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## **Balanced Liberty: Justice Kennedy's Work in Criminal Cases**

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# “Balanced Liberty”: Justice Kennedy’s Work in Criminal Cases

RORY K. LITTLE<sup>†</sup>

*During his forty-three years as a federal appellate judge, Anthony M. Kennedy authored over 350 opinions in cases relevant to criminal law (although establishing a precise number using various electronic databases offers a cautionary tale). Below I offer four general themes that emerge from my review of Justice Kennedy’s written work in criminal cases:*

- (1) Perhaps surprising to some, when writing for the majority, Justice Kennedy ruled more often for a defense-side view than for the government;*
- (2) His expansive vision of “liberty,” as expressed in civil cases, was more “balanced” in the criminal context;*
- (3) His balanced-liberty approach was less defendant-friendly in habeas cases; and*
- (4) His work was most impactful in (obviously?) death penalty and race-focused cases, as well as plea-bargaining; and he was consistently correct about the doctrine of “willful blindness.”*

*In conclusion, Justice Kennedy’s thirty years of writings on the U.S. Supreme Court mark him as one of the most influential Justices of our time in shaping criminal law doctrine.*

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<sup>†</sup> The Joseph W. Cotchett Professor of Law, U.C. Hastings, San Francisco. A version of these remarks was delivered at the Symposium focused on Justice Kennedy sponsored by the *Hastings Law Journal* on February 1, 2019. As the faculty sponsor of that Symposium, I am grateful to Alyxandra Vernon and Nina Gliozzo, both UC Hastings ‘19, for their support and assistance in putting on a wonderful full day of proceedings, including over two hours of untranscribed group conversations with Justice Kennedy himself. My thanks are due also to Chuck Marcus, a committed researcher in the UC Hastings law library, and Eve Zelinger, UC Hastings ‘19, for their tireless responsiveness to my repeated requests, and to Alyx Vernon for careful and patient editing assistance.

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Anthony McLeod Kennedy was a federal judge for over forty years, starting with his appointment to the United States Court of Appeals for the Ninth Circuit in 1975. Kennedy was first appointed by President Gerald Ford, a short-timer who also appointed another middle-of-the-road moderate, Justice John Paul Stevens, to the U.S. Supreme Court.<sup>1</sup> Twelve years later, Kennedy was nominated to the Supreme Court after the divisive hearings on failed nominee Robert Bork; Kennedy was perceived to be a moderate who could calm the partisan waters. Kennedy was confirmed in February 1988 by a Senate vote of 97–0,<sup>2</sup>

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1. Ford had been the longtime Minority Leader of the House when Nixon chose him to replace the resigned Vice President Spiro Agnew in Fall 1973. Vice President Ford became President in August 1974 upon the resignation of Richard Nixon. He served the remainder of that presidential term but lost the presidency to Jimmy Carter in the 1976 election, thus serving as President for less than two and a half years. *Gerald Ford*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Gerald\\_Ford](https://en.wikipedia.org/wiki/Gerald_Ford) (last visited May 13, 2019).

2. *Anthony Kennedy*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Anthony\\_Kennedy](https://en.wikipedia.org/wiki/Anthony_Kennedy) (last visited May 13, 2019). It was fitting that Kennedy, undoubtedly more moderate than the judge (Robert Bork) first nominated for his position, filled the seat of Justice Lewis F. Powell Jr., also viewed as a moderate and sometimes "swing" Justice on his Court. See JOHN JEFFRIES, *JUSTICE LEWIS F. POWELL: A BIOGRAPHY* 169, 266 (2001) (describing Powell as a "hard-line moderate" and explaining that "the most nearly determinative member of the Burger Court was neither Stewart nor White, but Powell").

On February 1, 2019, the University of California's Hastings College of the Law was thrilled to host the first post-retirement Symposium celebrating Justice Kennedy's jurisprudence with the Justice attending in person.<sup>3</sup> This Essay offer a few thoughts about the substantial body of work that Justice Kennedy's forty-three years of federal judicial opinion-writing leaves us on criminal law topics—an area not often discussed with regard to Justice Kennedy<sup>4</sup> (with the obvious exception of his opinions limiting the death penalty<sup>5</sup>).

Below, I first offer some numbers, and a cautionary lesson for young law students and lawyers. I then offer a few claims regarding Justice Kennedy's opinions in criminal cases. My claims are tentative and based on an overview of Kennedy's criminal law work, rather than reading every one of about 350 Kennedy criminal law opinions. Much analysis remains to be done of Kennedy's large impact on the Supreme Court and American jurisprudence over thirty somewhat tumultuous years.<sup>6</sup>

#### I. THE NUMBERS: HOW MANY KENNEDY OPINIONS ARE THERE? HOW MANY ADDRESS CRIMINAL LAW TOPICS?

Justice Kennedy served as an appellate judge on the Ninth Circuit for almost thirteen years (1975 to 1988), and then thirty years on the U.S. Supreme

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3. Symposium, *The Jurisprudence of Justice Anthony M. Kennedy: Four Decades of Influence*, 70 HASTINGS L.J. 1141 (2019); see also Symposium, *The Evolution of Justice Anthony M. Kennedy's Jurisprudence*, 44 MCGEORGE L. REV. 1 (2013) [hereinafter McGeorge Symposium].

