

STANDING, IN FLUFFY SLIPPERS

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*They also left a red handknit shawl with her, and fluffy house slippers to keep her feet warm. Somehow, they had never got around to talking of Bessie's case in the Supreme Court.*¹

INTRODUCTION

THIS is an Essay about standing and death, about the abstraction and thinness of judicial opinion as compared to the complex context and dimension of a literary work. It looks at the United States Supreme Court Justices' embrace of jurisdictional orthodoxy as they blind themselves to the danger that states may execute their citizens in violation of constitutional law. It explores the credibility of the orthodoxy pose, set in a larger political context in which the Chief Justice of the Supreme Court himself vigorously advocates legislation designed to expedite the death penalty. It begins with an analysis of *The Executioner's Song*,² a long and detailed account of the events leading up to the execution of Gary Gilmore, shot to death by the state according to his own choice, without any appellate court review of the constitutionality of his trial.³ It then considers the 1990 case of *Whitmore v. Arkansas*,⁴ in which the Gilmore question recurred, and a Court well-practiced at preserving its capacity to review decisions and to say what the law is⁵ rebuffed every argument designed to present *1178 the constitutional questions to the Supreme Court.⁶ This Essay critiques the Court's willful exclusion of emotion and real context from its decisions, its misguided characterization of this exclusion as heroic, and its deliberate and activist narrowing of standing to serve the publicly stated goal of freeing the states to kill with a minimum of constitutional scrutiny.⁷

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¹ N. Mailer, *THE EXECUTIONER'S SONG*, 712 (1979).

² *Id.* I do not intend in this Essay to express unmitigated respect for this book. For some of my criticism of it, see *infra* note 82.

³ See *infra* text accompanying notes 8-31.

⁴ 110 S.Ct. 1717 (1990).

⁵ See *infra* note 69 and accompanying text.

⁶ See *infra* text accompanying notes 31-78.

⁷ See *infra* text accompanying notes 79-90 (discussing, *inter alia*, *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989)). For a criticism of the Court's 1989 work on the ground that it placed a low value on individual rights, see West, *Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43 (1990).

I. A MAN IS AN ISLAND⁸

Norman Mailer's *The Executioner's Song* tells the story of condemned murderer Gary Gilmore and the people who surrounded him. The intricate portrayal does not make Gilmore lovable or even admirable. He remains a murderer who deserves death if anyone does. But, after subjecting yourself to the thousand-page ordeal, after experiencing the elaborate details of the last few years of his life, you do feel, in the end, that the men who stood behind a screen and aimed and shot four bullets into Gilmore's heart were also murderers. The real-world-resembling effect of seemingly unsifted information⁹ debilitates you. You feel bored by all the trivial side issues and minor characters and defiled by the endless, banal sexual details. Ultimately, however, *The Executioner's Song* becomes a lesson in how real life *1179 forms an elaborate context spilling far beyond the confines of the law.¹⁰

The Executioner's Song contrasts dramatically with a written appellate court opinion about the death penalty. A judicial opinion begins with a distilled Statement of Facts, taken from the record of whatever evidence happened to have been admitted at trial, severed from the outcome by the jury's unrecorded deliberation, and bearing some unknown resemblance to an historical event.¹¹ That Statement of Facts, though, becomes the only context for the court's decision – aside from the unacknowledged context that is the background of life experience, beliefs, ideas, and prejudices against which each judge views the stated facts. The articulation of law follows inexorably; it is, after all, what we are all waiting for. It is a means to an end, not a story told for the sake of telling a story. The application of law to fact resolves everything into a conclusion, to be neatly packaged in a book, and to be placed on the shelf alongside similarly bound books.

The literary mind reflecting on the same historical event becomes drawn into its unremitting complexities.¹² Instead of seeing an *1180 answer and writing toward that

⁸ Cf. J. Donne, DEVOTION XVII ("No man is an island . . ."), in J. Donne, *SELECTED POETRY AND PROSE*, 166 (T. Craike & R. Craike eds. 1986). On the mismatch between John Donne's meditation and the thinking that underlies standing doctrine, see *infra* text accompanying notes 24-26.

⁹ Of course, no matter how unsifted and realistic the information appears, it is still a distillation of an even larger amount of material, still presented by a human author with his own varied and idiosyncratic ideas about the world in general and the events portrayed in particular. And indeed, Mailer writes based on interviews largely conducted by another journalist and given by hundreds of persons each filtering their stories through their own set of interests, prejudices, and limitations of perception, memory, and communication. But in contrast to the judicial decision based on the same events, *Gilmore v. Utah*, 429 U.S. 1012 (1976), Mailer's work comes far closer to conveying the rich context of real life. Moreover, one can say that there is no "real life" to portray other than one perceived and shaped by idiosyncratic human actors.

¹⁰ On the significance of context, see Althouse, *Saying What Rights Are: In and Out of Context*, WIS. L. REV. (forthcoming 1991); Minow & Spelman, *In Context*, 63 S. CAL. L. REV. 1597 (1990).

¹¹ In another sense, the book and the opinion are very much the same. As described *supra* note 9 and *infra* note 82, Mailer did not personally experience the entirety of the events that he writes about, nor could he have. He had to rely on a record of evidence, gathered through interviews that differ from evidence at trial in their informality and lack of restrictive rules, but that nevertheless exhibit the same frailties as a trial record in that they rely on witnesses and their questioners.

¹² I am reminded of the classic piece of law student advice, repeated in the classic law school movie *The Paper Chase* (20th Century Fox 1973): "Forget the facts." The facts, the context, are deemed a distraction from what really matters, the abstract rules of law. In contrast, I think of a conversation I once had with a student who had great difficulty performing well on law school exams. She said that when she studied a case she became involved in the facts and her mental activity centered not on playing with legal abstractions (which law school rewards), but on thinking about what must have really happened and what the events that led to the case really meant to the people involved. She could not forget the facts.

There is a similar story about the poet Charles Reznikoff, who was trained as a lawyer and who took a job on the editorial staff of *Corpus Juris*. See Watson, *Reznikoff's Testimony*, 82 LAW LIBR. J. 647 (1990). He became fascinated by the stories desiccated and buried in the cases, and his absorption rendered him incompetent at his assigned task of extracting the law from the voluminous

answer, stating the facts as a preliminary, like a judge deciding a case, the literary mind sees the dimensions of an issue multiplying unmanageably. Virginia Woolf eloquently described this phenomenon, recounting her mental processes as she tried to prepare a speech on an assigned topic:

But when I began to consider the subject in this last way, which seemed the most interesting, I soon saw that it had one fatal drawback. I should never be able to come to a conclusion. I should never be able to fulfill what is, I understand, the first duty of a lecturer – to hand you after an hour’s discourse a nugget of pure truth to wrap up between the pages of your notebooks and keep on the mantelpiece for ever [W]hen a subject is highly controversial ... one cannot hope to tell the truth. One can only show how one came to hold whatever opinion one does hold. One can only give one’s audience the chance of drawing their own conclusions as they observe the limitations, the prejudices, the idiosyncrasies of the speaker.¹³

A case exists to reach a holding – “a nugget of pure truth” – to wrap in the bindings of a law reporter and to keep on the bookshelf forever. You may see the manifold issues trying to burst out and overwhelm the holding, but it is the “duty” of the decisionwriter to keep all of this chaos under control.

