead Man Walking* (cited in note 2).

75. In one striking indication that Robbins has done his homework, he has Poncelet order shrimp for his last meal, and Poncelet says that he wants them because he has never eaten them before. It is hard to imagine that anyone with teeth in Louisiana hasn't eaten shrimp, but Robbins got this detail from *Fourteen Days in May*. For his final meal, Edward Earl Johnson orders shrimp, telling Warden Cabana that he has never had them before.

says that he hopes prison officials clean the gurney before executing him.

Her colleagues worry that Prejean will be snookered—and I have seen more than a few sophisticated lawyers conned by murderers on death row—but Prejean is not. She is portrayed as a woman of wide-eyed realism. “I’m not sure I want to run into this guy on the street,” she tells her housemates. Yet she also believes deeply in the power of reason, in the ability of human beings to educate one another, and in the power of education to eradicate much evil. Following one of Poncelet’s racist tirades, for example, Prejean says to him, “Was your daddy a racist?” Poncelet stops his rant on a dime. Prejean engages him, gets him to express his admiration for Martin Luther King, Jr. Poncelet respected Reverend King, we learn, “because he wasn’t lazy,” and Prejean tells him that what he hates is laziness, not black people.

This romantic notion that education and reason will overcome prejudice and hate, that even the basest, least educated among us can be taught that we are all brothers and sisters, may be ingenuous, but then again, perhaps it is not.⁷⁶ For whatever other adjective one might use to characterize Prejean, she cannot fairly be called naive. One evening one of her housemates asks Prejean what has drawn her to the Poncelet case, and Prejean says, “I feel caught rather than drawn”—a characterization that contrasts starkly with Prejean’s earlier recollection of being “drawn” to a life as a nun: one journey was attractive to her; the other was merely irresistible. What is more, this same dynamic aptly characterizes the career arcs of many death penalty lawyers; it is not an attraction to murderers that leads them to this highly specialized area of practice where economic rewards are few and lawyers often become pariahs in their own neighborhoods, but rather an inability to resist a calling.⁷⁷ When judges and politicians accuse death penalty lawyers of preferring criminals to victims, in other words, they are not even close to the truth. The death penalty lawyers I know do what they do because, like Prejean, they are drawn; they feel irresistibly called upon to protect the rights of those who have neither allies nor

76. The sanguine message is the same, for example, in *American History X*, where a skinhead goes to prison for murder and emerges years later a changed man.

77. See, e.g., Austin Sarat, *Narrative Strategy and Death Penalty Advocacy*, 31 *Harv. C.R.-C.L. L. Rev.* 353 (1996); James M. Doyle, *The Lawyer’s Art: “Representation” in Capital Cases*, 8 *Yale J.L. & Hum.* 417 (1996).

resources, to safeguard rights of those who have no ability to fend for themselves.

Of course, one consequence of representing murderers is that lawyers drawn to such a practice will often have clients who, if not themselves irredeemable, have nonetheless committed unforgivable deeds. So too with Poncelet. For much of the length of the movie, his most (and, in truth, only) redeeming quality is that he loves his family, and they him. It takes courage to show that even a vile character can love and be loved, but this film does that. Moreover, this aspect of the film is yet another measure of the film's honesty, for the truth is that Poncelet's relationship with his family is common for an inmate on death row. One of the jarring sights one encounters when visiting death row is the sight of murderers' wives and children, mothers and aunts, who have come to visit. Also common is that the warm relationship Poncelet has with his family does not extend to his father, who abandoned Poncelet's family many years before—though not before he had taken young Matthew into a bar when Matthew was but twelve years old so as to teach him how to drink. It is true that most men on death row have either bad relationships or no relationships with their fathers; it is true that most men on death row grew up with no father at all or with one who was abusive. All this is true. But Poncelet does not blame his father for his crime, and Prejean's colleagues remind her that many kids without fathers do not become criminals.