4. Two books have been published about Justice Kennedy, but neither addresses the topic of criminal law in any detail. See FRANK J. COLUCCI, JUSTICE KENNEDY'S JURISPRUDENCE: THE FULL AND NECESSARY MEANING OF LIBERTY (2009); HELEN J. KNOWLES, THE TIE GOES TO FREEDOM: JUSTICE ANTHONY M. KENNEDY ON LIBERTY (rev. ed. 2019). Knowles gives only a passing mention of a Kennedy capital punishment opinion to support a discussion of his use of international law. *Id.* at 37–38. Colucci gives slightly more attention to Kennedy's capital punishment opinions, COLUCCI, *supra*, at 28, 172, but not to any other aspect of criminal law. See generally *Did Justice Anthony Kennedy Just Destroy His Own Legacy?*, POLITICO (June 27, 2018), <https://www.politico.com/magazine/story/2018/06/27/anthony-kennedy-legacy-supreme-court-218900> (presenting what “17 legal thinkers argue about why the retiring justice mattered,” with none of them discussing his criminal case jurisprudence). The 2013 McGeorge Symposium devoted to Justice Kennedy (McGeorge Symposium, *supra* note 3) is a notable exception, with articles addressing Justice Kennedy's work in three discrete criminal law areas. See generally Stephanos Bibas, *Justice Kennedy's Sixth Amendment Pragmatism*, 44 MCGEORGE L. REV. 211 (2013) (discussing Justice Kennedy's pragmatic, yet consistent and principled, approach to the Sixth Amendment); Linda E. Carter, *The Evolution of Justice Kennedy's Eighth Amendment Jurisprudence on Categorical Bars in Capital Cases*, 44 MCGEORGE L. REV. 229 (2013) (discussing Justice Kennedy's consistent application of a two-prong Eighth Amendment test to death penalty cases); Robert Weisberg, *Kennedy and the Prisons—Moral Exhortation and Technical Fastidiousness*, 44 MCGEORGE L. REV. 247 (2013) (discussing Justice Kennedy's approach to sentencing).

5. See, e.g., COLUCCI, *supra* note 4, at 172 (connecting Kennedy's death penalty jurisprudence to “the ideal of human dignity”); Carter, *supra* note 4; *Justice Kennedy: His Departure from the Court and Possible Consequences for Capital Cases*, ABA (Nov. 6, 2018), [https://www.americanbar.org/groups/committees/death\\_penalty\\_representation/project\\_press/2018/fall/kennedy-in-retrospective](https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2018/fall/kennedy-in-retrospective).

6. Neither I nor Joan Biskupic, author of a number of biographies of Supreme Court Justices (see, e.g., JOAN BISKUPIC, THE CHIEF: THE LIFE AND TURBULENT TIMES OF CHIEF JUSTICE JOHN ROBERTS (2019)), are aware of anyone currently working on a full biography of Justice Kennedy, although the project seems likely. Author conversation with Joan Biskupic, Feb. 14, 2019.

Court until he retired in 2018. My project for this Symposium began initially with what seemed like a simple task: establishing how many opinions Judge—and then Justice—Kennedy had written in criminal law and procedure cases.

Widely used databases such as Westlaw and Lexis/Nexis can easily enough be searched for opinions “authored” by Justice Kennedy. While the numbers do not completely match (565 for Lexis, 583 for Westlaw), this might be explained by different criteria and decisions on what exactly to count: opinions on certiorari denials? Opinions on “stay” applications or other “in Chambers” orders?<sup>7</sup> A more-complicated-to-use, but also more carefully-detailed, database that is overseen by Professor Lee Epstein, yields a similar number (546) for Kennedy-authored opinions (majorities, concurrences, and dissents) while on the Supreme Court.<sup>8</sup>

When you do the same search for opinions Kennedy authored on the Ninth Circuit, the numbers are again not identical (438 Lexis, 446 Westlaw), but they seem close enough (there might be, for example, other federal judges named Kennedy writing a small number of captured opinions). I feel relatively confident in relying on these imperfect and inexact database searches to say that Kennedy authored close to 1,000 opinions in his roughly forty-three years of service in the federal judiciary.

Of these roughly 1,000 judicial opinions, I have determined by analysis of the generated case-lists and my own review of actual opinions, that about 350 were in cases that I would categorize as “criminal” in subject matter. This breaks down to 144 criminal cases while on the Ninth Circuit, and another 210 while in the Supreme Court.<sup>9</sup> These numbers for what I count as criminal cases authored by Kennedy can be further specified as follows:

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7. A useful post about doing electronic database Supreme Court searches, written by a University of Houston Law librarian and noting some of the flaws and imperfections, is Dan Baker-Jones, *SCOTUS Justice Search Tips for LexisNexis/Westlaw*, UHLC NOTA BENE (Sept. 30, 2011), <http://notabeneuh.blogspot.com/2011/09/scotus-justice-search-tips-for.html>.

8. See Lee Epstein, Thomas G. Walker, Nancy Staudt, Scott Hendrickson & Jason Roberts, *The U.S. Supreme Court Justices Database*, WASH. U. ST. LOUIS, <http://epstein.wustl.edu/research/justicesdata.html> (last updated Feb. 11, 2019) [hereinafter Epstein Database]. Professor Epstein quite generously identified and then ran the appropriate searches within this database to determine this number, which is likely the most accurate. Copies of all the various lists yielded by the various database searches discussed in this Essay are on file with the Author.

