POPE FRANCIS NAILS THE RHETORIC OF ADDRESSING CONGRESS

Pope Francis just finished his address to Congress. It was a masterful speech from a political standpoint, designed to hold a mirror up to America and provide a moral lesson.

He started with an appeal the most conservative in America would applaud, to the foundation of Judeo-Christian law (CSPAN panned to the Moses relief in the chamber as he spoke).

> Yours is a work which makes me reflect in two ways on the figure of Moses. On the one hand, the patriarch and lawgiver of the people of Israel symbolizes the need of peoples to keep alive their sense of unity by means of just legislation. On the other, the figure of Moses leads us directly to God and thus to the transcendent dignity of the human being. Moses provides us with a good synthesis of your work: you are asked to protect, by means of the law, the image and likeness fashioned by God on every human face.

He then couched his lessons in a tribute to four Americans – two uncontroversial, Abraham Lincoln and Martin Luther King Jr – and two more radical, Dorothy Day and Thomas Merton (but probably obscure to those who would be most offended).

Several times he nodded towards controversial issues, as when he addressed making peace in terms that might relate to Cuba (controversial but still accepted by most who aren't Cuban-American) or might relate to Iran.

> I would like to recognize the efforts made in recent months to help overcome historic differences linked to painful

> episodes of the past. It is my duty to build bridges and to help all men and women, in any way possible, to do the same. When countries which have been at odds resume the path of dialogue – a dialogue which may have been interrupted for the most legitimate of reasons – new opportunities open up for all. This has required, and requires, courage and daring, which is not the same as irresponsibility. A good political leader is one who, with the interests of all in mind, seizes the moment in a spirit of openness and pragmatism. A good political leader always opts to initiate processes rather than possessing spaces (cf. Evangelii Gaudium, 222-223).

Similarly, he spoke of the threats to the family in such a way that might include gay marriage, but he then focused on the inability of young people to form new families.

> I will end my visit to your country in Philadelphia, where I will take part in the World Meeting of Families. It is my wish that throughout my visit the family should be a recurrent theme. How essential the family has been to the building of this country! And how worthy it remains of our support and encouragement! Yet I cannot hide my concern for the family, which is threatened, perhaps as never before, from within and without. Fundamental relationships are being called into question, as is the very basis of marriage and the family. I can only reiterate the importance and, above all, the richness and the beauty of family life.
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> In particular, I would like to call attention to those family members who are the most vulnerable, the young. For many of them, a future filled with

> countless possibilities beckons, yet so many others seem disoriented and aimless, trapped in a hopeless maze of violence, abuse and despair. Their problems are our problems. We cannot avoid them. We need to face them together, to talk about them and to seek effective solutions rather than getting bogged down in discussions. At the risk of oversimplifying, we might say that we live in a culture which pressures young people not to start a family, because they lack possibilities for the future. Yet this same culture presents others with so many options that they too are dissuaded from starting a family.

By far the shrewdest rhetorical move the Pope made – standing just feet from the Catholic swing vote on the Supreme Court, Anthony Kennedy, as well as John Roberts (Catholic Justices Sam Alito, Clarence Thomas, and Antonin Scalia, all blew off the speech given by the leader of their faith), with the Catholic Vice President and Speaker sitting just behind – calling to "defend life at every stage of its development." – This brought one of the biggest standing ovations of the speech (though Justices never applaud at these things and did not here), at which point the Pope pivoted immediately to ending the death penalty.

> The Golden Rule also reminds us of our responsibility to protect and defend human life at every stage of its development.
>
> This conviction has led me, from the beginning of my ministry, to advocate at different levels for the global abolition of the death penalty. I am convinced that this way is the best, since every life is sacred, every human person is endowed with an inalienable dignity, and society can only benefit from the rehabilitation of those convicted of crimes. Recently my brother

> bishops here in the United States renewed their call for the abolition of the death penalty. Not only do I support them, but I also offer encouragement to all those who are convinced that a just and necessary punishment must never exclude the dimension of hope and the goal of rehabilitation.

I hope the Pope's general pro life call, emphasizing the death penalty rather than abortion, will get people who claim to be pro-life to consider all that that entails.

That led – past his expected appeal to stop shitting on Eden and start taking care of the poor – to what was probably the worst received line in the speech, a call to stop trafficking in arms.

> Being at the service of dialogue and peace also means being truly determined to minimize and, in the long term, to end the many armed conflicts throughout our world. Here we have to ask ourselves: Why are deadly weapons being sold to those who plan to inflict untold suffering on individuals and society? Sadly, the answer, as we all know, is simply for money: money that is drenched in blood, often innocent blood. In the face of this shameful and culpable silence, it is our duty to confront the problem and to stop the arms trade.

The Pope went into a Chamber where large numbers are funded by arms merchants and told them they were relying on "money that is drenched in blood." Very few applauded that line.

Still, the message was about the duty of legislators to serve the common good and on several issues, the Pope avoided directed confrontation, preferring an oblique message that might be interpreted differently by people

of all political stripes. Amid the rancor of Congressional debates – about Planned Parenthood, about defunding government (and with it, harming the poor the most), about Iran – it was a remarkably astute message.

Mr. Vice-President,

Mr. Speaker,

Honorable Members of Congress, Dear Friends,

I am most grateful for your invitation to address this Joint Session of Congress in “the land of the free and the home of the brave”. I would like to think that the reason for this is that I too am a son of this great continent, from which we have all received so much and toward which we share a common responsibility.

Each son or daughter of a given country has a mission, a personal and social responsibility. Your own responsibility as members of Congress is to enable this country, by your legislative activity, to grow as a nation. You are the face of its people, their representatives. You are called to defend and preserve the dignity of your fellow citizens in the tireless and demanding pursuit of the common good, for this is the chief aim of all politics. A political society endures when it seeks, as a vocation, to satisfy common needs by stimulating the growth of all its members, especially those in situations of greater vulnerability or risk. Legislative activity is always based on care for the people. To this you have been invited, called and convened by those who elected you.

Yours is a work which makes me reflect in two ways on the figure of Moses. On the one hand, the patriarch and lawgiver of the people of Israel symbolizes the need of peoples to keep alive their sense of unity by means of just legislation. On the other, the figure of Moses leads us directly to God and thus to the transcendent dignity of the human being. Moses

provides us with a good synthesis of your work: you are asked to protect, by means of the law, the image and likeness fashioned by God on every human face.

Today I would like not only to address you, but through you the entire people of the United States. Here, together with their representatives, I would like to take this opportunity to dialogue with the many thousands of men and women who strive each day to do an honest day's work, to bring home their daily bread, to save money and –one step at a time – to build a better life for their families. These are men and women who are not concerned simply with paying their taxes, but in their own quiet way sustain the life of society. They generate solidarity by their actions, and they create organizations which offer a helping hand to those most in need.

I would also like to enter into dialogue with the many elderly persons who are a storehouse of wisdom forged by experience, and who seek in many ways, especially through volunteer work, to share their stories and their insights. I know that many of them are retired, but still active; they keep working to build up this land. I also want to dialogue with all those young people who are working to realize their great and noble aspirations, who are not led astray by facile proposals, and who face difficult situations, often as a result of immaturity on the part of many adults. I wish to dialogue with all of you, and I would like to do so through the historical memory of your people.

My visit takes place at a time when men and women of good will are marking the anniversaries of several great Americans. The complexities of history and the reality of human weakness notwithstanding, these men and women, for all their many differences and limitations, were able by hard work and self- sacrifice – some at the cost of their lives – to build a better future. They shaped fundamental values which will endure forever in the spirit of the

American people. A people with this spirit can live through many crises, tensions and conflicts, while always finding the resources to move forward, and to do so with dignity. These men and women offer us a way of seeing and interpreting reality. In honoring their memory, we are inspired, even amid conflicts, and in the here and now of each day, to draw upon our deepest cultural reserves.

I would like to mention four of these Americans: Abraham Lincoln, Martin Luther King, Dorothy Day and Thomas Merton.

This year marks the one hundred and fiftieth anniversary of the assassination of President Abraham Lincoln, the guardian of liberty, who labored tirelessly that “this nation, under God, [might] have a new birth of freedom”. Building a future of freedom requires love of the common good and cooperation in a spirit of subsidiarity and solidarity.