Again and again this film's message is that any platitude is false, and any easy answer is mistaken. This is the film's core quality: its subtle truthfulness. And it is in this respect more than any other that this film is different from most abolitionist arguments, and strikingly different from most death penalty advocacy. For most of the voices in the death penalty debate are shading the truth, usually intentionally. Most of the voices lie or cheat, because they believe that doing so furthers a desirable end. Nowhere is this shameful characteristic more prominent than in opinions of the Supreme Court. Thus, when the Supreme Court includes details of a murder in an opinion that deals, for example, with the question of whether a constitutional rule constitutes a "new rule" for purposes of determining its retroactive application,⁷⁸ the recital of those details is entirely gratuitous. The purpose played by such a recital is to provoke the

78. See *Teague v. Lane*, 489 U.S. 288 (1989); *Lambrix v. Singletary*, 520 U.S. 518 (1997).

reader's visceral outrage at the crime, and to make the reader entirely unsympathetic to the murderer—so unsympathetic that the reader does not care about the violation of a constitutional norm (if he or she even notices the violation).

Just as it is dishonest of the Supreme Court to include graphic details of a crime that are not germane to the dispositive legal issue, it is similarly dishonest for death penalty opponents to ignore the horrific crimes that most residents of death row have committed. A death penalty proponent who believes that the death penalty is an ethical form of punishment must address the fact that innocents will be executed; a death penalty foe must address the fact that most residents of death row did what they were convicted of doing and their crimes evoke in many reasonable people an impulse for vengeance that can be quieted only by an execution. When a death penalty opponent ignores the murderer's victims and the anguish of the victim's family and loved ones, the opponent is attempting to evade a fact that ought not—and cannot—be ignored. Facts are stubborn things for all the disputants, not just capital punishment supporters.

Dead Men Walking confronts, rather than evades, these disturbing facts. When they were killed, Hope Percy and her boyfriend Walter de la Croix were high school seniors. One cool Louisiana evening, while Percy and de la Croix were necking in de la Croix's car, Matthew Poncelet and an older fellow named Vitello were getting drunk. The two of them drove into the forest and stumbled onto Percy and de la Croix. In turn they raped Percy, and as Vitello killed her by stabbing her seventeen times, Poncelet shot de la Croix with a rifle in the back of the head, killing him. The bodies of the two teenagers were not found until six days later. Percy and de la Croix suffered terror and unimaginable physical pain, and the film presents it all. Poncelet's crime is a vicious one, and anyone who does not feel an urge for vengeance as the scenes of the crime are played over and over again is not, I think, emotionally sincere.

Up until twenty minutes before his execution, Poncelet continues to deny having committed a murder. He will admit only to having been present. Here *DMW* has the chance to cheat. It can saddle Vitello with both murders. Poncelet would not be innocent, in any cosmic sense, but neither would he be a murderer. Yet the film does not take this out. As Poncelet unconvincingly denies having pulled the trigger, *DMW* shows the rape-murder scene over and over. The movie itself is in color, but the flash-backs to the crime are in grainy black-and-white, a tech-

nique that has the effect of stripping everything down, whittling away all that is extraneous and irrelevant so that what we are left with is a terrifying, and terrifyingly simple, brutal act of savagery. Hilton Barber, who agrees at Prejean's entreaty to handle Poncelet's appeal, says early on in the movie that "it's easy to kill a monster but . . . hard to kill a human being"—a point so irrefragably true that the strategy of *DMW* is to make it not at all obvious which side of that line Poncelet falls on.

The fundamental moral strategy of death penalty advocates is precisely to characterize murderers as less than human. In recent years, the single execution in America that has been nationally newsworthy was the execution of Karla Faye Tucker in Texas—not because her crime was less or more horrific than Matthew Poncelet's, for it was not, but simply because she had a handful of characteristics that forced even committed death penalty proponents to confront her humanity.⁷⁹ At one point Poncelet, disgusted with the moral righteousness of Prejean, says to her, "Why should I respect you? Because you got that cross around your neck?" No, says Prejean, you should respect me "because I am a person." Prejean, who has spent hours with Poncelet, cannot help but see him as a person. Death penalty lawyers, who spend time with their clients and meet their clients' families, cannot help but see them as human beings, even as prosecutors and pandering politicians insist on saying that those on death row are animals. Yet every now and then, a murderer like Karla Faye Tucker pierces the pretense. The singular difference between Tucker and Poncelet is not that Poncelet is inhuman; it is that, unlike Tucker, he was not able to project his humanity to those who did not know him.