Occasionally a judge may allude to the chaos. In a recent case, Chief Justice William Rehnquist conceded that although judges make their holdings seem like “nugget[s] of pure truth,”¹⁴ controlled and dictated by the opinions that have gone before, they know, in reality, that a number of possible conclusions exist.¹⁵ The judge, to use Woolf’s phrase, “cannot hope to tell the truth,” but only offers up one opinion, to be taken for what it is worth. But that overt admission of the literary, slipping-away quality of legal work is rare. Mostly, we readers of the law must scrutinize opinions that look to all the world like nuggets of pure truth. We can only glimpse some faint sign of the real, unwieldy world seeping out.

The Executioner’s Song has a thousand pages of facts without conclusions. The circles of people around Gary Gilmore radiate out with a maddening lack of boundary. Their connections to him are sometimes **1181* intense, sometimes remote. The Supreme Court case pops up at one brief point, just to say that Bessie Gilmore, the condemned man’s mother, could not apply for a stay of execution. Mailer does not show us the Supreme Court’s opinion (which is also minimal). He shows us what ordinary people see when they find out about a Supreme Court case – the local newspaper:

Deseret News

No More Delays Gilmore Says

regional reporters. Fired, he undertook a long series of prose poems, revising and revivifying the stories he had found. (I thank Mimi Wesson for showing me this article).

¹³ V. Woolf, A ROOM OF ONE’S OWN, 6-7 (1929) (The assigned speech topic was “woman and fiction.”).

¹⁴ Woolf’s language, not Chief Justice Rehnquist’s.

¹⁵ See *Butler v. McKellar*, 110 S.Ct. 1212, 1217-18 (1990).

Salt Lake, Dec. 13th – In an order Monday, the U.S. Supreme Court held that Gary Mark Gilmore had made a knowing and intelligent waiver of his rights. On hearing the decision, Gilmore ended a 25 day hunger strike.¹⁶

The law is notable for its distance and its extreme smallness in relation to everything else in the story. The Supreme Court seems like an obtuse and ineffectual interloper, an abstract mind rendered stupid by the complete absence of context. On the facing page, the book tells you that visitors had brought Bessie Gilmore a red shawl and “fluffy house slippers to keep her feet warm.”¹⁷ They had forgotten to talk about the Supreme Court case. These trivial facts seem to symbolize the vast separation between people and the Court. How separate are the reality of the actors in the underlying event and the reality of the law: Bessie with her feet kept warm in slippers (a particular kind of slippers) and Bessie with no “standing” to seek a stay. Perhaps the participants sensed that more relief would come from warm clothing than from the Court.

The Supreme Court tells us that to have standing, one must suffer a “distinct and palpable”¹⁸ injury-in-fact that “fairly can be traced” to the defendant, and that is “likely to be redressed” in the litigation.¹⁹ *1182 This “irreducible minimum”²⁰ of the “case or controversy” requirement of Article III is intended to ensure that the federal courts have the kind of context that makes it possible to say with authority what the law is, as well as to limit the court to affecting real persons with real disputes;²¹ it prevents the courts from merely “saying the law” in the abstract.²² Yet in the Gilmore case, the Court did not even discuss whether Bessie Gilmore had standing because of the injury the state would inflict upon her if it killed her son; it discussed only Gary Gilmore’s own injury, which made him the sole decisionmaker as to whether to appeal his case, so long as he had enough competence to make a “knowing and intelligent waiver.”²³

¹⁶ N. Mailer, *supra* note 1, at 713. Determined to die, Gilmore had undertaken a hunger strike. On Gilmore’s power to destroy the state’s power against him through preferring death, see *infra* note 36.

¹⁷ N. Mailer, *supra* note 1, at 712.

¹⁸ *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)).

¹⁹ *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976)).

²⁰ *Valley Forge*, 454 U.S. at 472.

²¹ See *id.* at 472-73. On the way federal court doctrine generally rests on a belief that context is necessary to judicial authority, see Althouse, *supra* note 10.

There is a long tradition of commentary about standing, most of it very critical of the Court. See, e.g., Albert, *Justiciability and Theories of Judicial Review: A Remote Relationship*, 50 S. CAL. L. REV. 1139 (1977); Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227 (1990); Currie, *Misunderstanding Standing*, 1981 SUP. CT. REV. 41; Doernberg, “*We the People*”: *John Locke, Collective Constitutional Rights and Standing to Challenge Government Action*, 73 CALIF. L. REV. 52 (1985); Fallon, *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1 (1984); Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988); Floyd, *The Justiciability Decisions of the Burger Court*, 60 NOTRE DAME L. REV. 862 (1985); McCormack, *The Justiciability Myth and the Concept of Law*, 14 HASTINGS CONST. L.Q. 595 (1987); Nichol, *Rethinking Standing*, 72 CALIF. L. REV. 68 (1984) [hereinafter, Nichol, *Rethinking Standing*]; Nichol, *Injury and the Disintegration of Article III*, 74 CALIF. L. REV. 1915 (1986) [hereinafter Nichol, *Injury and the Disintegration*]; Sherry, *Issue Manipulation by the Burger Court: Saving the Community from Itself*, 70 MINN. L. REV. 611 (1986); Spann, *Expository Justice*, 131 U. PA. L. REV. 585 (1983); Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432 (1988); Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663 (1977); Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988).

²² The phrase “saying the law,” as used in the text, and the word “lawsaying,” used *infra* in the text accompanying note 69, are derived from *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

²³ Commentators writing about the Gilmore case view the mother’s injury as sufficient to meet the dictates of Article III. See, e.g., Nichol, *Rethinking Standing*, *supra* note 21, at 97.

John Donne wrote: “any man’s death diminishes me, because I am involved in mankind; and therefore never send to know for whom the bell tolls; it tolls for thee.”²⁴ But Donne’s diminishment, which I suppose the Supreme Court might find touching,²⁵ is not, of course, the **1183* sort of “injury-in-fact” that gives one standing to litigate in federal court. Donne, should he have turned his efforts from literature to litigation, would have been the quintessential “ideological plaintiff.”²⁶ To look upon the world and suffer to see harm befall another person – even one’s own son – is, in Article III standing terms, woefully inadequate.

*She had the look on her face of a woman who had just had her home bombed. “Get out,” Bessie said, “you people have killed my son.”*²⁷

The doctrine of standing (and litigation itself) breaks people into separately functioning units.²⁸ Literature reveals connections. *The Executioner’s Song* portrays the grand, interconnected mass of humanity that formed around even the least worthy person and illustrates how his fate included it all. Unlike a case, the book only gives its readers “the chance of drawing their own conclusions.”²⁹ It never hands us a nugget-form version of the truth. But if I had to draw my conclusion, manufacture a “holding,” I would say it is this boundless interconnection among persons.³⁰ In contrast to the thousand-page *Executioner’s Song*, the majority opinion in the Gilmore case simply resolved the entire matter in two pages of straightforward observation. And, in contrast to the book’s dramatization of the connection among all of the persons it names, the Court portrayed Gary Gilmore as an autonomous human being and his mother as a separate person. It made no reference to anyone else. **1184*

II. FRIENDLESS

Gary Gilmore was executed without an appellate court examination of his trial. His case attracted a great deal of attention because it led to the first execution in this country in a decade. It opened the way to a series of far less-noticed executions, most of which were actively litigated by the condemned person.³¹ Indeed, the active litigation has

²⁴ Donne, supra note 8 (emphasis in original text omitted).

²⁵ On the Supreme Court’s capacity to feel emotion, see infra text accompanying notes 79-90.