All of us are quite aware of, and deeply worried by, the disturbing social and political situation of the world today. Our world is increasingly a place of violent conflict, hatred and brutal atrocities, committed even in the name of God and of religion. We know that no religion is immune from forms of individual delusion or ideological extremism. This means that we must be especially attentive to every type of fundamentalism, whether religious or of any other kind. A delicate balance is required to combat violence perpetrated in the name of a religion, an ideology or an economic system, while also safeguarding religious freedom, intellectual freedom and individual freedoms. But there is another temptation which we must especially guard against: the simplistic reductionism which sees only good or evil; or, if you will, the righteous and sinners. The contemporary world, with its open wounds which affect so many of our brothers and sisters, demands that we confront every form of polarization which would divide it into these two camps. We know that in the attempt to be

freed of the enemy without, we can be tempted to feed the enemy within. To imitate the hatred and violence of tyrants and murderers is the best way to take their place. That is something which you, as a people, reject.

Our response must instead be one of hope and healing, of peace and justice. We are asked to summon the courage and the intelligence to resolve today's many geopolitical and economic crises. Even in the developed world, the effects of unjust structures and actions are all too apparent. Our efforts must aim at restoring hope, righting wrongs, maintaining commitments, and thus promoting the well-being of individuals and of peoples. We must move forward together, as one, in a renewed spirit of fraternity and solidarity, cooperating generously for the common good.

The challenges facing us today call for a renewal of that spirit of cooperation, which has accomplished so much good throughout the history of the United States. The complexity, the gravity and the urgency of these challenges demand that we pool our resources and talents, and resolve to support one another, with respect for our differences and our convictions of conscience.

In this land, the various religious denominations have greatly contributed to building and strengthening society. It is important that today, as in the past, the voice of faith continue to be heard, for it is a voice of fraternity and love, which tries to bring out the best in each person and in each society. Such cooperation is a powerful resource in the battle to eliminate new global forms of slavery, born of grave injustices which can be overcome only through new policies and new forms of social consensus.

Here I think of the political history of the United States, where democracy is deeply rooted in the mind of the American people. All political activity must serve and promote the good of the human person and be based on respect

for his or her dignity. “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness” (Declaration of Independence, 4 July 1776). If politics must truly be at the service of the human person, it follows that it cannot be a slave to the economy and finance. Politics is, instead, an expression of our compelling need to live as one, in order to build as one the greatest common good: that of a community which sacrifices particular interests in order to share, in justice and peace, its goods, its interests, its social life. I do not underestimate the difficulty that this involves, but I encourage you in this effort.

Here too I think of the march which Martin Luther King led from Selma to Montgomery fifty years ago as part of the campaign to fulfill his “dream” of full civil and political rights for African Americans. That dream continues to inspire us all. I am happy that America continues to be, for many, a land of “dreams”. Dreams which lead to action, to participation, to commitment. Dreams which awaken what is deepest and truest in the life of a people.

In recent centuries, millions of people came to this land to pursue their dream of building a future in freedom. We, the people of this continent, are not fearful of foreigners, because most of us were once foreigners. I say this to you as the son of immigrants, knowing that so many of you are also descended from immigrants. Tragically, the rights of those who were here long before us were not always respected. For those peoples and their nations, from the heart of American democracy, I wish to reaffirm my highest esteem and appreciation. Those first contacts were often turbulent and violent, but it is difficult to judge the past by the criteria of the present. Nonetheless, when the stranger in our midst appeals to us, we must not repeat the sins and the errors of the past. We must resolve now to live as nobly and

as justly as possible, as we educate new generations not to turn their back on our “neighbors” and everything around us. Building a nation calls us to recognize that we must constantly relate to others, rejecting a mindset of hostility in order to adopt one of reciprocal subsidiarity, in a constant effort to do our best. I am confident that we can do this.

Our world is facing a refugee crisis of a magnitude not seen since the Second World War. This presents us with great challenges and many hard decisions. On this continent, too, thousands of persons are led to travel north in search of a better life for themselves and for their loved ones, in search of greater opportunities. Is this not what we want for our own children? We must not be taken aback by their numbers, but rather view them as persons, seeing their faces and listening to their stories, trying to respond as best we can to their situation. To respond in a way which is always humane, just and fraternal. We need to avoid a common temptation nowadays: to discard whatever proves troublesome. Let us remember the Golden Rule: “Do unto others as you would have them do unto you” (Mt 7:12).

This Rule points us in a clear direction. Let us treat others with the same passion and compassion with which we want to be treated. Let us seek for others the same possibilities which we seek for ourselves. Let us help others to grow, as we would like to be helped ourselves. In a word, if we want security, let us give security; if we want life, let us give life; if we want opportunities, let us provide opportunities. The yardstick we use for others will be the yardstick which time will use for us. The Golden Rule also reminds us of our responsibility to protect and defend human life at every stage of its development.

This conviction has led me, from the beginning of my ministry, to advocate at different levels for the global abolition of the death penalty. I am convinced that this way is the best, since

every life is sacred, every human person is endowed with an inalienable dignity, and society can only benefit from the rehabilitation of those convicted of crimes. Recently my brother bishops here in the United States renewed their call for the abolition of the death penalty. Not only do I support them, but I also offer encouragement to all those who are convinced that a just and necessary punishment must never exclude the dimension of hope and the goal of rehabilitation.

In these times when social concerns are so important, I cannot fail to mention the Servant of God Dorothy Day, who founded the Catholic Worker Movement. Her social activism, her passion for justice and for the cause of the oppressed, were inspired by the Gospel, her faith, and the example of the saints.

How much progress has been made in this area in so many parts of the world! How much has been done in these first years of the third millennium to raise people out of extreme poverty! I know that you share my conviction that much more still needs to be done, and that in times of crisis and economic hardship a spirit of global solidarity must not be lost. At the same time I would encourage you to keep in mind all those people around us who are trapped in a cycle of poverty. They too need to be given hope. The fight against poverty and hunger must be fought constantly and on many fronts, especially in its causes. I know that many Americans today, as in the past, are working to deal with this problem.

It goes without saying that part of this great effort is the creation and distribution of wealth. The right use of natural resources, the proper application of technology and the harnessing of the spirit of enterprise are essential elements of an economy which seeks to be modern, inclusive and sustainable. “Business is a noble vocation, directed to producing wealth and improving the world. It can be a fruitful source of prosperity for the area in

which it operates, especially if it sees the creation of jobs as an essential part of its service to the common good" (Laudato Si', 129). This common good also includes the earth, a central theme of the encyclical which I recently wrote in order to "enter into dialogue with all people about our common home" (ibid., 3). "We need a conversation which includes everyone, since the environmental challenge we are undergoing, and its human roots, concern and affect us all" (ibid., 14).

In Laudato Si', I call for a courageous and responsible effort to "redirect our steps" (ibid., 61), and to avert the most serious effects of the environmental deterioration caused by human activity. I am convinced that we can make a difference and I have no doubt that the United States – and this Congress – have an important role to play. Now is the time for courageous actions and strategies, aimed at implementing a "culture of care" (ibid., 231) and "an integrated approach to combating poverty, restoring dignity to the excluded, and at the same time protecting nature" (ibid., 139). "We have the freedom needed to limit and direct technology" (ibid., 112); "to devise intelligent ways of… developing and limiting our power" (ibid., 78); and to put technology "at the service of another type of progress, one which is healthier, more human, more social, more integral" (ibid., 112). In this regard, I am confident that America's outstanding academic and research institutions can make a vital contribution in the years ahead.

A century ago, at the beginning of the Great War, which Pope Benedict XV termed a "pointless slaughter", another notable American was born: the Cistercian monk Thomas Merton. He remains a source of spiritual inspiration and a guide for many people. In his autobiography he wrote: "I came into the world. Free by nature, in the image of God, I was nevertheless the prisoner of my own violence and my own selfishness, in the image of the world into which I was born. That world was the picture of Hell, full of men like

myself, loving God, and yet hating him; born to love him, living instead in fear of hopeless self-contradictory hungers". Merton was above all a man of prayer, a thinker who challenged the certitudes of his time and opened new horizons for souls and for the Church. He was also a man of dialogue, a promoter of peace between peoples and religions.

From this perspective of dialogue, I would like to recognize the efforts made in recent months to help overcome historic differences linked to painful episodes of the past. It is my duty to build bridges and to help all men and women, in any way possible, to do the same. When countries which have been at odds resume the path of dialogue – a dialogue which may have been interrupted for the most legitimate of reasons – new opportunities open up for all. This has required, and requires, courage and daring, which is not the same as irresponsibility. A good political leader is one who, with the interests of all in mind, seizes the moment in a spirit of openness and pragmatism. A good political leader always opts to initiate processes rather than possessing spaces (cf. Evangelii Gaudium, 222-223).