9. These numbers are a result of, first, relying on the Lexis/Nexis database categorization for “criminal law and procedure,” and then going through the resulting lists by hand and eliminating obvious non-criminal cases. For example, I struck cases that addressed antitrust, labor, tax, and purely civil issues, from the lists. This produced a significant “over-counting” misclassification rate (fifteen percent by my count) in the LexisNexis “criminal law and procedure” database lists. At the same time, I recognize that some cases I might call “criminal” might not be included in the Lexis/Nexis category. I include precise numbers not because I believe they are perfectly accurate, but because people like numbers.

	U.S. Supreme Court	Ninth Circuit
Majority Opinions	101	118
Concurring Opinions	69	13
Dissenting Opinions	40	13
Total	210	144

This survey also reveals Justice Kennedy's interesting quirk of often writing short concurrences when he did not quite agree with all of a majority's reasoning or conclusions. (He did this far less often when on the Ninth Circuit.) It also suggests that he wrote dissents in criminal cases more often on the Supreme Court (about twenty percent) than on the Ninth Circuit (less than ten percent).

Such counting and categorizing is undoubtedly imperfect and open to arguments about categorization. But any way you count, Justice Kennedy produced a substantial body of work over four decades in the area of criminal law. Furthermore, there is no doubt that a great deal of this criminal law jurisprudence has significantly impacted American criminal law and procedure doctrine and practice.<sup>10</sup>

## II. A CAUTIONARY TALE: DON'T OVER-RELY ON ELECTRONIC DATABASES

My lesson for young law students and lawyers: do not rely on electronic databanks for precision or accuracy. Instead, you must do the hard work of reading and evaluating opinions yourself, and think critically about possible shortcomings in the electronic database criteria and lists.

Without recounting the hours and email chains of frustration that I and my talented research assistants suffered, let me just say that the categorizations and summaries in the databases are imperfect and inexact at best, and simply wrong in some cases. For example, I use a relatively broad definition of what counts as a "criminal law and procedure" case—I include habeas cases, "crimmigration" cases, and civil cases involving underlying criminal law facts or implications. Nevertheless, I found about a fifteen percent "over-counting" error rate in database classification. That is, when I reviewed each case on the list produced by Lexis/Nexis searches for Kennedy opinions in the category of "criminal law and procedure," I found that some tax cases, abortion cases, antitrust, labor, and religious freedom cases were included.<sup>11</sup> Perhaps "over-counting" is better than

10. See *infra* pp. 1253–59.

11. On the other hand, the list of Kennedy opinions produced by the Epstein Database, *supra* note 8, "under-counts" if one looks only for "criminal procedure" cases written by Kennedy, because important cases I would call "criminal" were categorized there as something else. For example, *Lafler v. Cooper*, 566 U.S. 156 (2012), an important case addressing ineffective assistance of counsel in criminal case plea bargaining, appeared as "civil rights" on the Epstein list of Kennedy opinions, which listed only 153 Kennedy opinions as "criminal

“under-counting” in such a search<sup>12</sup>—but users need to be aware of the possibility, and substantively review electronic-search case-lists with care. In addition, sometimes orders or dissents from certiorari denials were included. Moreover, I occasionally found the same case listed (and thereby counted) two or even three times, for example when Kennedy had written a single opinion labelled as “concurring in part, dissenting in part.”

In addition, “headnote” summaries given in such case-lists were sometimes (although not constantly) inaccurate or misleading. Occasionally a headnote summary might sound like the ruling was for the defendant, when in fact the headnote was merely describing a sub-issue in a case that actually affirmed a criminal conviction. Or a headnote recounted an evidentiary or procedural issue that sounded non-criminal, and I had to read the case to determine that it was actually “criminal” in nature. On the other hand, some headnotes sounded like criminal cases, but were in fact civil cases (misclassified because, for example, the underlying facts involved a criminal assault).

The lesson is that relying uncritically on electronic database categorizations or “key-word” searches, can be misleading, incomplete, and simply wrong. I do not pretend to have reviewed first-hand all 900-plus opinions allegedly authored by Judge/Justice Kennedy. Nor do I claim that the hand-sampling I have done was perfect. And of course, there is huge and obvious value in electronic caselaw databases and their searchability. But those benefits do not mean perfection. I urge law students and young lawyers to keep in mind that electronic database search terms, case classifications, and headnote summaries, can be imprecise and idiosyncratic. There is no substitute for doing the hard work of actually reading the full cases (not just headnotes) yourself. Don’t rely unthinkingly on electronic database decisions made by faceless others.

### III. FOUR GENERAL THEMES ABOUT JUSTICE KENNEDY’S CRIMINAL LAW JURISPRUDENCE

Without claiming to have read all 350 criminal case opinions written by Justice Kennedy over forty-three years, I now present some overview thoughts, based on some knowledgeable background,<sup>13</sup> regarding Justice Kennedy’s judicial writings in criminal cases as I broadly define that category (see the previous page).

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procedure” (*Lafler* appeared as Kennedy opinion #228), versus the 210 I counted as “criminal,” see *supra* p. 1244.

12. Of course one cannot know if some criminal cases were “under-counted”—that is, left off the list—unless one already knows of particular criminal cases that are not on the list. It is thus much harder to detect under-counting versus over-counting errors.

13. I have been studying the U.S. Supreme Court and its Justices for almost forty years (since I first subscribed to U.S. Law Week while a law student in 1980), teaching criminal procedure topics for thirty, writing annual criminal law Supreme Court summaries for the ABA for over twenty, and writing for SCOTUSblog.com for ten.