²⁶ See, e.g., *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 217 (1974) (rejecting “generalized interest of all citizens in constitutional governance” as a basis for standing).

²⁷ N. Mailer, supra note 1, at 976 (referring to “[y]ou people in Utah”).

²⁸ See Winter, supra note 21, at 1393 (standing doctrine not only reflects the belief that the individual is the only “cognizable social unit,” it also “submerg[es] our common stake in the community”). Certainly, the Court could frame a new doctrine of standing reflecting more communal values. See, e.g., Doernberg, supra note 21; Spann, supra note 21; Tushnet, supra note 21.

²⁹ V. Woolf, supra note 13, at 7.

³⁰ There is an equally plausible and totally contrary conclusion to be reached: that the individual, particularly the male outlaw, is special and unique and engaged in a heroic struggle against every other person and all of society. But I suppose this demonstrates the open-ended, reader-shaped quality of literature. See S. Fish, *IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES* (1980). Reading Mailer’s book, I would veer between the two interpretations, largely influenced by whether I felt inclined to admire the book. The complex ideas and emotions that affected my wavering admiration would fit in a book, not a footnote.

³¹ See Streib, *Executions Under the Post-Furman Capital Punishment Statutes: The Halting Progression From “Let’s Do It” to “Hey, There Ain’t No Point in Pulling So Tight,”* 15 RUTGERS L.J. 443 (1984).

aroused the well-publicized ire of the Chief Justice, who has openly promoted legislative reforms designed to speed up the process of collateral review in death penalty cases.³²

This struggle to accelerate the application of the death penalty furnishes a background for the Court's recent reexamination of the Gilmore problem. Ronald Gene Simmons was sentenced to death for killing two persons.³³ In a second trial, he was convicted of killing fourteen members of his family and again sentenced to death.³⁴ After each verdict, he said that he wanted to be executed, stating at one point, "[i]t is my wish and my desire that absolutely no action by anybody be taken to appeal or in any way change this sentence. It is further respectfully requested that this sentence be carried out expeditiously."³⁵ Both times a court decided he had made a "knowing and intelligent" waiver of his right to appeal, the judicial determination held sufficient for waiver in the Gilmore case.³⁶ ***1185**

Jonas Whitmore, sentenced to death in Arkansas, the same state that condemned Simmons, wanted to step in and litigate for Simmons.³⁷ Whitmore argued that the Constitution requires appellate review before the state can execute anyone, even if that person wants to die.³⁸ Does such a constitutional requirement bind the state? We ***1186**

³² See, e.g., *More Death, Less Justice*, N.Y. TIMES, May 21, 1990, at A20, col. 1 (editorial discussing speech to American Law Institute urging Congress to curtail the use of habeas in death penalty cases); *Vote is a Rebuff for Chief Justice on Appeals Limits*, N.Y. TIMES, March 15, 1990, at A1, col. 4 (reporting rejection by the Judicial Conference of habeas limitations advocated by the Chief Justice).

³³ *Whitmore v. Arkansas*, 110 S.Ct. 1717, 1721 (1990).

³⁴ *Id.* at 1722.

³⁵ *Id.* at 1721-22.

³⁶ *Id.* This preference for death over prison is scarcely bizarre. Gilmore's decision, as reported in *The Executioner's Song*, seemed entirely sane and rational, given his long experience of the reality of prison life. Popular songs have long portrayed a life sentence as worse than execution. See G. Brooks, "Send Me to the 'lectric Chair" (Mills Music, Inc. 1927) ("Now I don't want to bondsman here agoin' on my bail./And I don't wanna spend them nine and ninety years in jail;/So judge, judge, good kind judge,/Send me to the 'lectric chair."); M. Haggard & J. Sanders, "Life in Prison" ("I begged they'd sentence me to die/But they wanted me to live and I know why – My life will be a burden every day/If I could die, my pain might go away."). And Patrick Henry said, "give me liberty or give me death!" to the 2d Revolutionary Convention in Virginia, March 23, 1775 (cited in 14 *ENCYCLOPEDIA AMERICANA* 108 (1986)), a sentiment the state of New Hampshire compels its drivers to bear on their license plates. See *Wooley v. Maynard*, 430 U.S. 705 (1977) (Court straining the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), to bar prosecution of the nonconformist couple who took offense at the slogan "Live Free or Die" and covered it up with tape); see also *Cruzan v. Director, Mo. Dep't of Health*, 110 S.Ct. 2841, 2885 (1990) (Stevens, J., dissenting) (citing Patrick Henry's quote in recognizing a "right to die"). For further discussion of the *Cruzan* case, see *infra* note 57.

The most widely venerated refusal to fight the death penalty was that of Jesus: "Pilate questioned him again: 'Have you nothing to say in your defense? You see how many charges they are bringing against you.' But, to Pilate's astonishment, Jesus made no further reply." Mark 15:4-5. Like Gilmore, Jesus withdrew from the process the law afforded him and accepted execution. Why has Jesus' choice inspired reverence and Gilmore's scorn? Gilmore turned his back on a legal system we still support and view as a source of justice; Jesus turned his back on a legal process we consider corrupt and evil. Perhaps it is not that we despise the acceptance of death, but that we judge an expression of contempt of the legal system in accordance with our opinion of that system. Socrates is also famous for accepting the death penalty. See Plato, *Crito*, reprinted in Plato, *THE LAST DAYS OF SOCRATES* 53-70 (H. Tredennick trans. 1954). Unlike Gilmore and Jesus, however, Socrates did not refuse any available step in the legal process. He refused the extralegal step of escape and argued against violating the law in a legal system that had wronged him. Thus, he expressed the very antithesis of contempt for the legal system.

The most obvious explanation for the scorn directed at Gilmore is simply that in judging him, we cannot separate his preference for death from the fact that he was a murderer, just as we cannot separate our judgment of Jesus and Socrates from our knowledge that they committed no offense we can remotely understand as punishable by death. Whereas Jesus and Socrates were great men we would never have condemned, Gilmore was a social excrescence whose demise relieves us (judgment takes place in context, not in the abstract). Or perhaps, at least for those who support the death penalty, scorn for Gilmore's choice expresses frustration that he somehow destroyed the state's power to punish. Someone who prefers death will only be killed by execution – not punished. Gilmore is incomparable with Jesus and Socrates for any number of reasons, but among those reasons is that only Gilmore deprived us of whatever satisfaction attaches to social vengeance.

³⁷ *Whitmore*, 110 S.Ct. at 1722.

³⁸ See *id.* at 1729 (Marshall, J., dissenting). Justice Thurgood Marshall argued at length about the importance of appellate review of the death penalty. He wrote that although the Court has held that there is no right to appellate review of sentences other than death, *id.*

can only receive an answer to that question if someone has standing to ask it, but the question only arises when the condemned person chooses not to appeal. Unless someone other than the condemned person has standing, the question will remain forever unanswered.

Whitmore tried to fit himself into the Supreme Court's standing requirement. He tried arguing that he could litigate for Simmons, serving as his "next friend." This argument failed because the Court honored Simmons' right as an autonomous human being to decide for himself if he wanted to appeal. Since it decided that Simmons, like Gilmore, had made a "knowing, intelligent" waiver of his right to appeal, no one else could presume to make a different decision and credibly claim to be deciding for him.³⁹

A second way to argue for standing is to sue on one's own behalf, based on one's own injury. But how does one characterize the imposition of the death penalty on another as a "distinct and palpable injury" to oneself? After all, the Court did not permit Bessie Gilmore to sue to prevent the injury of a lost son. Indeed, the analysis focused solely on whether a mother could speak for her son. In the opinion of the Court, since Gilmore had already competently spoken for himself, there was nothing left for her to say.