Being at the service of dialogue and peace also means being truly determined to minimize and, in the long term, to end the many armed conflicts throughout our world. Here we have to ask ourselves: Why are deadly weapons being sold to those who plan to inflict untold suffering on individuals and society? Sadly, the answer, as we all know, is simply for money: money that is drenched in blood, often innocent blood. In the face of this shameful and culpable silence, it is our duty to confront the problem and to stop the arms trade.

Three sons and a daughter of this land, four individuals and four dreams: Lincoln, liberty; Martin Luther King, liberty in plurality and non-exclusion; Dorothy Day, social justice and the rights of persons; and Thomas Merton, the capacity for dialogue and openness to God.

Four representatives of the American people.

I will end my visit to your country in Philadelphia, where I will take part in the World Meeting of Families. It is my wish that throughout my visit the family should be a recurrent theme. How essential the family has been to the building of this country! And how worthy it remains of our support and encouragement! Yet I cannot hide my concern for the family, which is threatened, perhaps as never before, from within and without. Fundamental relationships are being called into question, as is the very basis of marriage and the family. I can only reiterate the importance and, above all, the richness and the beauty of family life.

In particular, I would like to call attention to those family members who are the most vulnerable, the young. For many of them, a future filled with countless possibilities beckons, yet so many others seem disoriented and aimless, trapped in a hopeless maze of violence, abuse and despair. Their problems are our problems. We cannot avoid them. We need to face them together, to talk about them and to seek effective solutions rather than getting bogged down in discussions. At the risk of oversimplifying, we might say that we live in a culture which pressures young people not to start a family, because they lack possibilities for the future. Yet this same culture presents others with so many options that they too are dissuaded from starting a family.

A nation can be considered great when it defends liberty as Lincoln did, when it fosters a culture which enables people to “dream” of full rights for all their brothers and sisters, as Martin Luther King sought to do; when it strives for justice and the cause of the oppressed, as Dorothy Day did by her tireless work, the fruit of a faith which becomes dialogue and sows peace in the contemplative style of Thomas Merton.

In these remarks I have sought to present some of the richness of your cultural heritage, of

the spirit of the American people. It is my desire that this spirit continue to develop and grow, so that as many young people as possible can inherit and dwell in a land which has inspired so many people to dream.

God bless America!

NO, THERE IS NO RELATIVE HUMAN VALUE STATUS IN TRAGIC SHOOTINGS

The BREAKING NEWS tonight is nine people being shot to death in Charleston South Carolina. From ABC News:

> Nine people were killed when a gunman opened fire in a historic Charleston, South Carolina church Wednesday evening and police were searching for the suspect.
>
> Police said that eight people were found dead inside the church. Two other people were rushed to the hospital and one died.
>
> “We’re still gathering information so it’s not the time yet for details,” Mayor Joe Riley told local newspaper The Post and Courier. “I will say that this is an unspeakable and heartbreaking tragedy in this most historic church, an evil and hateful person took the lives of citizens who had come to worship and pray together.”

CNN further reported that the knee jerk mayor of Charleston told reporters that it is all obviously a “hate crime” because people in a

church were shot.

Is this, yet another, mass murder with all too easy to bring to bear and fire guns in the US tragic? Yes, obviously. Tragic is being too kind and semantically vague. It is horrid.

But, please, it is NOT worse because the victims were church goers, as their lives are not worth more than agnostics, atheists or other humans. Black children are worth no less than white suburbians. One faith is worth no more than the next or none at all. Just stop with that blithering idiocy.

Human life is precious, and we are all entitled to live. You are not privileged more than me, no matter how pious you may be, or pretend to be.

So, grieve mightily the gross and unnecessary loss of life in Charleston South Carolina tonight. But those lives are worth nothing more than Eric Garner, Walter Scott, Michael Brown or other human senselessly slain in the ridiculous gun fetish culture of the United States. And, no, Mr. Mayor, the locus of the shooting in a church does not *de facto* make it a "hate crime". Stop with that bogus over claim too. Hyperbole is the antithesis of informed viewpoints.

JOHN GALT FACES PRISON FOR CONTAMINATING WEST VIRGINIA WATER

Back in January, John Galt proclaimed his independence from pesky regulatory oversight in West Virginia when he contaminated the drinking water supply of over 300,000 residents. Recall that Galt did his damage through his appropriately named corporation, Freedom

Industries, where he was using the contaminant to magically make coal “clean”. In a remarkable development, though, we learned yesterday that a federal grand jury has indicted six people associated with Freedom Industries:

> A federal grand jury on Wednesday indicted four owners and operators of the company whose toxic chemical spill tainted a West Virginia river in January, forcing a prolonged cutoff of drinking water to nearly 300,000 residents in and around Charleston.
>
> Each was charged with three counts of violating the Clean Water Act, which bars discharges of pollutants without a permit. Their company, Freedom Industries, and its owners and managers did not meet a reasonable standard of care to prevent spills, the indictment stated.
>
> One of those indicted, Gary L. Southern, the company’s president, was also charged with wire fraud, making false statements under oath and bankruptcy fraud. Freedom declared bankruptcy days after the spill.

Actual prison time is at stake in these charges:

> Besides Mr. Southern, of Marco Island, Fla., the indictment named three other owners and operators: Dennis P. Farrell, 58, of Charleston; William E. Tis, 56, of Verona, Pa.; and Charles E. Herzing, 63, of McMurray, Pa.
>
> Two others were also charged: Robert J. Reynolds, 63, of Apex, N.C., and Michael E. Burdette, 63, of Dunbar, W.Va. Mr. Reynolds was Freedom’s environmental consultant, and Mr. Burdette managed the tank farm. Mr. Herzing, Mr. Tis and Mr. Farrell sold the tank farm to a Pennsylvania company about a month before the accident.

> All six were charged with the negligent discharge of a pollutant, negligent discharge of a refuse matter and violating an environmental permit. The violations carry a maximum penalty of three years in prison, according to a statement issued by the United States attorney for the Southern District of West Virginia.

Southern, on the other hand, faces up to 68 years when the additional ten charges he is facing are factored in.

This is a truly remarkable development. Recall that John Galt got away with killing Texans in the massive fertilizer plant explosion in West, Texas that caused over $100 million in property damage in addition to killing 15 and injuring over 200. That investigation was stymied at almost every turn, and no criminal charges were ever filed unless you count the strange prosecution of one of the first responders for possession of homemade bomb-making materials.

But recall that this is Eric Holder's "Justice" Department that we are talking about here, so it is worth drilling down below the headlines. If we move to more local reporting on the charges, we find typical Holder behavior when it comes to how the company is being treated:

> Also, U.S. Attorney Booth Goodwin charged Freedom Industries, the bankrupt company, with the same three counts of criminal water pollution violations. The company was charged through a document called an information, rather than an indictment, a move that usually indicates the defendant has reached a plea deal with prosecutors.
>
> Mark Welch, Freedom's chief restructuring officer, confirmed that the company had entered into a plea agreement with federal authorities and said the move was aimed partly at

> limiting the possible fines and criminal defense costs if the company were to be indicted. Welch, in a prepared statement, said the plea agreement also stipulates that the U.S. Attorney's Office will not seek restitution from Freedom for victims of the company's crimes, because of the company's ongoing bankruptcy proceeding.
>
> "This will permit Freedom to focus its time and limited resources on its environmental cleanup obligations and addressing the claims of its creditors," Welch said.

In the world of Eric Holder (and John Galt), any claims by creditors who helped Freedom Industries to contaminate the Elk River have higher standing than any mere citizen who was harmed by Freedom.

TORTURE? OBVIOUSLY, BUT WHAT ABOUT LITANY OF OTHER CRIMES?

So, just a quick thought here, and with a little prompting by Jon Turley, obviously there is torture, and outright homicide thereon, spelled out and specified by the SSCI Torture Report. As I have said on Twitter, there are many things covered in the SSCI Torture Report and, yet, many things left out.

There are too many instances in the SSCI Torture Report to catalogue individually, but let's be perfectly clear, the failure to prosecute the guilty in this cock up is NOT restricted to what is still far too euphemistically referred to as

“torture”.