#### A. JUSTICE KENNEDY OFTEN RULED FOR THE DEFENDANT WHEN WRITING MAJORITY OPINIONS

First, something that may surprise you. I have now reviewed 210 majority opinions written by Justice Kennedy in what I categorize as criminal law and procedure cases. Justice Kennedy has sometimes been assumed to be a conservative, pro-government judge.<sup>14</sup> For example, in a short interview when Justice Kennedy retired, Dean Vikram Amar said without further detail that Justice Kennedy was “generally . . . conservative . . . in criminal law and criminal procedure cases.”<sup>15</sup> But I can report to you with some confidence that, when Justice Kennedy was assigned to *write* a majority opinion, he wrote more often on the side of criminal defendants than for the government.

By my count, again when writing the majority opinion, Justice Kennedy reached results favoring a criminal defense claim (even if not adopting the full defense position) in forty-nine cases, while favoring the government forty-six times.<sup>16</sup> Moreover, his opinions favoring the criminal defense side increased as his tenure increased and the overall Court became more conservative, by a factor of almost two-to-one.<sup>17</sup>

Many of Justice Kennedy’s pro-criminal-defense majority opinions are familiar to teachers of criminal law and procedure, from his most recent (*Byrd v. United States* in 2018<sup>18</sup>), to one of his earliest (*Minnick v. Mississippi* in 1990<sup>19</sup>). These of course include his pro-defense death penalty decisions (discussed below), but also include well-known decisions in other diverse criminal fields, such as *Lafler v. Cooper* and *Missouri v. Frye*,<sup>20</sup> *Bond v. United*

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14. See, e.g., Amelia Thomson-DeVeaux, *Justice Kennedy Wasn't a Moderate*, FIVETHIRTYEIGHT (July 3, 2018, 5:58 AM), <https://fivethirtyeight.com/features/justice-kennedy-wasnt-a-moderate/>. This popular-press analysis used statistics and categorizations from the Epstein Database, *supra* note 8.

15. Phil Ciciora, *What Is Anthony Kennedy's Legacy as a Supreme Court Justice?*, U. ILL. NEWS BUREAU (July 5, 2018, 8:30 AM), <https://news.illinois.edu/view/6367/668358> (interview with Dean Vikram Amar).

16. Those numbers total 95 out of 101 total on my list. A few of Kennedy’s opinions in criminal cases embody rulings that I would not categorize in either direction.

17. That is, for cases that Kennedy wrote after Justice O’Connor retired in 2006 and was replaced by Justice Alito, my count has twenty-seven opinions favoring the defense versus only eleven favoring the government. This “liberalizing” trend in Kennedy’s votes starting in 2006 has been noted by others, although my claim is based on decisions he wrote, not just votes. Cf. Thomson-DeVeaux, *supra* note 14 (noting that Kennedy was “likelier to side with the liberals once he became the court’s swing vote”).

18. 138 S. Ct. 1518 (2018) (holding that the driver of rental car presumptively has a “reasonable expectation of privacy” protected by the Fourth Amendment even if not listed on the rental agreement).

19. 498 U.S. 146 (1990) (holding that under *Miranda v. Arizona*, 384 U.S. 436 (1966), when questioning of an accused in custody stops upon a request for counsel, questioning must not begin again until counsel is physically present).

20. 566 U.S. 156 (2012); 566 U.S. 134 (2012) (plea bargaining cases).

*States*,<sup>21</sup> *Brown v. Plata*,<sup>22</sup> *Boumediene v. Bush*,<sup>23</sup> and his early decision in *United States v. James Daniel Good Real Property*.<sup>24</sup>

Interestingly, my overall impression is that Justice Kennedy was more defense-friendly when he was writing than when he was just voting. In my counting, his overall “pro-defense” percentage when writing was about 52%, rising to roughly 70% after 2006. By contrast, another analysis based on Kennedy’s overall voting record (not just his writings) categorized Kennedy as about 57% “conservative” after 2006, and 80% conservative overall.<sup>25</sup> If that figure is intended to mean that Kennedy voted “pro-defense” only 20–43% of the time, it is significantly lower than my analysis of Kennedy’s writing-only views.

One might ask: did Justice Kennedy’s instincts become more defense-friendly once he was actually writing? Or did he simply assign to himself (when he could) the more “liberal” criminal law opinions? Given Kennedy’s position as Senior Associate Justice starting in 2006, and the conservative leanings of his Chief Justices (Rehnquist and then Roberts), Justice Kennedy was not infrequently in the position of *assigning* majority opinions when the result was pro-defense in a divided Court.<sup>26</sup> Other explanations are of course possible, including random chance—if my characterization of Justice Kennedy’s writings is even accurate.<sup>27</sup> Future biographers will have to do the detailed mining that this Essay merely suggests.

#### B. “BALANCED LIBERTY”: JUSTICE KENNEDY’S EXPANSIVE VIEW OF LIBERTY IS MUTED IN HIS CRIMINAL CASE OPINIONS

It is well-recognized that a central motivating theme in Justice Kennedy’s judicial work has been a concept of “liberty.”<sup>28</sup> Just for example, when Kennedy

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21. 572 U.S. 844, 853 (2014) (holding that an individual defendant has standing to raise a Tenth Amendment challenge).

22. 563 U.S. 493 (2011) (prison conditions).

23. 553 U.S. 723 (2008) (due process for wartime detainees).

24. 510 U.S. 43 (1993) (asset forfeiture).

25. Thomson-DeVeaux, *supra* note 14, chart 3. Thomson-DeVeaux’s analysis was based on data and characterizations drawn from the Epstein Database, *supra* note 8. It is unclear whether that database’s “conservative” characterization would correspond with my own “pro-government in criminal cases” evaluation. Moreover, Professor Epstein might not agree with Thomson-DeVeaux’s use of data or characterizations.