Whitmore, however, found a different way of trying to stand on his own interest. He argued that under Arkansas' system of comparative review of death sentences,⁴⁰ he would fare better if Simmons' case found its way into "the data base against which his crime is compared."⁴¹ Though Whitmore stabbed his victim ten times, cut her throat, and carved an "X" in her face,⁴² his crime, he hoped, would pale in comparison to Simmon's massacre.⁴³ *1187

(citing *Ross v. Moffitt*, 417 U.S. 600, 611 (1974)), the death penalty does require review because of its "unique, irrevocable nature," id. at 1729, and because of the "crucial role of appellate review in ensuring that the death penalty is not imposed arbitrarily or capriciously." Id. at 1730 (citing *Gregg v. Georgia*, 428 U.S. 153, 198 (1976) (state's statutory provision of automatic appellate review of the death penalty an important factor in making death penalty constitutional)). Given the high incidence of appellate court reversal in death penalty cases, failure to review would mean that "an unacceptably high percentage of criminal defendants would be wrongfully executed--'wrongfully' because they were innocent of the crime, undeserving of the severest punishment relative to similarly situated offenders, or denied essential procedural protections by the State." Id. at 1731.

³⁹ Id. at 1728-29.

⁴⁰ See id. at 1723.

⁴¹ Id. (quoting Brief for Petitioner at 21, *Whitmore v. Arkansas*, 110 S. Ct. 1717 (1990)).

⁴² Id. at 1724 (citing *Whitmore v. State*, 296 Ark. 308, 317, 756 S.W.2d 890, 895 (1988)).

⁴³ I must note the dissonance I feel in hearing talk of putting the killing of sixteen people into a "data base" for the purpose of being fair to a man who killed a woman and carved an "X" in her face. This Essay criticizes the Court for its exclusion of emotion and context from its decisionmaking process, but Whitmore's counsel may deserve the same kind of criticism, particularly in its choice of the term "data base." Criticism of lawyers must differ from criticism of courts and focus on benefit to the client. But I must express skepticism as to whether these words actually did benefit the client. The Court skewed the reader's sympathies easily by describing Whitmore's crime and quoting the "data base" language.

Note that the conservative members of the Court, in majority and dissenting opinions, do not hesitate to layer context and emotion into their opinions when they describe victims of crime and deny the rights of criminal defendants. Professor Robin West takes note of this phenomenon and criticizes the other members of the Court:

By leaving the reader with nothing more than the narrative of the crime outlined in the majority opinion, by providing no 'counter-narrative,' and by insisting instead upon a protective shield of rights, the insularity of the right-holder, and the bedrock liberal conviction that even the most despicable, inexplicably horrific, alien and inhuman among us possess rights, liberals underscore the already strong communal inclination to view these defendants, and not just their deeds, as despicable, inexplicably horrifying, alien, and irretrievably inhuman. The dissenters neglected to acknowledge or clarify the emotional and moral labor of humanizing the defendant. Their disinclination to do so, shared by liberals generally, may well make the jurors' neglect to [consider mitigating circumstances] more likely.

West, *supra* note 7, at 90-91 (discussing the Court's description of the incomprehensibly brutal murder of a woman in the case of *Sawyer v. Smith*, 110 S.Ct. 2822, 2825-26 (1990)).

For an excellent example of this phenomenon in action, see *Allen v. McCurry*, 449 U.S. 90 (1980) (holding that collateral

Expressing disbelief that Whitmore could avoid the death penalty even with Simmons' crime in the "data base," the Court labeled Whitmore's alleged injury "too speculative."⁴⁴ In the language of standing doctrine, the words "too speculative," like "abstract" and "hypothetical," set up a constitutional barrier, preventing the plaintiff from asserting the claim in federal court.⁴⁵ Invoking a very high standard, the Court wrote that "[a] threatened injury must be 'certainly impending' to constitute injury in fact."⁴⁶ Earlier cases, themselves *1188 notoriously restrictive, had required only that the threatened injury be "real and immediate" or "substantially likely," but not necessarily certain.⁴⁷ Naturally, the Court did not believe that putting Simmons' case into the data base would certainly move the Arkansas courts to spare Whitmore's life, and so, according to the doctrinal structure erected by the Court, Whitmore had no standing to litigate "in his individual capacity."⁴⁸

Whitmore's third argument met swift defeat. He sought to litigate simply on behalf of the public's interest in constitutional state executions.⁴⁹ Chief Justice Rehnquist characterized this argument as a public policy plea and dismissed it accordingly: "It is not for this Court to employ untethered notions of what might be good public policy to expand our jurisdiction in an appealing case."⁵⁰ Assuming the "tethered" posture of jurisdictional orthodoxy, he pointed to the profound dispute over the advisability and

estoppel barred a state prisoner from bringing a § 1983 damage action against police who had seized evidence from his home, where a state court, in a criminal trial, had found the seizure to be constitutional and denied a motion to suppress the evidence). Justice Potter Stewart, writing for the majority, narrates in detail the story of a drug dealer who, after answering the door to two undercover police officers, went back into the house, got a gun, came back to the door, fired at and seriously wounded the officers, and then proceeded to have a gun battle with other officers and their reinforcements. When McCurry finally surrendered, the officers searched the house and found the drugs that the state judge refused to exclude at trial. McCurry sought \$1 million in damages from the two undercover police officers. *Id.* at 92. In dissent, Justice Harry Blackmun said simply that "[t]he legal principles with which the Court is concerned in this civil case obviously far transcend the ugly facts." *Id.* at 105 (Blackmun, J., dissenting). One must question whether the removed and condescending attitude conveyed by words like "obviously" and "far transcend," and the refusal to get involved with "the ugly facts" have much power to win new converts to the enterprise of aggressively enforcing rights.

⁴⁴ Whitmore, 110 S.Ct. at 1724.

⁴⁵ See *id.* at 1724-25 (discussing cases developing the Court's "injury-in-fact" test).

⁴⁶ *Id.* (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979) (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923))). The Court also drops a "see also" cite to *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983), discussed *infra* note 47.

⁴⁷ See, e.g., *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (quoting *Golden v. Zwickler*, 394 U.S. 103, 109-10 (1969); *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 74 (1978) ("substantial likelihood"); *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941). In *Lyons*, the Court raised the requirements for standing, demanding an injury-in-fact to fit each aspect of relief sought in the litigation. 461 U.S. at 101-10. The plaintiff, Adolph Lyons, had suffered a police chokehold that had nearly killed him and that had killed sixteen others, mostly black men, in the City of Los Angeles. *Id.* at 114-16 (Marshall, J., dissenting). The Supreme Court told him that he could only litigate for his own past damages, because his injury was in the past. Even though the threat of additional deaths by chokeholds remained a very present and obvious reality in Los Angeles, Lyons could not litigate for a prospective injunction barring the dangerous practice. His threatened future injury was only "speculative," not distinct and palpable, and thus he had no standing. *Id.* at 109. Because no one could show any greater potential to suffer the future injury – the act by its nature struck randomly (except to the extent that it targeted black men) – no one could have standing to seek the much-needed injunctive relief.