No, the criminality of US Government officials goes far beyond that. And, no, it is NOT “partisan” to point out that the underlying facts occurred under the Cheney/Bush regime (so stated in their relative order of power and significance on this particular issue).

As you read through the report, if you have any mood and mind for actual criminal law at all, please consider the following offenses:

18 U.S.C. §1001 False Statements

18 U.S.C. §1621 Perjury

18 U.S.C. §1505 Obstruction of Justice

These are but a few of the, normally, favorite things the DOJ leverages and kills defendants with in any remotely normal situation. I know my clients would love to have the self serving, toxically ignorant and duplicitous, work of John Yoo and Jay Bybee behind them. But, then, even if it were so, no judge, court, nor sentient human, would ever buy off on that bullshit.

So, here we are. As you read through the SSCI Torture Report, keep in mind that it is NOT just about “torture” and “homicide”. No, there is oh so much more there in the way of normally prosecuted, and leveraged, federal crimes. Recognize it and report it.

YES, RAY RICE’S DIVERSION ADJUDICATION WAS APPROPRIATE

The popular meme has been that Ray Rice got some kind of miraculous plea deal to diversion (pre-trial intervention, or "PTI", in New Jersey parlance) and that NOBODY in his situation ever gets the deal he did.

Is that true? No. Not at all. Kevin Drum wrote a few days ago at Mother Jones on this subject:

> First, although Ray Rice's assault of Janay Palmer was horrible, any sense of justice—no matter the crime—has to take into account both context and the relative severity of the offense. And Ray Rice is not, by miles, the worst kind of domestic offender. He did not use a weapon. He is not a serial abuser. He did not terrorize his fiancée (now wife). He did not threaten her if she reported what happened. He has no past record of violence of any kind. He has no past police record. He is, by all accounts, a genuinely caring person who works tirelessly on behalf of his community. He's a guy who made one momentary mistake in a fit of anger, and he's demonstrated honest remorse about what he did.
>
> In other words, his case is far from being a failure of the criminal justice system. Press reports to the contrary, when Rice was admitted to a diversionary program instead of being tossed in jail, he wasn't getting special treatment. He was, in fact, almost a poster child for the kind of person these programs were designed for. The only special treatment he got was having a good lawyer who could press his cause competently, and

> that’s treatment that every upper-income person in this country gets. The American criminal justice system is plainly light years from perfect (see Brown, Michael, and many other incidents in Ferguson and beyond), but it actually worked tolerably well in this case.

Mr. Drum is absolutely correct, Ray Rice was quite appropriate for the diversion program he was ultimately offered and accepted into by Atlantic County Superior Court. Let me be honest, Kevin talked to me about this and I told him the truth.

In fact, that is exactly the deal I would hope, and expect, to get for any similarly situated client in Rice’s position. It is also notable the matter was originally charged as a misdemeanor assault in a municipal court, which is how this would normally be charged as there was no serious physical injury. Rice would have gotten diversion there too and, indeed, that was the deal his lawyer, Michael Diamondstein, had negotiated with the municipal prosecutors before the county attorney snatched jurisdiction away and obtained a felony indictment. Despite the brutality depicted by the video, this is precisely the type of conduct that underlies most every domestic violence physical assault (seriously, what do people *think* it looks like in real life?) and it is almost always charged as a simple misdemeanor assault.

Janay Palmer Rice clearly did not receive a “serious physical injury” level of injury under the applicable New Jersey definition in NJ Rev Stat § 2C:11-1(b) and a small period of grogginess/unconsciousness is not considered, by itself, as meeting the threshold. Now, to be fair, New Jersey has two levels of injury that can lead to a felony charge, the aforementioned “serious physical injury”, and the lower “significant physical injury”, pursuant to NJ Rev Stat § 2C:11-1(d) that Rice was charged under, and which is a far less serious charge, even though still nominally a felony under New

Jersey classification.

The injury to Janay Palmer (Rice) did fall within the lower "significant physical injury" threshold under New Jersey's criminal statutes because of the momentary apparent lapse of consciousness. So, under the New Jersey statute, while the felony, as opposed to simple misdemeanor, charge may have not been the norm for such a fact set, it was certainly minimally factually supportable. That said, most all similar cases would still be charged as simple assault, as indeed, as stated above, Rice initially was. The New Jersey assault statute, with its different iterations of offenses, and offense levels, is here.

With that description of the nature and structure of assault in New Jersey out of the way, there is something else that must be addressed: I am absolutely convinced that the much ballyhooed "percentages" reported by ESPN's Don Van Natta from an September 12, 2014 ESPN report showing how "extremely rare" it is for a person like Ray Rice to be given diversion, a claim constantly bandied about across all media and throughout the public, are entirely bogus and based upon gross misunderstanding of what exists in the criminal justice system.

Van Natta clearly does not understand the criminal law system, much less diversion/PTI programs and their underpinnings, whether in New Jersey or anywhere else, and clearly no one broke it down appropriately for him. Yet Van Natta, ESPN, and nearly all the media and public have parroted this false information relentlessly like it is the gospel. It is not, and the public understanding is false.

I will assume Van Natta's baseline numbers of a total of "15,130 domestic violence cases" and "3,508 involv[ing] some level of assault" are correct, and to give Van Natta the benefit of the doubt, I will work off his reported numbers in that regard. Van Natta (and I urge you to read his report while considering the deeper discussion here) takes his figures off of all

Domestic Violence (DV) incidents that involve assault, which he states as being 3,508 in year 2013. He then magically says the 30 PTI diversions reported [Note: the professionals in New Jersey I talked to say the persons accepted into PTI figure is 70, not 30, but I will continue to use Van Natta's numbers], which is the program Rice was adjudicated into, were "less than 1%", so Rice is "rare"!!

Here is Van Natta's problem. Off the bat, he admits 496 of his baseline 3,508 cases were never adjudicated, so they have to be excised from the relevant set being discussed. We are now down to 3,012 for the set of criminal DV defendants Ray Rice could be in.

Then comes Van Natta's real whopper. You see, nearly all DV assaults are filed as simple misdemeanor assaults (again, as Rice originally was in this case). I think 85% is probably *way* too conservative as the percentage that are treated as misdemeanors as opposed to felonies (the percentage is likely well higher than that, leaving even fewer defendants similarly situated as Rice), but let's use that figure, which means only 15% of the 3,012, or 452, of DV assault cases actually made it to a felony level indictment and prosecution as Ray Rice did.

The above is absolutely critical because the "PTI" diversion program Rice was given is *only* available for felony level offenses, it statutorily *does not* apply to misdemeanors (misdemeanors have other diversion options available, but that is a different jurisdiction and classification than Rice ultimately faced). So, now, as to Ray Rice's situation, we are down to 30 out of 452. Already looking less "rare" than Van Natta let on.

But it doesn't stop there. Not by a long shot. The common way DV assaults get elevated to felony level is that a dangerous weapon (gun, knife, etc) is used, or a dangerous instrument (bat, blunt object, whatever) is used, usually in conjunction with the higher level "serious physical injuries" described above. Ray Rice's

fact scenario had none of that, and Janay Palmer Rice's injuries, while technically nominally meeting the threshold for "significant physical injury" under the New Jersey's statutory construct, certainly did not meet that for "serious physical injury". Let's again be conservative and say that half of those remaining 452 cases left in Van Natta's numbers involved dangerous weapon/instrument and/or serious physical injury (again, this is likely very conservative), all of which would almost certainly have precluded PTI diversion. Now the set of cases similar to Rice is down to 226.

But, these kind of cases that get filed as felonies quite often have defendants with prior convictions. Let's say a third of the cases had defendants with one or more priors, which is normally a putative disqualifier for PTI diversion. Now the relevant set similar to Ray Rice, who had no priors of any kind, much less for assault, is down to 150 cases. Again, I think this is very conservative and giving Van Natta the benefit of the doubt. There are still other factors critical to professional diversion screening, and the Atlantic County justice system has just such a professional screening system, and coordinator, that affects this calculation.

For one, New Jersey has a comprehensive Victim's Rights provision giving the victim strong input into charging and disposition, including, specifically, placement of the defendant within pre-trial programs such as diversion. While the wishes of the victim are certainly not carte blanche, their input is a very substantial element. Like Janay Palmer Rice, the victim does not always desire, much less demand, prosecution of their attacker, and has the ability to request diversion instead of prosecution. This is common in DV situations, even ones where the victim is the incident reporter, which was *not* the case with Janay Rice, as she was never the instigator of police involvement, reporting and/or initial charging.