26. Of course, some of Justice Kennedy’s pro-defense opinions, for example *Byrd v. United States*, 138 S. Ct. 1518 (2018), were unanimous, meaning that his assignment came from the Chief, not himself. But if the Chief was in dissent while Kennedy was in the majority, after 2006 Kennedy was the Senior Associate Justice and thus would make the majority assignment. Helen Knowles describes this phenomenon somewhat similarly, calling Justice Kennedy the “Senior Associate Justice of a specific voting coalition.” KNOWLES, *supra* note 4, at 241.

27. Cf. Ilya Shapiro, *Justice Kennedy: The Once and Future Swing Vote*, CATO INST. (Nov. 13, 2016), <https://www.cato.org/publications/commentary/justice-kennedy-once-future-swing-vote> (“Kennedy’s rulings defy categorization . . .”).

28. Indeed, “liberty” was the titled theme of the two books addressing Kennedy’s jurisprudence (both coincidentally published in 2009). See COLUCCI, *supra* note 4 (entitled *Justice Kennedy’s Jurisprudence: The*

announced his retirement in Summer 2018, Chief Justice John Roberts chose as the topic of his published tribute a list of Justice Kennedy's "suggested readings on liberty," which Kennedy had prepared first for his grandchildren and then the public.<sup>29</sup>

In fact, Justice Kennedy told us from the beginning that "liberty" was a central theme for him: in his 1987 Senate confirmation hearing he explained that "the enforcement power of the judiciary is to insure that the word "liberty" in the Constitution is given its full and necessary meaning."<sup>30</sup>

Other themes in Justice Kennedy's jurisprudence have of course also been noted, most obviously "dignity"<sup>31</sup> and "equality."<sup>32</sup> Yet a concept of constitutional liberty seems, to me, to be the most fundamental fulcrum on which Justice Kennedy's jurisprudence has turned.

Thus, for example, the substantive exposition in Justice Kennedy's perhaps most overall impactful decision, *Obergefell v. Hodges*, begins by asserting that "[t]he Constitution promises liberty to all within its reach."<sup>33</sup> Then Kennedy's early assertion in *Obergefell*—"the identification and protection of fundamental [liberty] rights is an enduring part of the judicial duty"<sup>34</sup>—bears a striking similarity to his testimony during his confirmation hearings almost thirty years earlier. As he explained at that 1987 hearing, "there is a zone of liberty . . . a line that is drawn where the individual can tell the Government: Beyond this line you may not go."<sup>35</sup> He candidly told the Senate that identifying where this "uncertain" constitutional line should be "is the judicial function."<sup>36</sup>

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*Full and Necessary Meaning of Liberty*); KNOWLES, *supra* note 4 (entitled *The Tie Goes to Freedom: Justice Anthony M. Kennedy on Liberty*); see also, e.g., Jeffrey Rosen, *The Justice Who Believed in America*, ATLANTIC (June 27, 2018), <https://www.theatlantic.com/ideas/archive/2018/06/celebrating-anthony-kennedy/563966/> (discussing Kennedy's "broad vision of constitutional liberty").

29. Chief Justice John G. Roberts, Jr., *In Tribute: Justice Anthony M. Kennedy*, 132 HARV. L. REV. 1, 1, app. at 24–27 (2018) (appending the list, apparently titled by Kennedy as *Understanding Freedom's Heritage: How to Keep and Defend Liberty*).

30. *The Nomination of Anthony M. Kennedy to Be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 100th Cong. 122 (1987) [hereinafter *Hearing*]. This statement provided the title for Professor Colucci's thorough 2009 book. See COLUCCI, *supra* note 4, at 8.

31. See e.g., Gary Feinerman, *Tribute: Civility, Dignity, Respect, and Virtue*, 71 STAN. L. REV. ONLINE 140 (2018) (tribute to Kennedy upon his retirement); Yuvraj Joshi, *The Respectable Dignity of Obergefell v. Hodges*, 6 CALIF. L. REV. CIR. 117 (2015); Charles Lane, *Commentary: Justice Kennedy's Unifying Theme Was Dignity*, BULLETIN (July 1, 2018, 10:13 PM), <https://www.bendbulletin.com/opinion/6348418-151/commentary-justice-kennedys-unifying-theme-was-dignity>; Leah Litman, *Dignity and Civility, Reconsidered*, 70 HASTINGS L.J. 1225 (2019). Indeed, in the unsigned *per curiam* opinion for which Justice Kennedy supplied the dispositive fifth vote to end the 2000 Presidential election, the opinion referred to "the equal dignity owed to each voter." *Bush v. Gore*, 531 U.S. 98, 104 (2000).

32. See AKHIL REED AMAR, *THE LAW OF THE LAND: A GRAND TOUR OF OUR CONSTITUTIONAL REPUBLIC* 78 (2015) (titled Chapter 4 as *California: Anthony Kennedy and the Ideal of Equality*).

33. 135 S. Ct. 2584, 2593 (2015).

34. *Id.* at 2598.

35. *Hearing*, *supra* note 30, at 86.