Lyons is the Court's most disturbing standing case, and one of the most disturbing of all cases. Students tell of intense emotion on reading the case; one black woman wept in class. Commentators justly criticize the decision. See, e.g., Fallon, *supra* note 21. Raising the requirements of standing beyond *Lyons* – if that is indeed what the Court intended to do here – is an alarming development indeed. The Court went on in *Whitmore* to discuss *United States v. SCRAP*, 412 U.S. 669 (1973), a case advancing a theory of future injury no one could describe as "certain." *Whitmore*, 110 U.S. at 1725. The Court did not explicitly disapprove of *SCRAP*. It only stated that case "surely went to the very outer limit of the law." *Id.* at 1725. The alleged future injury in *Whitmore* could not even meet that generous standard. *Id.* Thus, the distinction between a "likely" and a "certain" injury was not crucial to the decision. But use of the word "certainly" does reveal the Court's general hostility to a broad standing doctrine.

⁴⁸ *Whitmore*, 110 S.Ct. at 1723, 1725.

⁴⁹ *Id.* at 1725-26.

⁵⁰ *Id.* at 1726.

morality of the death penalty *1189 and cautioned that the Court must take great care to “resist the temptation” to express preferences about it in the form of jurisdictional rules.⁵¹ Judges must strain to remove the influence of the merits from their jurisdictional rules. The law of jurisdiction must remain apart from the world upon which it operates. The death penalty question may be important, but that just makes avoiding its influence on jurisdictional matters “even more important.”⁵²

But one may fairly question whether the majority has indeed avoided that influence. If one considers the outcome of this case, the majority’s approval of the death penalty seems to drive its assertedly neutral positions on jurisdiction. Justice Rehnquist wrote this plea for jurisdictional neutrality during the same period in which he made public statements about the need to withdraw federal court interference with the states’ imposition of the death penalty and sent to Congress, without the authorization of the Judicial Conference, a legislative proposal designed to expedite the death penalty by speeding up the process of habeas corpus.⁵³ Refusing standing worked quite neatly to end the litigation process and to achieve the Chief Justice’s political goal, well-advertised in the press, though suppressed in the written opinion.

Justice Thurgood Marshall’s dissent in *Whitmore* also corresponded to his position on the merits: firm opposition to the death penalty.⁵⁴ His openly expressed view on standing doctrine incorporates his thinking about the case as a whole. One might say that he sees the value of context⁵⁵ or, as Justice Rehnquist would put it, that he succumbs to the “temptation”⁵⁶ to import his opinion on the death *1190 penalty into his decision about jurisdiction. According to Justice Marshall,

A defendant’s voluntary submission to a barbaric punishment does not ameliorate the harm that imposing such a punishment causes to our basic societal values and to the integrity of our system of justice. Certainly a defendant’s consent to being drawn and quartered or burned at the stake would not license the State to exact such punishments.⁵⁷ *1191

⁵¹ Id. This notion that judges should resist ordinary human impulses is examined again infra text accompanying notes 83-90 (discussing the Court’s caution that judges feeling “sympathy” must hold back from “yielding” to the “impulse” to respond).

⁵² *Whitmore*, 110 S.Ct. at 1726.

⁵³ See supra note 32 (citing news articles about the Powell Commission’s habeas proposal).

⁵⁴ *Whitmore*, 110 S.Ct. at 1729-37. Justice William Brennan, who repeatedly joined Justice Marshall in opinions expressing complete opposition to the death penalty, also joined in the *Whitmore* dissent. For an argument that all jurisdictional doctrine rests on ideas about the merits, see Wells, *The Impact of Substantive Interests on the Law of Federal Courts*, 30 WM. & MARY L. REV. 499 (1989). For an argument that standing should “simply be a question on the merits of the plaintiff’s claim,” see Fletcher, supra note 21, at 223.

⁵⁵ See C. Gilligan, IN A DIFFERENT VOICE (1982); Althouse, supra note 10; Minow & Spelman, supra note 10.

⁵⁶ *Whitmore*, 110 S.Ct. at 1726.

⁵⁷ Id. at 1732. Cf. *Cruzan v. Director, Mo. Dep’t of Health*, 110 S.Ct. 2841 (1990) (Justice Blackmun’s dissent, joined by Justice Marshall, embraced an individual’s right to choose to die, whereas the Chief Justice’s majority opinion accepted the state’s high standard of proof and consequent decision that the individual had not chosen to die.). Both of the Chief Justice’s opinions, in *Whitmore* and in *Cruzan*, rest on notions of federal judicial restraint and deference to choices made by the state. In *Whitmore*, Justice Marshall tried to harmonize his two positions by denying that the instant case involved a right to die. Simmons did not merely ask the state to let him take his own life; he invited the state to kill him and, in doing so, “violate[d] two of the most basic norms of a civilized society – that the State’s penal authority be invoked only where necessary to serve the ends of justice, not the ends of a particular individual, and that punishment be imposed only where the State has adequate assurance that the punishment is justified.” *Whitmore*, 110 S.Ct. at 1732 (comparing *Whitmore* to a right-to-die case). In contrast to an individual’s private decision to die, a “wrongful execution” is a harm to all of society. Id. at 1733.

Still, one is left wondering about state authorization of euthanasia: why is that not a wrong committed against all of society? If

Thus, like Norman Mailer writing about Gary Gilmore as an inseparable part of a large group of people, Justice Marshall looked beyond the individual defendant who had expressed his desire to be left alone. He saw the issue in a much broader social setting: the point is not the interest of an individual in having the autonomy to forgo an appeal and to submit to execution, but that of all society in making sure that the government does not act brutally and lawlessly. He then argued in favor of shaping jurisdiction to serve this interest.

In arguing that Whitmore could stand in as Simmons' next friend, despite any supposed knowing and intelligent waiver of the right to appeal by Simmons, Justice Marshall did not purport to offer an entirely new, communitarian framework for standing.⁵⁸ He carefully fit his theory into the confining structure of the Court's injury-in-fact test.⁵⁹ According to Justice Marshall, Simmons' own injury indeed satisfied the Article III standing requirement, so Whitmore need not add a second constitutional injury of his own if he acted as Simmons' "next friend."⁶⁰ Legal standards do govern who can serve as next friend, but that law is subconstitutional. Since next friend law is subconstitutional, that is, merely "prudential," judges have the power to incorporate policy judgments into it.⁶¹ The need to review a sentence of death when a criminal defendant does not choose to appeal is surely an important policy; if the waiver standard articulated in the Gilmore case is not a constitutional one, then the Court can and should rewrite it to allow Whitmore to litigate on Simmons' behalf.⁶² *1192

In response to this point, Chief Justice Rehnquist's majority opinion brought up the popular habeas corpus topic, though *Whitmore* itself involved an attempt to intervene in a

one looks at the larger context of the two situations, instead of the legal abstractions of Justice Marshall's strained distinction, the difference seems to be the benevolence of the result sought in *Cruzan* rather than the autonomy of the person who wants to die. This is particularly so when one compares the two expressions of autonomy: Ronald Gene Simmons made a far, far stronger expression of the desire to die than did Nancy *Cruzan*, who lay in a persistent vegetative state. It hardly seems as though we are talking about respecting autonomous choice; rather, we are judging the character of the two different proposed state actions. For a critique of reliance on choices by persons in constrained situations, see Pateman, *Women and Consent*, 8 POL. THEORY 149 (1980). Pateman's discussion of women in society can be applied to constrained situations such as those faced by Ronald Gene Simmons (life in prison) and Nancy *Cruzan* (life in a vegetative state).