So, let's say that the victim is hostile to the defendant and wants full prosecution half of the time. That was not the case with Janay Rice, who was crystal clear in not wanting prosecution, and unequivocal in her unwillingness to cooperate in any formal prosecution, much less trial. If in only half of these 150 remaining cases does the victim want prosecution, and Janay Rice did not, then Ray Rice's relevant identifiable set is down to 75 or so cases like his.

The remaining 75 are cases where the victim *does indeed* want diversion for the accused defendant instead of prosecution. We are now down to 30 out of 75 per Van Natta's own baseline numbers [and remember, professionals in New Jersey say the figure is 70 that were diverted, not 30 as Van Natta alleged]. Hey, those odds look a LOT different than Van Natta's numbers and percentages that Van Natta, ESPN, and most of the public and press, have been falsely demagoguing relentlessly. Maybe, that is why Ray Rice was appropriately accepted into New Jersey's PTI diversion program and not, as Don Van Natta has falsely demagogued, a rare 1% freak outlier.

Now, anybody who has done a lot of this type of criminal defendant, and/or criminal victim, Domestic Violence representation, or the actual DV intake screening underlying diversion programs, will tell you financially stable defendants with strong family and social structure, strong community ties etc … all factors easily attributable to Ray Rice … are *by far* the most likely to benefit from diversion, successfully complete it, and not reoffend. THOSE are the people best suited for diversion, indeed that diversion was designed for, and Ray Rice, by all known appearances, facts and reports, was exactly such a person.

That is why, after thorough screening and consideration, by professionals, Ray Rice was allowed by the Atlantic County PTI Diversion Coordinator, Atlantic County Prosecutor and the

Atlantic County Judge assigned to the PTI program, to participate in PTI diversion, and, frankly, why he is an excellent candidate to succeed. It appears it was absolutely the right prosecutorial exercise of discretion and I find it not out of the ordinary, whatsoever, that diversion was offered to him by Atlantic County Prosecutor James McClain. McClain has publicly addressed precisely why he decided to allow Rice to participate in diversion, and, frankly, it comports with everything that is appropriate in consideration and screening of these type of DV cases. This is precisely the situation DV diversion is intended to address, and by all intended parameters, McClain's decision in the Ray Rice case looks absolutely appropriate.

This is also the view of many of the most knowledgeable professionals in New Jersey, including the former Atlantic County probation official and former assistant director of the Pre-Trial Intervention program in Atlantic County, David Gruber, who has said:

> Since PTI was started in Atlantic County in 1976, thousands of applications have been processed. From all appearances, the Ray Rice case was handled "by the book" and all relevant factors were duly considered. I am aware that some in the media have combed New Jersey Superior Court records and discovered that only 70 of more than 15,000 domestic-violence assault cases were admitted to PTI. But it is impossible to determine suitability for PTI by merely collecting raw data. Every case is different. And, though it might sound trite, it is also very true that only a trained, experienced professional is in a position to make an appropriate ruling.
>
> All in all, I believe the Ray Rice case proves that New Jersey has a pretrial intervention program that is second to none and beyond reproach. On top of that, with anger and misinformation

> swirling all around, Atlantic County showed the country what a cool-headed, objective, open-minded criminal justice system looks like. We all can be proud of that.

Even in New Jersey, with their strict criminal assault statutes, Rice was in the subset of DV assault cases, and attenuated level of court involvement, that were appropriate for, and often do indeed get diverted (despite Van Natta and ESPN's recklessly demagogued and misrepresented numbers). And, yes, it helps to have an experienced (read probably expensive) attorney like Mike Diamondstein helping work all this out and present it the right way to the screening authorities. But indigent defendants appear to get considered right alongside of well to do ones in Atlantic County. The quality of presentation may help, but it appears it is certainly far from dispositive, under the New Jersey system.

And the New Jersey system is actually quite admirable and inclusive. I say that as a practitioner in Arizona, and I am envious of the detailed program specified in the New Jersey State Code. The PTI diversion program in New Jersey is promulgated in New Jersey Revised Statutes Section 2C:43-12 and it delineates 17 separate factors that, on the whole, militate and direct, especially considering the victim's demands, exactly that Ray Rice was an exemplar for the PTI division program.

This analysis is based upon contact with multiple people at the Atlantic County Prosecutors Office, Atlantic County Office of Public Defenders, private criminal defense attorneys in New Jersey and New York, former heads of the New Jersey PTI Diversion Program, Yearly Uniform Crime Reports from The State of New Jersey, Yearly Domestic Violence Reports from The State of New Jersey and, significantly, from many decades of personal practice in criminal defense, defending both the accused, and victims, of domestic violence.

Pre-trial diversion programs, whether for assault, drugs, theft, or other crime, are one of the key efforts in the battle to reduce the ridiculously high incarceration rate in the United States. If you believe in that goal, you must accept that appropriately screened defendants will get diverted. And that, by all appearances, is exactly what happened in the Ray Rice case. Recognizing this fact is not tantamount to condoning Rice's DV abuse, it is simply recognizing that there are alternative adjudicative resolutions available, and utilized, when and where appropriate. I would argue this is a very good thing in our society.

The ultimate verdict on Ray Rice having been granted diversion will be up to Mr. Rice. By all known facts to date, Rice has been a model participant in the assigned diversion program. Rice entered the program on May 20, 2014 and is now slightly over halfway through it. He seems to be an ideal candidate to benefit from the program, but only his own conduct, and time, will tell.

The only point here is that, contrary to the media demagoguery, led by ESPN, and parroted by nearly all, it was indeed appropriate, and not at all that unusual, for a person of Ray Rice's particular facts and circumstances to be permitted participation in New Jersey's PTI diversion program. In short, Kevin Drum was right. And so was Atlantic County Prosecutor James McClain and supervising judge Michael Donio, for placing Rice in the program.

UNIONS EVEN CONSERVATIVES CAN

LOVE

You know how conservatives (and education reform Democrats like Rahm and Obama and Cuomo) claim that they need to break up teacher's unions because they hurt children of color because they impede efforts to give them a better education?

You never see anyone make the same argument, that cops unions hurt children of color because they ensure that cops who shoot children never get punished for it.

Funny how shooting 12-year olds bearing toys is considered less damaging to children of color than working in an underfunded school.

And cops unions' role in the treatment of brown boys as presumptively criminal goes beyond just the shootings.

Cops unions lobbied to defeat bipartisan interest in demilitarizing cops.

> According to Pasco, FOP members reached out to "maybe 80 percent of senators and half the House." Since militarization was at the greatest risk in the Democratic Senate, the disparity made sense. As McMorris-Santoro reported, the departing Senate's blockade on Republican amendments made it impossible for Paul to attach anything to a passable bill. And the clock's basically run out for reform. A new Congress is coming in, but the FOP doesn't see it as particularly likely to dismantle 1033.

And the Saint Louis Police Officers Association is now attacking 5 Rams players who entered the field yesterday with their hands raised in Stop Don't Shoot symbolism.

> "The SLPOA is calling for the players involved to be disciplined and for the Rams and the NFL to deliver a very

> public apology. Roorda said he planned to speak to the NFL and the Rams to voice his organization's displeasure tomorrow. He also plans to reach out to other police organizations in St. Louis and around the country to enlist their input on what the appropriate response from law enforcement should be. Roorda warned, "I know that there are those that will say that these players are simply exercising their First Amendment rights. Well I've got news for people who think that way, cops have first amendment rights too, and we plan to exercise ours. I'd remind the NFL and their players that it is not the violent thugs burning down buildings that buy their advertiser's products. It's cops and the good people of St. Louis and other NFL towns that do. Somebody needs to throw a flag on this play. If it's not the NFL and the Rams, then it'll be cops and their supporters."

As Deadspin notes, SLPOA spokesperson Jeff Roorda has a history of submitting false statements to protect himself and other cops.

I am in no way doubting the importance of police unions. All public sector workers are under attack these days, and while cops are often spared the brunt of those attacks (and exempted from anti-union laws), they need to have representation to defend their interests. I absolutely support that.

But I am cognizant of how critical a cog cops unions increasingly play — and how perfectly this language of "cops against the thugs" captures — in what defense attorney Joseph Margulies describes as the toxic ideology behind our policing.