36. *Id.*

For Kennedy, that line appears to have moved closer to the government's side when criminal law issues were at stake. In civil "due process" cases, Justice Kennedy often wrote expansively about his concept of liberty (whether to the praise or criticism of others). But his concept of constitutional liberty was focused primarily on individual freedom as it might be exercised in the non-criminal context.<sup>37</sup> That is, Justice Kennedy's expansive vision of liberty was developed mainly for law-abiding persons. Thus Kennedy wrote in *Casey* in 1992 that "[a]t the heart of liberty is the right to define one's own concept of existence."<sup>38</sup> Almost twenty-five years later in *Obergefell*, he wrote similarly, but with a significant qualifier: "The Constitution promises . . . a liberty that includes certain specific rights that allow persons, *within a lawful realm*, to define and express their identity."<sup>39</sup>

I think the qualifier in that sentence—"within a lawful realm"—is revealing. When claims were presented outside the "lawful realm"—that is, in the criminal context—Justice Kennedy's relatively unrestrained vision of constitutional liberty was frequently tempered.<sup>40</sup> Outside the context of capital punishment—a repeated object of the Justice's attention, second in legacy, perhaps, only to his decisions addressing same-sex issues—Justice Kennedy's criminal law jurisprudence was often balanced by deferential attitudes favoring governmental law enforcement interests and public order or safety.

Justice Kennedy did not seek to hide or disguise this view. In an otherwise obscure 2017 criminal habeas opinion, *Weaver v. Massachusetts*, he clearly laid out his balanced view of "liberty" in the criminal context: "In the criminal justice system, the constant, indeed unending, duty of the judiciary is to seek and to find

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37. This focus on liberty as expressed in *civil* freedom contexts is reflected in the title of Knowles' book about Kennedy, KNOWLES, *supra* note 4 (in a book hardly mentioning criminal cases at all).

38. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (plurality opinion). The passage went on to list "one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Id.* Although the controlling plurality opinion in *Casey* listed three authors, this passage is universally attributed to Justice Kennedy. *Id.* at 843, 844 (opinion of Kennedy, O'Connor & Souter, JJ.). And while the last phrase ("mystery of human life") was, in my view, entirely appropriate in an opinion seeking to bring peace to the battle over when life begins, Justice Scalia, ever the poor loser, later mocked it in his dissent in *Lawrence* as the "famed sweet-mystery-of-life passage." *Lawrence*, 539 U.S. at 588 (Scalia, J., dissenting).

39. *Obergefell*, 135 S. Ct. at 2593 (emphasis added). In his *Obergefell* dissent, Justice Scalia—again mockingly, unfairly, and without precision—compared this phrasing to "the mystical aphorisms of the fortune cookie." *Id.* at 2630 n.22 (Scalia, J., dissenting).

40. Some might argue that *Lawrence v. Texas*, 539 U.S. 558 (2003), is an obvious exception. *Lawrence* was of course a criminal case, in which Justice Kennedy nevertheless wrote expansively about the right of liberty. He began the opinion with the word "Liberty," *id.* at 562, and immediately wrote expansively: "Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty . . . in its more transcendent dimensions." *Id.* But *Lawrence*, it seems to me, was not about the liberty of criminal defendants, but rather about liberty for us all. Indeed, Kennedy's opinion was declaring that the conduct at issue may *not* be criminalized by the state. I necessarily "count" *Lawrence* as one of Justice Kennedy's "criminal cases." But I doubt that the Justice himself—or the public—so considers it.

*the proper balance* between the necessity for fair and just trials and the importance of finality of judgments.”<sup>41</sup>

This “balanced liberty” approach in criminal cases is seen even when Kennedy is ruling for defendants, not just against them. Thus in *Lafler v. Cooper*, while expanding the constitutional right of criminal defendants to effective counsel in plea bargaining, Kennedy explained that any *remedy* must consider “competing interests” and “not grant a *windfall* to the defendant or needlessly squander the considerable resources the State *properly* invested in criminal prosecution.”<sup>42</sup> Similarly, in examining whether a cheek swab for DNA can be taken constitutionally merely upon arrest, Justice Kennedy first noted the “invasion of ‘cherished personal security’” that even a cheek swab of an arrested person represents.<sup>43</sup> But he then went on to happily apply the modern balancing test for Fourth Amendment questions which “requires a court to weigh ‘the promotion of legitimate governmental interests.’”<sup>44</sup> Stressing “the need for law enforcement officers” to be able to conduct their jobs “in a safe and accurate way” as well as other law enforcement interests, Kennedy ultimately concluded that the swab could be taken without a warrant or even probable cause.<sup>45</sup>

Justice Kennedy could certainly write on occasion in criminal cases with his trademark expansiveness. Thus in an early Fourth Amendment case, he broadly wrote that “[t]he Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by [government] officers.”<sup>46</sup> But while ruling in that case that drug and alcohol testing can constitute a government “search,” he went on to explain that the government’s “special needs” in this area justified warrantless drug testing procedures without individualized suspicion.<sup>47</sup> He then concluded with expansive remarks about the dangers of drug use, rather than about the liberty interests of the persons tested: “The possession of unlawful drugs is a criminal offense that the Government may punish, but it is a separate and far more dangerous wrong to perform certain sensitive tasks while under the influence of those substances.”<sup>48</sup>

Kennedy’s less expansive approach to liberty in criminal cases can be seen in contrasting writing styles. While Justice Kennedy might begin an important civil case with expansive generalities (for example, “Liberty finds no refuge in a jurisprudence of doubt”<sup>49</sup>), his criminal case opinions usually began with a

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41. 137 S. Ct. 1899, 1913 (2017) (emphasis added).

42. 566 U.S. 156, 170 (2012) (emphases added) (citation omitted) (internal quotation marks omitted).