The salient moral divide is the line we have constructed between persons and wild animals. In *DMW* we see Prejean forge a connection, a human connection, with Poncelet: a man who committed an animalistic act, a man who expresses admiration for Hitler and doubts that six million Jews were killed. Poncelet is not likable, and that is the point. Karla Faye Tucker found a sympathizer in Pat Robertson because she was likable.⁸⁰ Poncelet, like everyone, has some good qualities, but no aptitude for projecting them. Even in the very end, when he finally admits

79. See Dow, *The Humanity of Karla Faye Tucker*, 90:3 *Texas Observer* (cited in note 5).

80. *Id.* More recently, Robertson has endorsed the call for a death penalty moratorium, because of the risk of executing an innocent. See *supra* note 5.

his guilt and is suffused with remorse, he is still not likable. So how does Prejean forge with him a human connection? What special power does she have that allows her to see him as a human being? Is this a skill given only to those possessed of religious faith—and therefore a skill that is as foreign to those of us without such faith as the ability to run a four-minute mile? Not according to Prejean. “It’s not faith that heals hate,” she says, “it’s a lot of work.” This is the lesson Tim Robbins has learned from Prejean’s book, and the message that drives this film.

DMW is, I think, an anti-death penalty film. It mocks the protestors who celebrate executions. It portrays the prison chaplain (a man who cites the Old Testament in support of the death penalty with not the slightest understanding of the Hebrew bible’s nuanced and equivocal approach to this ultimate punishment)⁸¹ as a buffoon. It derides the Governor who grotesquely uses executions as a political tool (as so many recent Presidents and presidential candidates have done). It portrays prison guards and the prison doctor and even the warden himself as men who avoid having qualms about what they are doing by avoiding giving any thought to what they are doing. “It’s just part of the job, you know,” the doctor says, a sentiment shared by the guard who straps execution victims to the gurney. These men—the doctor, the guards, even the warden himself—are surely not the moral equivalent of an Eichmann or a Calley, yet they are their distant moral cousins. These men in Angola do not kill as many, and those whom they do execute can hardly be portrayed as innocent. Yet they do act, and they consciously refuse to confront the morality of their actions. It is precisely in such refusals that most all ordinary evil begins.

DMW has a point of view, but it is a point of view that whispers rather than shouts. Except for the chaplain and the governor (easy targets), the film is respectful to every character and every point of view. Part of *DMW*’s strategy, it seems, is to break down the simplistic dichotomies and hackneyed stereotypes. Hope’s father says to Prejean, “You can’t befriend that murderer and expect to be our friend, too,” and he is probably right about that because he has characterized Prejean as a “friend” of the murderer, and victims’ families tend to see death penalty lawyers in exactly that light. But it is the wrong light.

81. On this nuance and ambivalence, see David R. Dow, *The Death of Fairness Counsel Competency and Due Process in Death Penalty Cases*, 31 *Houston L. Rev.* 1105, 1114 (1994).

One does not need to like Poncelet—one need not be his friend—to think he should not be executed. That is why Poncelet is so thoroughly unlikable. He is not equivalent to Hope or Walter, who were young and innocent. The distinction between victim and murderer is not entirely artificial; it is not a social construct, and any death penalty movie that suggests that it is loses all credibility. Hope and Walter were young kids who had their entire lives before them, until Poncelet (and Vitello) murdered them.

In the movie's penultimate scene, Poncelet says in his final words that killing is wrong, regardless of whether the killer is Poncelet or the State of Louisiana,⁸² yet the faces of Hope and Walter, superimposed on the glass partition that separates Poncelet from the witnesses, remind us that although all killing may well be wrong, there are still degrees of evil. Their innocent visages do not dare let us equate their deaths with Poncelet's. As Poncelet takes his final breaths, scenes of the rape-murder mingle with scenes of the execution, and there is no question which is more violent, which is more horrific, which is more terrifying, which is worse. Killing is not killing. That truth is certain. But that truth does not entail that executions are just.