> Policymakers who profess an interest in criminal justice reform have thus far declined to re-examine the ideological foundation on which the current system

> was built. They have not questioned, in other words, the essential disposition to view the great majority of offenders as “them”—marauders who must be separated from “us” by any means necessary and for as long as possible. They show no awareness that the entire system was built on a foundation that unleashed the police and directed them to divide, rather than restrained the police and enjoined them to unite. Like any dominant ideology, this foundation operates unseen and unquestioned.
>
> Now that reform is finally in the air, we must acknowledge that the American criminal justice system is flawed at its ideological core, a flaw that no amount of tinkering will fix. The shooting of Michael Brown, like the shooting of so many unarmed African-American men, was the predictable product of the same punitive turn in American life that produced the misguided War on Drugs, the dangerous militarization of local police, and the shame of mass incarceration. Until policymakers are willing to revisit the destructive and divisive ideology of “us” and “them,” and all that it implies, from police practice to sentencing to prison conditions, meaningful reform is impossible.
>
> And the next grand jury will come to the same conclusion as this one.

At a time when so many other working people’s civil society organizations are being attacked, this one remains, intact, a key part of the ideology that subjects the poor rather than protects them. And as income inequality grows, this function of police unions will grow increasingly valuable to the powers that be.

A NOTE OF PRAISE FOR JAKE TAPPER

Yammering on the internet is not hard work, in fact it is blindingly (and sometimes maddeningly when it is pointed in your direction) easy. Getting heard, and functionally interacting in a fashion that can contribute to the real focus and discussion, however, *is* hard. For my part, I often carp enough about the failings of big media that it is only right to give praise where due.

Today credit is due to CNN's Jake Tapper. Because he cares.

Two nights ago, rightly or wrongly …. but I think rightly … I laid into CNN for their overbearing focus on repetitive, and somewhat mindless, continuing drivel on celebrity. That was, of course, in relation to Robin Williams' death. A noteworthy, sad, and tragic event for sure, but there was only so much news, the rest was pure Entertainment Tonight like pathetic drivel.

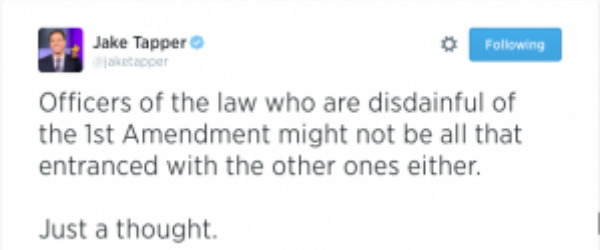
So I went after CNN, and I tacked Jake Tapper's twitter handle on the end. I did so not because I thought he was the prime offender producing the overall CNN news product, but because I knew, from prior interaction, that Jake actually gives a damn and and is a contact point at CNN who would care. And maybe…maybe…be a change

point. That was both fair, and unfair to him personally, at the same time.

I am pretty sure both CNN and Jake were bombarded by by an untold number of missives of the same variety. I don't how how other inflection points at CNN dealt with what was surely a lot of feedback, but the fact Mr. Tapper took the time to take umbrage, and discuss…and think…seems significant and admirable to me. And I admire that.

I thought about writing this post long before I saw the following, but I was off with clients and court appearances, and could have easily shined it on, as I do with so many posts I want to write but don't get to.

Until I saw something from Mr. Jake Tapper today that was just awesome.



Well, yes!

But then, not long later, came this:

Well, to be sure, this is the stuff even a critic of journalism can love and applaud. You know why? Because not only is solidarity with journalists under grand jury and governmental oppression admirable (I have some experience in GJ targeting), it is the only, and only proper, thing that can be done.

There are not many out there to be so applauded. Maybe tomorrow there will be an issue, and

moment of difference, on a different case. So it goes, and so be it.

But, now, James Risen stands exposed and on his own. As a man, and as a journalist, Tapper stood up and gave public square to his voice. Good on him.

Tonight, I am glad Jake Tapper is out there and is willing to engage. Tonight he did one hell of a report from Ferguson Missouri. Even if a big part was consumed by press conference feed. But, before and after, he made his voice clear. That is not exactly a common thing. It is to be commended.

Give the man credit, he was there, and he cares. And I will buy him a drink.

PAKISTAN'S GEO NOW ACCUSED OF BLASPHEMY: THAT COULDN'T HAPPEN HERE, COULD IT?

Just under a month ago, Pakistan's largest private television news station was engaged in a dispute with Pakistan's intelligence agency, ISI, over charges that the ISI was behind an assassination attempt on one of its anchors. For Geo, those probably seem like the good old days, because now the station is engaged in a controversy that has already caused a proliferation of lawsuits and threatens to erupt into massive vigilante violence against Geo employees and buildings. Reuters describes the threats Geo now faces and how the situation came about:

> Pakistan's biggest television station

> said it was ramping up security on Tuesday after it became the object of dozens of blasphemy accusations for playing a song during an interview with an actress.
>
> Geo Television is scrubbing logos off its vans and limiting staff movements after receiving scores of threats over allegedly blasphemous content, said channel president Imran Aslam.
>
> “This is a well-orchestrated campaign,” he told Reuters. “This could lead to mob violence.”
>
> /snip/
>
> The cases allege a traditional song was sung about the marriage of Prophet Muhammad’s daughter at the same time a pair of shoes was raised.
>
> Both elements are traditional in a wedding ceremony but the timing was insulting to Islam, dozens of petitioners have alleged. Others allege the song itself was insulting.

Lawsuits arising from the incident are proliferating. The Express Tribune has a partial list of the cases filed recently here.

But the Reuters article points out that under Pakistani law, blasphemy itself is not actually defined clearly:

> Blasphemy carries the death penalty in Pakistan but is not defined by law; anyone who says their religious feelings have been hurt for any reason can file a case.

But it gets even wilder. It turns out that a rival station is now also accused of blasphemy. Why? Because they repeatedly played snippets of the original program carried on Geo. And Reuters points out that blasphemy cases also are

dangerous for judges and attorneys, as well:

> Advocate Tariq Asad said his suit named the singers and writers of the song, cable operators, television regulators, a national council of clerics and ARY, a rival television station.
>
> ARY repeatedly broadcast clips of the morning show, alleging it was blasphemous, an action that Asad said was blasphemous in itself.
>
> Judges frequently do not want to hear evidence in blasphemy cases because the repetition of evidence could be a crime. Judges acquitting those accused of blasphemy have been attacked; a defense lawyer representing a professor accused of blasphemy was killed this month.

So just repeating the blasphemous material, even as a judge or attorney citing it in court, is a blasphemous act in itself worthy of vigilante action.

But of course, nothing so outrageous could happen here in the US, could it? Sadly, such a ridiculous state of affairs doesn't seem that far off here. Note that politicians, even leading candidates for the US Senate, now openly state that "Government cannot force citizens to violate their religious beliefs under any circumstances" and even that such stances are not negotiable in any way. But that's not just a campaign stance. We have companies now going to the Supreme Court to state their right to ignore laws to which they object on religious grounds.

So if both politicians and companies now openly advocate to ignore laws on religious grounds, how far away are we from these same zealots advocating for prison terms or even death sentences for those who offend their religious sensibilities? After all, we have already seen a bit of the vigilantism that goes along with such attitudes.

Update: It turns out that the incident with ISI hadn't blown over yet. Breaking news from Dawn:

> A committee formed by the Pakistan Electronic Media Regulatory Authority (Pemra) has suspended the licences of three television channels owned by the Geo TV network.
>
> The committee has also decided that Geo TV offices be immediately sealed.
>
> However, a final decision on the revocation of the licences will be announced following the meeting on May 28, which will also be attended by government representatives.
>
> The committee, which includes members Syed Ismail Shah, Pervez Rathore and Israr Abbasi, was tasked to review the Ministry of Defence's application filed against Geo TV network for leveling allegations against an intelligence agency of Pakistan.

It will be interesting to see how Geo responds.

9TH CIRCUIT EXTENDS EQUAL PROTECTION (AND BATSON) TO SEXUAL IDENTITY

In yet another win for equality, and equal protection, on issues involving sexual orientation and identity, the Ninth Circuit has issued an important opinion holding *Batson v. Kentucky* protections apply to sexual orientation issues in jury selection.

The case is *Smithkline Beecham Corp, dba GSK v.*

Abbott Laboroatories, and the decision is here.