With respect to the notion that the state is not really acting in *Cruzan*, but merely refraining from interfering with the behavior of private actors, consider the position endorsed by Justices Marshall and Brennan in *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 203-12 (1989) (Brennan, J., dissenting), discussed *infra* text accompanying notes 83- 87. There, the two dissenters argued for the imposition of liability on state actors who refrained from interfering with a father's private behavior toward his son (beating). Though they took pains to argue that the state had in fact acted affirmatively when it created a system that would influence other potential rescuers not to try to help the boy, one senses that the dissenters only resorted to this strained argument – transforming nonaction into action – because they knew just how far liability based on failure to act was from any doctrine of due process the Court had accepted. Cf. *infra* text accompanying notes 58-62 (noting that Justice Marshall declined to frame an expansive new standing doctrine and modestly and realistically confined his argument to the existing framework). I sense that if only the legal framework would have admitted the argument, they would have preferred to impose liability for nonaction.

For a reversal of the usual assumption that harmful action is worse than harmful inaction, see P. Levi, *THE DROWNED AND THE SAVED* (Simon & Schuster trans. 1988). Describing his experience in Auschwitz, Levi writes of his lifelong guilt from the nonaction of failing to share a glass of water. *Id.* at 78-81. Speaking more generally, he writes: "Few survivors feel guilty about having deliberately damaged, robbed, or beaten a companion. Those who did so ... block out the memory. By contrast, however, almost everybody feels guilty of having omitted to offer help." *Id.* at 78.

⁵⁸ Commentators offer such proposals. See sources cited *supra* note 28.

⁵⁹ *Whitmore*, 110 S.Ct. at 734-37. It should be noted that Justice Marshall never advocated the injury-in-fact test – he would shape that, too, to allow a much wider scope to litigation. See, e.g., *City of Los Angeles v. Lyons*, 461 U.S. 95, 113, 122-31 (1983) (Marshall, J., dissenting); *Rizzo v. Goode*, 423 U.S. 362, 381-87 (1976) (Blackmun, J., dissenting, joined by Marshall, J.).

⁶⁰ *Whitmore*, 110 S.Ct. at 1734-37 (Marshall, J., dissenting).

⁶¹ *Id.* at 1735 (Marshall, J., dissenting).

⁶² *Id.* at 1735-37 (Marshall, J., dissenting).

direct appeal, as opposed to a habeas petition.⁶³ The idea of using a next friend to litigate occurs, he wrote, most frequently in the area of habeas corpus, where the inability of prisoners to act on their own behalf is most common.⁶⁴ Congress, for instance, explicitly provided for the use of next friends in the federal habeas statute.⁶⁵ Interpreting the next friend provision of the habeas statute, courts have developed an elaborate test: a would-be next friend must “provide an adequate explanation – such as inaccessibility, mental incompetence, or other disability – why the real party in interest cannot appear on his own behalf,” be “truly dedicated to the best interests of the person” represented, and perhaps even have “some significant relationship” with that person.⁶⁶ Whitmore’s appeal did not fulfill these conditions.⁶⁷

But *Whitmore* was not a habeas petition and thus did not arise under the statute that had led the courts to develop that next-friend test. One would think that the context of Supreme Court review would raise a whole new set of concerns, different from those applicable on habeas. After all, the Supreme Court has a unique role in articulating rules of law.⁶⁸ Indeed, in recent years, in order to preserve its special lawsaying role, the Court has aggressively shaped the doctrine that controls its own jurisdiction.⁶⁹ But to the Chief Justice in *Whitmore*, *1193 the absence of a statute authorizing next friends in petitions for Supreme Court review merely increased the need for restraint. So the Court refused to move beyond the limits that courts had read into the habeas statute. Without limitations of this sort, next friends could just be “intruders or uninvited meddlers.”⁷⁰ In Rehnquist’s view, the concept of next-friend status could subvert the Article III doctrine barring ideological plaintiffs and those who litigate on behalf of a “generalized interest in constitutional governance.”⁷¹

The Chief Justice accomplishes several notable things with these words. He draws a clear boundary around the most injured person, Simmons, making him the only injured person in the eyes of federal law, and making everyone else a “meddler.” He appears to

⁶³ Id. at 1728.

⁶⁴ Id. at 1726-27.

⁶⁵ Id. (“Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.”) (quoting 28 U.S.C. § 2242 (1982)) (emphasis omitted).

⁶⁶ Whitmore, 110 S.Ct. at 1727 (citations omitted).

⁶⁷ Id. at 1728.

⁶⁸ See *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304 (1816); see also Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157 (1960) (arguing that the Supreme Court has an “essential function” that Congress cannot remove despite the exceptions and regulations clause, U.S. Const. art. III, § 2).

⁶⁹ For example, in *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983), the Court presumed Supreme Court jurisdiction when it was not clear whether a state court opinion rested on an independent and adequate state ground. In *ASARCO, Inc. v. Kadish*, 109 S.Ct. 2037 (1989), the Court found standing in the Supreme Court in a case that could not have met federal standing requirements at the point of filing on the trial level. According to the court, even though the plaintiffs’ injury was too abstract to constitute an injury-in-fact, once the state court had rendered a judgment in their favor (unbound by federal standing requirements), it had dealt the defendants an injury-in-fact. Since the defendants were now the petitioners seeking entry to the Supreme Court, they fulfilled the injury-in-fact requirement. Id. at 2048-49. In *ASARCO*, however, both the Chief Justice and Justice Antonin Scalia dissented, characterizing nonreviewability of state court decisions of federal law as “a rather unremarkable proposition,” and opining that the Court should not “bend its Article III jurisprudence out of shape to avoid a largely imaginary problem.” Id. at 2055 (Does this mean they would accept bending jurisdiction out of shape to avoid a real (or only slightly imaginary) problem? If so, has not Justice Marshall in *Whitmore* identified a real problem?). Compare Rehnquist and Scalia’s acceptance of unreviewability to Justice Joseph Story’s reaction in *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 348 (1816) (unreviewable state court decisions of federal law called “truly deplorable,” “evils,” “mischief”). On the use of the coined word “lawsaying,” see *supra* note 22.

⁷⁰ Whitmore, 110 S.Ct. at 1727-28 (citations omitted).

⁷¹ Id. at 1728.

elevate the “generalized grievance” bar, repeatedly cited as one of the “prudential” limits on standing,⁷² to the constitutional level. He makes the next-friend issue, which Justice Marshall manages to demote to the common law level, into as close to a constitutional problem as he can, and he then allows the mere shadow of Article III to overcome the need for appellate review of death sentences. Thus, he assumes a heroically restrained position at the outset of the case, flaunting elaborately articulated, fastidious respect for the spirit of Article III. In so doing, he is able to ignore entirely the horror of an unconstitutional execution (or, more truthfully, the horror of any execution).