43. *Maryland v. King*, 569 U.S. 435, 446 (2013) (quoting *Cupp v. Murphy*, 412 U.S. 291, 295 (1973)).

44. *Id.* at 448 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)). In *King*, Kennedy repeatedly relied on his earlier decision that similarly had found the constitutional balance to weigh in favor of drug-testing, *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602 (1989). See *King*, 569 U.S. at 446–48, 462.

45. *King*, 569 U.S. at 449.

46. *Skinner*, 489 U.S. at 613–14.

47. *Id.* at 619, 624, 628, 633.

48. *Id.* at 633.

49. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992).

straightforward factual description. For instance, in *Maryland v. King*, the important DNA cheek swab case noted above, Justice Kennedy began with: “In 2003 a man concealing his face and armed with a gun broke into a woman’s home.”<sup>50</sup> This straightforward, unexpansive style was apparent even when Kennedy was writing in a criminal defendant’s favor. For example, in *Missouri v. Frye*—an important and progressive case which ensured the right to effective counsel in criminal plea bargaining—Kennedy began simply with a statement of the Sixth Amendment right.<sup>51</sup>

Thus the “zone of liberty” for individuals convicted or accused of criminal acts seems to have been consistently smaller in Justice Kennedy’s world than that surrounding civil liberties. Expansion of legal doctrine in Kennedy’s criminal cases was incremental, and his expositions were usually straightforward, uninspiring, and balanced.<sup>52</sup> In fact, I would say (without criticism) that overall, Justice Kennedy’s opinions in criminal cases are dull. They lack unrestrained odes to individual liberty and dignity (again with the recognized exception of his capital punishment jurisprudence).

With over two hundred opinions in criminal cases authored by Justice Kennedy to choose from, the foregoing few examples could be multiplied (and undoubtedly an exception or three might be found). But, as Professor Ahkil Amar once famously explained in cutting a list short, “I am a lover of mercy.”<sup>53</sup>

### C. JUSTICE KENNEDY’S “BALANCED LIBERTY” APPROACH WAS LESS DEFENDANT-FRIENDLY IN THE HABEAS CONTEXT

The quote from *Weaver*, above, captures the essence of Justice Kennedy’s somewhat less-defendant-friendly balancing in those criminal cases that came before the Court not on direct appeal but through some mechanism of “collateral review.” For convenience, criminal justice scholars tend to call such cases, whether from state or federal courts, “habeas” cases,<sup>54</sup> employing the shorthand label derived from the Constitution’s mention of the Great Writ.<sup>55</sup>

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50. *King*, 569 U.S. at 439.

51. 566 U.S. 134, 138 (2012) (“The Sixth Amendment . . . provides that the accused shall have the assistance of counsel in all criminal prosecutions.”). In the companion case to *Frye*, *Lafler v. Cooper*, 566 U.S. 156 (2012), Kennedy began similarly with an unexciting statement of the question presented. *Lafler*, 566 U.S. at 160 (“In this case . . . a criminal defendant seeks a remedy when inadequate assistance of counsel caused nonacceptance of a plea offer . . .”).

52. *E.g.*, *Lafler*, 566 U.S. at 170.

53. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 770 (1994).

54. The law and literature on habeas corpus is deep and unending, just try a Google search. For a sampling, see ERIC M. FREEDMAN, *HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY* (2001); ERIC M. FREEDMAN, *MAKING HABEAS WORK: A LEGAL HISTORY* (2018); ANDREA D. LYON ET AL., *FEDERAL HABEAS CORPUS: CASES AND MATERIALS* (2005); BRIAN R. MEANS, *FEDERAL HABEAS MANUAL: A GUIDE TO FEDERAL HABEAS CORPUS LITIGATION* (2018).

55. U.S. CONST., art. I, § 9, cl. 2: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” Habeas corpus actions are technically civil cases, although the doctrine allows federal courts to review, within statutory and constitutional

Without reviewing every Kennedy habeas opinion in detail, my overall impression is that he gave “finality” concerns more weight in his “balanced liberty” approach when examining criminal law issues in collateral “habeas” cases. In addition to *Weaver*, another example is *Calderon v. Thompson*, in which Kennedy invoked “the deep-rooted policy in favor of the repose of judgments,” the “jurisprudential limits applicable in habeas corpus cases,” and “the profound societal costs that attend the exercise of habeas jurisdiction,” to reverse a Ninth Circuit stay of execution as “a grave abuse of discretion.”<sup>56</sup> These interests counterbalanced, in *Calderon*, Justice Kennedy’s often stronger liberty instincts in death penalty cases.<sup>57</sup> Many might agree with Justice Kennedy’s opinion in *Calderon*; it was certainly a highly unusual exercise of power by the Ninth Circuit. But four Justices did not.<sup>58</sup> *Calderon* is an example of Justice Kennedy’s position, whether swinging or not,<sup>59</sup> as the dispositive fifth in many cases. Where he struck his own balance was often where the Court struck its result. And on criminal habeas review, that balance was often for the government.