This case evolved out of a licensing dispute between two pharmaceutical makers of HIV medications. GSK contended Abbott violated antitrust laws, dealt in bad faith and otherwise engaged in unfair trade practices by licensing to GSK the authority to market an Abbott HIV drug in conjunction with one of its own and then increasing the price of the Abbott drug fourfold, so as to drive business to Abbott's own combination drug.

Judge Steve Reinhardt set the table:

> During jury selection, Abbott used its first peremptory strike against the only self-identified gay member of the venire. GSK challenged the strike under Batson v. Kentucky, 476 U.S. 79 (1986), arguing that it was impermissibly made on the basis of sexual orientation. The district judge denied the challenge.
>
> This appeal's central question is whether equal protection prohibits discrimination based on sexual orientation in jury selection. We must first decide whether classifications based on sexual orientation are subject to a standard higher than rational basis review. We hold that such classifications are subject to heightened scrutiny. We also hold that equal protection prohibits peremptory strikes based on sexual orientation and remand for a new trial.

The fact the court unanimously found that heightened scrutiny applies is critical. Finding heightened scrutiny controlling on sexual preference issues has been the holy grail for a long time, and exactly what the Supreme Court ducked in *Windsor* (mostly) and *Perry* (completely through avoidance).

The *Batson* challenge was effectively uncontroverted materially by Abbot, and the

court found exactly that. The far more important discussion, however, comes in the analysis of whether the violation by Abbott violated the Equal Protection Clause. This is a necessary question because, while the Supreme Court in *J.E.B. v. Alabama* extended Batson protections to gender, and presumably other suspect class groups, it still stated:

> "[p]arties may . . . exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to 'rational basis' review."

In short, if heightened scrutiny is not found to apply, Abbott's *Batson* violation would nevertheless be permissible (even if slimy). And the 9th Circuit, for all its claimed "liberal tendencies" had in the past avoided clear cut assignment of heightened scrutiny to sexual orientation in such well known cases as *High Tech Gays v. Defense Industrial Security Clearance Office* and *Witt v. Department of the Air Force*. In those cases, the 9th instead framed away and attempted to decide on Due Process grounds instead of Equal Protection, even though they often strained to do so.

But today Judge Reinhardt, writing for the unanimous panel, took the final step up he was too cowardly to do in *Perry v. Schwarzenegger*. I have always had an inclination Reinhardt was uncomfortable with the dodge he took in *Perry*, today we have some confirmation. Reinhardt notes the Supreme Court, through his friend Anthony Kennedy, still managed to avoid the critical Equal Protection question in the seminal Windsor opinion:

> Windsor, of course, did not expressly announce the level of scrutiny it applied to the equal protection claim at issue in that case, but an express declaration is not necessary. Lawrence presented us with a nearly identical quandary when we confronted the due

> process claim in Witt. Just as Lawrence omitted any explicit declaration of its level of scrutiny with respect to due process claims regarding sexual orientation, so does Windsor fail to declare what level of scrutiny it applies with respect to such equal protection claims. Nevertheless, we have been told how to resolve the question. Witt, 527 F.3d at 816. When the Supreme Court has refrained from identifying its method of analysis, we have analyzed the Supreme Court precedent "by considering what the Court actually did, rather than by dissecting isolated pieces of text."

And from there, the barn door opened for full on, and clear cut, assignment of heightened scrutiny under the Equal Protection Clause. After an explanation of the evolution from Kennedy's decision in *Lawrence v. Texas* through *Windsor*, The Ninth states:

> Windsor review is not rational basis review. In its words and its deed, Windsor established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review. In other words, Windsor requires that heightened scrutiny be applied to equal protection claims involving sexual orientation.

and…

> Rational basis is ordinarily unconcerned with the inequality that results from the challenged state action. See McGowan, 366 U.S. at 425–26 (applying the presumption that state legislatures "have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality"). Due to this distinctive feature of rational basis review, words

> like harm or injury rarely appear in the Court's decisions applying rational basis review. Windsor, however, uses these words repeatedly. The majority opinion considers DOMA's "effect" on eight separate occasions. Windsor concerns the "resulting injury and indignity" and the "disadvantage" inflicted on gays and lesbians. 133 S. Ct. at 2692, 2693.

and…

> Windsor requires that when state action discriminates on the basis of sexual orientation, we must examine its actual purposes and carefully consider the resulting inequality to ensure that our most fundamental institutions neither send nor reinforce messages of stigma or second-class status. In short, Windsor requires heightened scrutiny. Our earlier cases applying rational basis review to classifications based on sexual orientation cannot be reconciled with Windsor. See Miller, 335 F.3d at 892–93. Because we are bound by controlling, higher authority, we now hold that Windsor's heightened scrutiny applies to classifications based on sexual orientation.

There is more, much more, justification and reasoning laid down by Steve Reinhardt. And it is beyond persuasive. This is the decision Reinhardt should have stuck in the face of the oh so timid Supreme Court in *Perry*. It may not have created a different ultimate result, but at least the framing of the question would have been straight up for all to see, and the nine justices forced to confront. When Reinhardt framed his Perry opinion in terms of *Romer* and state law, he weakened both *Perry* and *Windsor*. Today, he makes some amends.

Coupled with the decision of Judge Shelby in the

Utah case of *Kitchen v. Herbert* (and apparent receptiveness of the 10th Circuit to upholding it) and in a very similar case the 10th Circuit is being asked by all parties to consolidate, the table is being set rather rapidly for the Supreme Court to have to decide once and for all whether or not to apply heightened scrutiny and give sexual orientation the suspect class protection it deserves. The 9th has now said it is the only logical conclusion, and the 10th Circuit looks lined up to do the same. The time is coming, and likely a lot faster than the Supremes wanted.

AARON SWARTZ, PLEA LEVERAGING & THE BORDENKIRCHER PROBLEM

As Netroots Nation 2013 begins, I want to emphasize one of the best panels (If I do say so) of the event. It is titled: *Beyond Aaron's Law: Reining in Prosecutorial Overreach*, and will be hosted by Marcy Wheeler. Joining Marcy will be Aaron Swartz's attorney, Elliot R. Peters, of Keker & Van Nest LLP in San Francisco, Shayana Kadidal of the Center for Constitutional Rights in New York, and Professor Jonathan Simon of Boalt Hall at Berkeley. The panel goes off at 3:00 pm Saturday June 22.

As a lead in to the panel discussion, I want to

address a topic that struck me from the first moment of the tragic loss of Aaron Swartz, the pernicious effect of the late 70's Supreme Court case of *Bordenkircher v. Hayes*.

Paul Hayes was a defendant on a rather minor (involved $88.30), but still felonious, bad check charge in Kentucky. But Hayes had a bad prior criminal history with two felony priors. The prosecutor offered Hayes a stipulated five year plea, but flat out threatened Hayes that if he didn't accept the offer, the prosecution would charge and prosecute under Kentucky's habitual criminal (three strike) law. Hayes balked, went to trial and was subsequently convicted and sentenced to life in prison under the habitual offender enhancement charge. It was a prosecutorial blackmail threat to coerce a plea, and the prosecutor delivered on his threat.

Hayes appealed to every court imaginable on the theory of "vindictive prosecution" with the prosecutorial blackmail as the underlying premise. Effectively, the argument was if overly harsh charging and punishment is the penalty for a defendant exercising his right to trial, then such constitutes prosecutorial vindictiveness and degrades, if not guts, the defendant's constitutionally protected right to trial.

Every appellate court along the way declined Hayes' appeal until the 6th Circuit. The 6th, however, came up with a surprising decision, granting Hayes relief, but under a slightly different theory. The 6th held that if the prosecutor had originally charged Hayes with the habitual offender charge, and then offered to drop it if Hayes pled guilty, that would have been perfectly acceptable; but using it like a bludgeon in plea negotiations once the case was charged was impermissibly vindictive, and therefore unconstitutional.

Then, from the 6th Circuit, the case finally made its way to the Supreme Court of the United States. By that time, Hayes had long been in prison and the prison warden, Bordenkircher, was

the nominal appellee in the caption of the case. The Supreme Court, distinguishing another seminal vindictive prosecution case, *Blackledge v. Perry*, reversed the 6th Circuit and reinstated Hayes' life sentence.

Blackledge v. Perry is a famous case known in criminal defense circles as the "upping the ante case". Blackledge was convicted of a misdemeanor and appealed, which in North Carolina at the time meant he would get a new trial in a higher court. The state retaliated by filing the charge as a felony in the higher court, thus "upping the ante". The Supreme Court in *Blackledge* held that to be impermissibly vindictive.