III. CONCLUSION: SHOULD INNOCENCE MATTER?

The Thin Blue Line and *Fourteen Days in May* are "real" in the sense that they are documentaries, telling stories that are nonfiction. They are real in the sense that states do send innocent men to death row, states do execute innocent men, and these documentaries show us some. The documentaries are real in the sense that their characters are not actors. And yet, in many respects, the Hollywood movies are more real—more real because they show us more, more real because they show us guilty men. Like *Dead Men Walking's* Matthew Poncelet and *The Green Mile's* Wild Bill, most men on death row did the act that they are sent to death row for having done, and like Ponce-

82. In the movie's execution scene, *DMW* does cheat just a little: when Poncelet addresses the witnesses with his final statement, he is already strapped to the gurney, which is how it actually happens, but in the movie the guards swivel the gurney so that Poncelet is upright. With his arms strapped to the gurney at 90 degree angles to his torso, he looks like Jesus on the cross. That isn't how it's done in Louisiana, and the theatricality is a bit of cheating, yet it is forgivable because even as the lethal drug cocktail is being administered, the faces of Poncelet's murder victims are reflected in the execution chamber glass.

let, many death row inmates deny their guilt for many years, before seeking redemption in confession.

The Hollywood movies are more real because, unlike the lawyers who represented Randall Dale Adams and unlike the habeas lawyers who represented Edward Johnson, the trial lawyers who represented the killers in *Dead Man Walking* and *The Green Mile* were dismal: Poncelet's lead counsel was a tax lawyer who had never before tried a capital case; he spent four hours on jury selection—a process that, if done well, takes weeks, if not months. In a trial that lasted five days, this lawyer raised a single objection. Coffey's lawyer was just going through the motions, infected with the same insidious attitude toward black men that skewed the vision of so many southerners in the 1930s (and, sadly, today).

The Hollywood films are more real than the documentaries because, if one wants to address the morality of the death penalty, then one must acknowledge that, while cases like Adams's are chilling, they are far from typical. Ninety-nine percent of the people on death row did what they have been convicted of. Perhaps the prospect of a one-percent error rate will cause some to conclude that the death penalty ought to be abolished. That fact alone, however, will not change most minds. If the objective is to think about the morality of capital punishment per se, then it is a distraction to choose a subject who is innocent. *Dead Man Walking* eschews that distraction entirely; its subject is a particular and detestable guilty man who committed a particularly grisly murder. *The Green Mile* includes an innocent man, but not at the expense of overshadowing all the rest.

In contrast, *The Thin Blue Line* and *Fourteen Days in May*, though exceedingly powerful films, have nothing to do with the philosophical issue of the death penalty's moral legitimacy. To a committed death penalty advocate, executing an occasional innocent man is simply the cost of doing business. The focus on innocence is even worse than a distraction because it tends to legitimate the increasingly entrenched legal doctrine that holds that unless an inmate can prove that he did not actually commit the crime for which he was sentenced, then virtually any constitutional violation can be overlooked.⁸³ Surely innocence should matter, but it should not be all that matters. Constitutional val-

83. *Calderon v. Coleman*, 525 U.S. 141 (1998).

ues and moral norms are not applicable only to the wrongly accused.

Dead Man Walking and *The Green Mile* tackle the moral issues frontally and without the distraction of innocence. Death penalty advocates commonly offer three justifications for capital punishment, and these films speaks to each of them. The first justification is the so-called general deterrence rationale. The idea of general deterrence is that when the state executes a convicted murderer, it sends the message to others thinking about murder and discourages them from killing. Bank robbers, for example, will load their guns with blanks instead of live ammunition so that when they brandish them during the course of a robbery no one will inadvertently get shot. But of course, it does not take studies to prove that bank robbers rob because they think they will not get caught. That is why bank robbers in Texas, Louisiana, and Mississippi still use bullets even though these states show no hesitation in implementing the death penalty. (In Texas, the State carries out more than three executions a month.) Matthew Poncelet and Wild Bill committed rape and murder even though Louisiana has a death penalty and uses it.⁸⁴