*[T]he seat of execution was no more than a little old office chair, and behind it was an old filthy mattress backed up by sandbags and the stone wall of the cannery. They had rammed that mattress between the chair and the sandbags, a last-minute expedient, no doubt, as if, sometime during the night, they had decided that the sandbags *1194 weren't enough and bullets might go through, hit the wall, and ricochet. But the dirty mattress repelled Schiller. He said to himself, My God, they stitched the black canvas neatly around the rifle slots for the assassins. Then he realized the word he was using.⁷³*

One senses that the real dispute is not whether an issue is really constitutional or really prudential. After all, it was not so long ago that the injury-in-fact test did not exist. Its elevation to constitutional status is a recent innovation.⁷⁴ Moreover, the test imposes the task of deciding whether an injury is “distinct and palpable” or merely “abstract and hypothetical,” whether the injury is “fairly traceable” to the defendants or the causation is “too attenuated,” and whether the case is “likely to redress” the plaintiff or the likelihood of redress is “too speculative.”⁷⁵ In choosing where to draw these lines, judges can regain all the discretion lost through the constitutionalization of standing.⁷⁶ They also cease to speak openly about why they exercise this discretion as they do, thus appropriating an even greater measure of discretion. *1195

The real dispute in standing is over the need to say what the law is,⁷⁷ which in turn depends on the question of the merits of the death penalty. Justices Marshall and Brennan considered it desperately necessary to preserve the ability of federal courts to review the constitutionality of death penalty cases. Within the context of their views on the death

⁷² See, e.g., *Allen v. Wright*, 468 U.S. 737, 751 (1984).

⁷³ N. Mailer, *supra* note 1, at 951. Lawrence Schiller was a researcher who collected much of the information used by Norman Mailer in writing the book. See *id.* at 1022. Anticipating writing his own book, Schiller began conducting interviews with various participants well before the execution took place, and he thus was able to observe many of the key events.

⁷⁴ The Warren Court spoke of standing in more generalized terms, and left much of the specifics to “prudential”, doctrine, subject to flexible adaptation to individual types of cases. See *Baker v. Carr*, 369 U.S. 186, 204 (1962) (“Article III minimum is “such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues ...”); *Flast v. Cohen*, 392 U.S. 83, 106 (1968) (standing hinges on whether the court feels “confident that the questions will be framed with the necessary specificity”). The Burger Court focused on the injury requirement, specified the three-part nature of the inquiry, and made it clear that the test was constitutional. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (injury-in-fact test as “irreducible minimum” of Article III); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976) (stating the injury-in-fact test as a constitutional minimum). Once the test was constitutionalized, relaxing the requirements became anathema. As Justice Rehnquist put it in *Valley Forge*, one cannot pragmatically readjust standing, for that would mean “that ‘cases and controversies’ are at best merely convenient ... and at worst nuisances that may be dispensed with when they become obstacles to that transcendent endeavor.” *Valley Forge*, 454 U.S. at 489. The “transcendent endeavor” to which Justice Rehnquist sarcastically refers is the role of the federal courts in saying what the law is.

⁷⁵ See *Allen v. Wright*, 468 U.S. 737, 751 (1984).

⁷⁶ Cf. *Nichol, Injury and the Disintegration*, *supra* note 21, at 1941 (under “distinct and palpable harm standard,” justices “do little more than label the cause as acceptable or not”).

⁷⁷ Cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

penalty, they were willing to forgo some aspects of standing so that there would be someone who could litigate. The Chief Justice and the rest of the majority condoned the death penalty and wished to remove obstacles hindering its imposition; thus, they felt no special pull toward ensuring that the federal courts have an occasion to say what the law is.⁷⁸

III. DISCONNECTED

After reading a few hundred pages of *The Executioner's Song*, I felt exasperated, annoyed by the profusion of seemingly insignificant detail (fluffy slippers!) and by characters who did not deserve a book at all, let alone a thousand-page book. What was the point? Where was my nugget of truth? But I kept plodding along until finally I realized that you can't read it like a case. You must move through it, exposed, and allow it to affect you. Allow the weight of detail to fall on you until the last page, when Bessie Gilmore, "a woman whose son had taken four bullets through the heart," sits alone in her trailer home, feeling that "somebody" might come and shoot her too.⁷⁹ And then you can cry.⁸⁰

Outside the trailer park, automobiles went by on McLaughlin Boulevard. Once in a while, a car would drive under the battered white wooden archway at the entrance, come up to her dark windows and stop. She could feel them looking. She had received letters that threatened her life and she ignored them. Letters could not hurt a woman whose son had taken four bullets through the heart.

*She also received letters from people who wrote songs about Gary and wanted her permission to publish. She ignored such letters also. *1196*

She would just sit there. If a car came at night, came into the trailer park, drove around and slowed up, if it stopped, she knew somebody out in that car was thinking that she was alone by the window. Then she would say to herself, "If they want to shoot me, I have the same kind of guts Gary has. Let them come."⁸¹

And then perhaps you will not read the case for the holding either, though it is offered to you, wrapped up like a nugget of truth. You may let the skimpy facts – suggestive of a much larger, more unruly set of facts – seep into you. You may see that part of the "facts" is the judge, and that the case is not merely the report of something else that happened.⁸²

⁷⁸ Similar disagreements occur in virtually all of the Court's standing cases. See, e.g., *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974).

⁷⁹ N. Mailer, *supra* note 1, at 1019.

⁸⁰ On crying as a reaction outside of the comprehension of the law, see S. Estrich, *REAL RAPE* 65 (1987).

⁸¹ N. Mailer, *supra* note 1, at 1019.

⁸² And here I will observe that in reading *The Executioner's Song*, one ought to realize that it, too, is not the actual event of Gary Gilmore's life, but Norman Mailer's presentation of it. Indeed, the compendium-of-detail form it takes is itself a manipulation that hides itself in a cloak of journalistic neutrality. Much of the assembled detail concerns Gilmore's intensely active sexual attachment to a woman, and part of my annoyance with the book stemmed from my sense that Mailer sought to make the reader (presumably male) regret Gilmore's execution because it destroyed such a vital nexus of male sexuality. Gilmore's devious and nearly successful attempts to persuade the woman to commit suicide in order to join him in death seem, as presented by Mailer, to express the depth of Gilmore's passion and to evidence the transcendence of sexual passion over the social order. Though I will not undertake a full-scale attack on Norman Mailer here, I do not intend to glorify him as the bearer of truth, only to contrast his method to the judicial method. See also *supra* notes 9 & 11 (discussing context in *The Executioner's Song* as compared to context in case law). For a more sustained

It is an event itself and the judge is one of the actors, though he usually remains discretely offstage. He may pretend to be only the author, omniscient narrator. But he is one of the actors – an actor who pretends not to be in the play at all, but acts the role of a character who remains aloof, affects neutrality, and suppresses all emotion.

Consider how out of character it seems when on some rare, rare occasion, a judge expresses emotion: everyone who reads the *DeShaney* case,⁸³ about a child beaten by his father to the point of *1197 brain damage, remembers Justice Blackmun's exclamation "Poor Joshua!"⁸⁴ Chief Justice Rehnquist, writing for the majority and holding that Joshua had no due process right against the state for failing to rescue him from his father, acknowledged emotion this way:

Judges and lawyers, like other humans, are moved by natural sympathy in a case like this to find a way for Joshua and his mother to receive adequate compensation for the grievous harm inflicted upon them. But before yielding to that impulse, it is well to remember once again that the harm was inflicted not by the State of Wisconsin, but by Joshua's father.⁸⁵

He concedes that judges are "like other humans," and thus feel "natural sympathy in a case like this." But he does not say "I feel sympathy in this case," and certainly never exclaims, as though writing in the throes of emotion, "Poor Joshua!" The emotion a judge might feel is not a freefloating, existential emotion ("Poor Joshua!"), but an emotion that connects, in legal fashion, to a remedy that one desires to give ("adequate compensation"⁸⁶). Yet even that emotion is inadmissible: the Chief Justice immediately cautions against "yielding ... to impulse." The judges (unlike lesser "humans" not charged with the duty to decide cases) must adopt an aloof, emotionless position in order to keep legal thinking properly focused on what they have deemed relevant – here, the fact that the father, and not the state, "inflicted" the harm.⁸⁷ In this key cautionary sentence, as in the previous sentence, he does not say "I" or "we," or even "the Court." He says, "it is well to remember."