> A prosecutor clearly has a considerable stake in discouraging convicted misdemeanants from appealing and thus obtaining a [new trial] in the Superior Court, since such an appeal will clearly require increased expenditures of prosecutorial resources. . . . And, if the prosecutor has the means readily at hand to discourage such appeals – by "upping the ante" through a felony indictment whenever a convicted misdemeanant pursues his statutory appellate remedy – the State can insure that only the most hardy defendants will brave the hazards of a [new] trial.
>
> . . . A person convicted of an offense is entitled to pursue his statutory right to a trial . . ., without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration.

Alas, the Supreme Court in *Bordenkircher v. Hayes* did not think the same logic in *Blackledge* controlled the day. In a 5-4 decision, Potter Stewart held that the practice engaged in by the Hayes prosecutor was just fine. In

distinguishing *Blackledge*, Justice Stewart wrote:

> In those cases the Court was dealing with the State's unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right to attack his original conviction – a situation "very different from the give-and-take negotiation common in plea bargaining between the prosecution and defense, which arguably possess relatively equal bargaining power."

By now, it should go without saying that Justice Stewart's view of a criminal defendant having "relatively equal bargaining power" with the prosecution is a sick and demented joke. Nothing could be further from the truth. But, from that time on, the power of prosecutors to add charges as a bludgeon against criminal defendants has been unfettered and increasingly problematic.

And so we come to the unfortunate case of Aaron Swartz. You can probably already see the *Bordenkircher* problem in the Swartz case. There is, however, another related problem in Swartz – overcharging. Overcharging is the initial charging by a prosecutor of multiple counts where only one charge is called for, or tacking on extra charges that are beyond what the evidence calls for, all in an effort to coerce the defendant to quickly accept a plea. It is a corollary, but distinct, practice that goes hand in hand with *Bordenkircher* leveraging of charges. Both are excessive and vindictive leveraging of criminal defendants to force a plea (or cooperation as a snitch), and both are present in spades in the prosecution of Aaron Swartz by Carmen Ortiz and the US Attorney's Office for the District of Massachusetts.

Initially, upon arrest at MIT, Aaron Swartz was first charged in the local Middlesex/Cambridge state court. Which was somewhat notable and interesting since the arresting officer was actually Special Agent Michael Pickett of the

United States Secret Service, who was working with the Boston area located New England Electronic Crimes Task Force. The Task Force had a well established reputation for working with the D-Mass US Attorney's Office and FBI. So, despite an arrest by a federal agent, working a federal task force, the charge was in local court. That was January 7, 2011.

Then came the first significant upping of the ante against Aaron Swartz with the filing of the initial federal indictment on four counts with a request for forfeiture of property on July 14, 2011, over six months after his arrest and filing of local charges. What did Aaron Swartz do in the time between his arrest and initial charges to the federal indictment to earn the increase in seriousness of the charges against him? Nothing, he simply failed to roll over.

You would think the United States Department of Justice might have exercised enough vindictiveness against the 26 year old Swartz. But, no, there was more in the offing. Much more. Again, Aaron Swartz did not roll over. Swartz had a benefit than very few caught up in the American justice system do, he had money and he had powerful friends and supporters. He wouldn't roll.

Aaron Swartz and his lawyers relentlessly tried to negotiate a fair plea – probation and no incarceration – for the piddly level of conduct that was actually involved, and they were relentlessly rebuffed by the DOJ. What happened next? The US Attorney's Office for the District of Massachusetts, led by Carmen Ortiz (with undoubtedly some help from DOJ Main), decided to really put the thumb on Mr. Swartz.

A superseding indictment to further terrify Swartz was filed on September 12, 2012 charging an outrageously puffed up thirteen felony counts, along with the forfeiture demand. Four months later Aaron Swartz was gone.

Aaron Swartz was overcharged right out of the gate in the first federal indictment, which also

constituted upping the ante from the state charges. Then the overcharging and upping of the ante went nuclear in the superseding indictment. It was unnecessary, oppressive and unreasonable. It was, and is, the mark of a Department of Justice, and justice system, run amok. Both a *Bordenkircher* and an overcharging nightmare writ large and public.

Aaron Swartz is tragically gone far too young, but he left us so much in his time. And one of those things is the public exposure this case has brought, and the manner in which it has exposed the ugly underbelly of the American criminal justice system and its reliance on an oppressive and unbalanced system of plea negotiation.

Kevin Cullen, in a Boston Globe op-ed, in quoting Mr. Swartz's lawyer Elliot Peters, put it succinctly:

> Elliot Peters, the San Francisco lawyer who took the case over from Weinberg last fall, could not persuade prosecutors to drop their demand that Swartz plead guilty to 13 felonies and spend six months in prison. Peters was preparing to go to trial and was confident of prevailing.
>
> But the prospects weighed heavily on Swartz.
>
> "There was such rigidity with the people we were dealing with," Peters said. "I couldn't find anyone in that office to talk about proportionality and humanity. It was driven by a desire to turn this into a significant case, so that some prosecutor could put it in his portfolio."

Proportionality and humanity are excellent words that are part and parcel of what is supposed to be "prosecutorial discretion". As the courts in *Bordenkircher* and *Blackledge* noted, the criminal justice system, from local to federal, runs on

plea bargaining. But contrary to what Potter Stewart said in *Bordenkircher*, the power of the defendant is NOT "relatively equal" to that of the prosecution.

The system, and the wielding of power by the government is out of balance, and out of control, as even prominent former federal judges are noting. There are any number of reasons prosecutors so abuse their power. Sometimes it is the desire to notch the big win, always it is a self desire to maintain their personal "conviction record" necessary for promotion, and sometimes it is to force a defendant into cooperation and snitching on other potential defendants and cases. All can be appropriate concerns for a prosecutor, but not without proportionality, humanity and discretion.

Radley Balko penned an excellent discussion of many of the different facets of the immense power, and abuse of power, of the prosecutor:

> Prosecutors have enormous power. Even investigations that don't result in any charges can ruin lives, ruin reputations, and drive their targets into bankruptcy. It has become an overtly political position — in general, but particularly at the federal level. If a prosecutor wants to ruin your life, he or she can. Even if you've done nothing wrong, there isn't a whole lot you can do about it.

I highly recommend reading Balko's piece in full as there is much depth there that goes beyond what there is space for in the instant post.

High profile cases like that of Aaron Swartz have brought a new light on abuse of prosecutorial power. Another example I feel compelled to mention is that of famed Hollywood director John McTiernan that was put on display last month in one of the last big articles by a friend to this blog, the late Michael Hastings. But while the famous cases like Swartz and

McTiernan bring needed exposure, the root problem plagues and rots the entire system. Most defendants are at a far greater disadvantage than those who are wealthy and well known.

Former federal prosecutor and current criminal defense attorney Kenneth White, on his Popehat blog, gave a passionate and troubling description of the bigger picture in our criminal justice system:

> People think the system failed or abused or singled out Aaron Swartz. This is the system, dammit, and if you think that Aaron Swartz faced what he did because he's a hacker and the government has it out for hackers, then I'm here to tell you that you're full of shit. Aaron Swartz had a great, well-funded defense team and a healthy support system. Most people don't. If you read this blog, you know the types of things the system does to people, including people with far less ability to fight back. The system sends sick people to their death in a system that can't care for them because they smoked weed. The system denies its prisoners medical care until they have to have their genitals amputated in a fruitless effort to delay an early death from cancer. The system sticks people into cells and very literally forgets them until they've spent a few days drinking their own urine. The system strives and strains to execute people based solely on the word of serial perjurers – serial perjurers whose record of perjury they have concealed from the defense. The system prizes junk science so long as that junk science supports its allegations. The system treats invocation of constitutional rights as evidence of guilt. The system reacts with petulant fury to being questioned. The system detects and punishes law enforcement and prosecutorial misconduct so rarely that

> bad actors are hardly ever subjected to real consequences.
>
> These things happen every day to people less photogenic, talented, and charismatic than Aaron Swartz.

If the Aaron Swartz case has taught us anything, it is that as a nation we desperately need to have a discussion and recalibration on prosecutorial discretion, proportionality and humanity in our criminal justice system. The “system” is not about “them”, it is about us and who we are as a people. It is long past time to fix the system.