The second reason cited in support of the death penalty is specific deterrence. The idea of specific deterrence is that even if executing a criminal does not send a message to murderers in general that they had better not kill, it does send a message to a particular murderer, i.e., the one who is executed. That murderer, at least, will never kill again. The specific deterrence rationale is compelling in a statistical sense, because it is true one hundred percent of the time that executed murderers never murder again. Matthew Poncelet and Wild Bill have killed their final victims. But Poncelet, as well as all of the murderers shown in *TGM*, were not murderous while in prison. These inmates could have been stopped from killing again by keeping them at Angola for the rest of their lives.⁸⁵ And in truth, even had any of

84. Moreover, executions occur so regularly in America that they are not newsworthy. In Texas, where more than 230 men and one woman have been put to death since the death penalty resumed in 1982, implementation of the death penalty is so common—so mundane—that the State's largest newspapers no longer even send reporters to death row when executions are scheduled. If no one pays attention to the implementation of the penalty, it is impossible for anyone to be deterred by it.

85. Of course, most states do not provide juries in capital cases with the option of true life without parole—an issue beyond the scope of *DMW* and *TGM*. Still it is noteworthy that although 75 percent of the public expresses support for capital punishment, this figure drops significantly, by some 15 percent or more, when life without parole is offered as an alternative punishment. This very fact goes a long way toward explaining

these murderers ever been released on parole, it is by no means clear that any would have tended to kill again, for there are no reliable data indicating that murderers are likely to murder again if they ever do get released from prison. On the contrary, of more than a dozen death row inmates in Texas whose convictions were set aside on legal grounds and who were therefore released from prison, not a single one had committed another murder in the following decade.⁸⁶

The final justification for the death penalty can be characterized as religious or retributive in nature: an eye for an eye. The irony here is well-known: the moral premise of the retributive rationale is that it is wrong to murder, that it is immoral to kill. So how can one who holds this view sanction a punishment whereby the state kills? This is the question that tortures Walter de la Croix's father, who cannot resist visiting Poncelet's grave.⁸⁷ Despite our norm condemning homicide, still we say that killing is permitted in self defense,⁸⁸ but how does the killing of Poncelet implicate this exception? Homicide is an act that is inherently wrong, and this inherent wrongness does not evanesce when the homicide is carried out by the state.

Among all of humanity, there is perhaps no stronger or more universal norm than the proposition that killing is wrong. *The Thin Blue Line* and, to a slightly lesser extent, *Fourteen Days in May*, hold up an innocent man and say, "The death penalty may be acceptable in theory, but what about the wrongly convicted?" And in so doing, these two films manage to avoid the issue of the death penalty altogether. *Dead Man Walking* and, to a lesser extent, *The Green Mile*, hold up guilty men and say that all this talk of innocence is a moral distraction. Death row is full of guilty men, but they are yet men: human beings who committed vile and despicable acts, yet still human beings.

why prosecutors and other proponents of the death penalty routinely struggle to defeat legislative measures that would permit juries to sentence murderers to life without parole: they know that if jurors could sentence murderers to a real life term, they would be far less likely to sentence them to death.

86. This remarkable statistic is all the more noteworthy because a psychiatrist called as a witness by the State testified at the trial of every one of these men that that he was 100 percent certain that each would, if released, kill again. This psychiatrist, James Grigson, is discussed above, in the section of this essay that addresses *TBL*.

87. I represented a man on death row who murdered a woman whose son, prior to the murder of his mother, had been an active opponent of capital punishment. I do not know whether the murder of his mother changed his mind. I do know that he attended every hearing and appellate argument, of whatever length, during the years of the appeal.

88. The deterrence rationale for the death penalty is a highly attenuated instance of this exception.

We in society have the legal power to kill these men when we act through the fiction of the state, but we cannot elude moral restraints by funneling our actions through that fiction. If it is wrong for the men (and women) on death row to have killed, it is wrong for us to kill; if it is wrong for us to kill, it is wrong for us to have the state kill on our behalves. That simple syllogism is the essence of the moral objection to the death penalty. It is that objection that death penalty documentaries, for all their greatness, entirely avoid; and it is that objection that the Hollywood movies compel us to face.