How revealing that in the very sentence in which the Court is at pains to emphasize the agency of the father, it hides its own agency *1198 behind the arch, passive phrase,

attack on Mailer, see K. Millet, *SEXUAL POLITICS* (1970) (predating *The Executioner's Song*). To generate your own attack, see N. Mailer, *THE PRISONER OF SEX* (1971).

⁸³ *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989). This case has stirred a tremendous amount of critical commentary. See, e.g., Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990); Beermann, *Administrative Failure and Local Democracy: The Politics of DeShaney*, 1990 DUKE L.J. 1078; Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665, 1670-78 (1990); Soifer, *Moral Ambition, Formalism, and the "Free World" of DeShaney*, 57 GEO. WASH. L. REV. 1513 (1989); Strauss, *Due Process, Government Inaction, and Private Wrongs*, 1989 SUP. CT. REV. 53.

⁸⁴ *DeShaney*, 489 U.S. at 213 (Blackmun, J., dissenting).

⁸⁵ *Id.* at 202-03. Note that here, in contrast to the *Gilmore* case, the Court recognizes that an injury to her son harms a mother.

⁸⁶ Consider, too, the flatness and coldness of the expression "adequate compensation." A moment's reflection will reveal the absurdity of these words: there is no conceivable judicial remedy to compensate Joshua adequately for the past pain of the beatings and the betrayal by his own father and the future pain of lifelong confinement in an institution for the mentally retarded.

⁸⁷ Cf. Watson, *supra* note 12, at 658-59 (discussing the poet's process of redescribing the facts of legal cases to remove the "dishonest language" that the courts use to protect themselves from other people's pain). Unlike the Court, Reznikoff was only interested in the pain, and ignored the various legal rules and remedies in the opinions that he turned into poems. *Id.* at 658. Poetry, then, is like saying, "Poor Joshua!" To a legal mind, this is ineffectual: it doesn't do anything, it doesn't compensate for the pain it describes.

“it is well” (but it is not “well” at all, a mere, unjudgely “human” might blurt out, here in this case of monumental unwellness). The Court’s effort at linguistic sanitization leaves a trace: a dangling participle. “It” is not in danger of “yielding,” the judges are. It is as if the words themselves experience more emotion, rebel against the abuse of sanitization, and, drawing attention to the place where the suppression occurred, erupt into grammatical error.

In the doctrine of standing, a judge’s recognition of an injury is not a freefloating phenomenon like the two-word expression of emotion “Poor Joshua!”⁸⁸ Just as the only judicial emotion the *DeShaney* majority could even imagine (if only to exclude) was a sympathy expressed as an impulse to give “adequate compensation,” the only injury that judges can respond to, according to standing doctrine, is one tied to a remedy and “likely to be redressed” by the proposed litigation.⁸⁹ And, just as judges had to resist the impulse to move from “sympathy” to compensation in *DeShaney* because the defendant did not directly cause the injury, in standing doctrine judicial power fails when the injury to be redressed is not “fairly traceable” to the defendant.⁹⁰

CONCLUSION

In *Whitmore v. Arkansas*, the Court methodically shut off every path used to raise an urgent constitutional question. It hastily threw **1199* up every barrier: now a future injury must be “certain” and not just “likely;”⁹¹ now the law governing next friends has become constitutional – or at least constitutional enough to bar incorporation of any mere “policy” considerations (such as the possibility that a state may put a man to death in violation of the Constitution).⁹²

Standing doctrine arose initially from a desire to prevent the federal courts from acting in the abstract, from giving merely advisory opinions.⁹³ It was intended to situate the courts in a context of real facts and real world impact. But now we see that it has

⁸⁸ Similarly, the plaintiff’s emotions cannot amount to a “distinct and palpable injury.” For example, in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), the plaintiff, who had been choked by the police in the past and needed to allege a future injury in order to have standing to seek prospective relief, attempted to use his fear of future encounters with the police as the needed injury. The Court wrote:

It is the reality of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff’s subjective apprehensions. The emotional consequences of a prior act simply are not a sufficient basis for an injunction absent a real and immediate threat of future injury by the defendant. Of course, emotional upset is a relevant consideration in a damages action.

Id. at 107 n.8. Note how the Court is willing to acknowledge emotion, but only in an oddly minimized form (“emotional upset”), with a disengaged attitude (“of course”), and only in its proper place (as part of past damages, not as a basis for seeking an injunction). The Court thus (heroically) restrains itself from “yielding” to emotion.

⁸⁹ *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41 (1976)).

⁹⁰ *Valley Forge*, 454 U.S. at 472 (quoting *Simon*, 426 U.S. at 38).

⁹¹ See *supra* notes 44-47 and accompanying text.

⁹² See *supra* text accompanying notes 64-72.

⁹³ See, e.g., *Baker v. Carr*, 369 U.S. 186, 204 (1962) (requiring “such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends. . .”).

come to have precisely the opposite effect. The Court now uses standing to alienate itself from the real world.⁹⁴

The Court represents litigation about rights as a sleekly designed, functioning machine. A distinctly and palpably injured plaintiff can activate the machine, making it fabricate a remedy engineered to remove the precise injury that activated it. With this bloodless picture in mind, the Court can react with aloofness and distance to the problems that bang at its door. A man is to be executed, the state wants to kill him, and he doesn't care – he wants to die. Is there some standard, beyond that man's consent, that controls whether the state may kill him? The Court can sit back, congratulate itself for its heroic restraint, and observe that an autonomous human being has elected not to appeal. How simple, how mechanical, how absolutely blind to any picture of death, any human heart exploded by four bullets.

*He skinned Gilmore right up over his shoulders like taking a shirt half off, and with a saw cut right up the breastbone to the throat, and removed the breastplate and set it in a big, open sink with running water. Then, he took out what was left of Gilmore's heart. Jerry Scott couldn't believe what he saw. The thing was pulverized. Not even half left. Jerry didn't recognize it as the heart. Had to ask the doctor. "Excuse me," he said, "is that it?" The doctor said, "Yup." *1200*

"Well, he didn't feel anything, did he?" asked Jerry Scott. The doctor said, "No." Jerry had been looking at the bullet pattern earlier, and there had been four neat little holes you could have covered with a water glass, all within a half inch of each other. The doctors had been careful to take quite a few pictures. They numbered every hole with a Magic Marker, and turned Gary over to photograph where each bullet exited from his back. Looking at those marks, Jerry could see the guys on the firing squad hadn't been shaky at all. You could tell they'd all squeezed off a good shot.

Of course, Jerry was always thinking about getting shot himself. It could happen any time on duty. He had to keep wondering what it would be like. Now, looking at the heart, he repeated, "He didn't feel anything, did he?" The doctor said, "No, nothing." Jerry said, "Well, did he move around after he was shot?" The doctor said, "Yes, about two minutes." "Was that just nerves?" Jerry asked. The fellow said, "Yes," and added, "He was dead, but we had to officially wait until he quit moving. That was about two minutes later."⁹⁵

⁹⁴ I have written here of the use of standing doctrine by the Court to distance itself from the reality of the death penalty cases, but this use of standing doctrine also has occurred in other cases, most notably and painfully in the case of *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). *Lyons* is discussed *supra* note 47.

⁹⁵ N. Mailer, *supra* note 1, at 981-82.