I find numerical counts for “habeas” cases even less satisfying than the counts discussed above.<sup>60</sup> If you must have numbers, my categorizing puts the number of Kennedy-authored habeas opinions at thirty-four; of these, nineteen went against the defense position, while fifteen were pro-defendant. However, over half of the “pro-defense” decisions involved death penalties, an area in which Justice Kennedy had special concerns in tension with his usual balanced concern for law enforcement interests in criminal cases.<sup>61</sup> In non-death habeas

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limits, the validity of state, as well as federal, criminal convictions, usually after the conviction has become “final” through direct appeal. Thus the federal court’s review is “collateral” to the original trial and direct appeal. Habeas is not just federal; many states also provide procedural means by which “final” criminal convictions may be judicially reviewed. *E.g.*, CAL. PENAL CODE §§ 1473–1509.1 (West 2018). But the United States Supreme Court, of course, can only review a habeas case, whether state or federal, if it presents a “federal question” or otherwise meets the requirements of Article III.

56. 523 U.S. 538, 551 (1998) (internal quotation marks omitted) (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944)); *id.* at 553; *id.* at 554 (internal quotation marks omitted) (quoting *Smith v. Murray*, 477 U.S. 527, 539 (1986)); *id.* at 542.

57. *See infra* pp. 1255–56.

58. *See Calderon*, 523 U.S. at 566 (Souter, J., joined by Stevens, Ginsburg & Breyer, JJ., dissenting).

59. Justice Kennedy has famously asserted that “the cases swing, I don’t.” *E.g.*, Andrew M. Duehren, *At Law School, Justice Kennedy Reflects on Cases, Time as Student*, HARV. CRIMSON (Oct. 23, 2015), <https://www.thecrimson.com/article/2015/10/23/justice-kennedy-harvard-law/>.

60. A narrow procedural category of “habeas” is unsatisfying because, for example, the precise mechanism for bringing a criminal judgment before the Court collaterally might not be called “habeas”; for example, it is sometimes difficult to distinguish § 1983 cases from habeas cases in terms of issues and concerns. *See, e.g.*, *Hill v. McDonough*, 547 U.S. 573 (2006). In addition, direct appeals from state court criminal judgments often raise many of the same “finality” and federalism concerns as do habeas cases.

61. *See infra* pp. 1255–56. I count nine habeas-death penalty cases as “pro-defense:” *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016); *Hall v. Florida*, 572 U.S. 701 (2014); *Graham v. Florida*, 560 U.S. 48 (2010); *House v. Bell*, 547 U.S. 518 (2006); *Roper v. Simmons*, 543 U.S. 551 (2005); *Panetti v. Quarterman*, 537 U.S. 322 (2003); *Miller-El v. Cockrell*, 537 U.S. 312 (2003); *Williams v. Taylor*, 529 U.S. 420 (2000); and *Stringer v. Black*, 503 U.S. 222 (1992). I include *Montgomery* and *Graham* because they addressed a criminal punishment

cases, then, the balance of Justice Kennedy's jurisprudence swings markedly in favor of the government.

D. EXPANSIVE, IMPACTFUL, AND CONSISTENT JURISPRUDENCE IN JUSTICE KENNEDY'S CRIMINAL CASEWORK

While recognizing Justice's Kennedy's "balanced liberty" approach to criminal cases, and his often pro-government results in habeas cases, it is important to recognize that there are consistent areas of exception to these generalized claims. Below, I will briefly discuss two: Justice Kennedy's clear concern for liberty and dignity in cases involving race bias or the death penalty. Then I briefly point out his consistent and impactful development of an important concept of criminal law mens rea: "willful blindness."

1. *Race Bias and Death Penalty Concerns Consistently Shifted Kennedy's Criminal Balance Toward Liberty*

Justice Kennedy repeatedly wrote about his concerns regarding racial bias in criminal cases, which not infrequently swung him to a pro-defendant result, whether in habeas or direct review of state judgments. Thus in the habeas case of *Miller-El v. Cockrell*,<sup>62</sup> and the more recent direct state-court appeal of *Pena-Rodriguez v. Colorado*,<sup>63</sup> Justice Kennedy's strong distaste for evidence of race bias led him to grant relief for criminal defendants.

And when issues of race bias came before him, Justice Kennedy did not hesitate to write expansively. Thus his opinion in *Pena-Rodriguez* began with an expansive paean to the value of a fair jury trial in criminal cases as reflecting "acceptance in the community . . . [that is] essential to respect for the rule of law."<sup>64</sup> When evidence of race bias in criminal jury deliberations seemed clear, as in *Pena-Rodriguez*, Justice Kennedy was quick to condemn in expansive terms: "It must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons," giving force to the constitutional "imperative to purge racial prejudice from the administration of justice."<sup>65</sup>

Similarly, even in a collateral habeas attack, when race bias threatened criminal justice Justice Kennedy ruled for the defendant. In *Miller-El*, Kennedy wrote to permit a detailed comparative analysis of a prosecutor's use of peremptory jury strikes that appeared to be based on race, as well as

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of "life without parole," which I prefer to call simply a "slow death penalty" since the defendant must die in prison. See *Miller v. Alabama*, 567 U.S. 460 (2012) (extending Eighth Amendment protections to life without parole sentences for juveniles based on capital case considerations). Justice Kagan's opinion in *Miller* was undoubtedly influenced by Kennedy's writing in *Graham*, and Kennedy joined her opinion.

62. 537 U.S. 322.

63. 137 S. Ct. 855 (2017).

64. *Id.* at 860.

65. *Id.* at 867. A juror who voted to convict *Pena-Rodriguez* was later shown to have expressed and relied upon, in the jury room, racial bias and stereotypes. *Id.* at 862.

consideration of historical evidence of race bias in the jurisdiction's jury selection procedures.<sup>66</sup> Soft-peddling his detailed examination of the record in *Miller-El* as merely a "threshold examination," and only "question[ing]" the state officials' explanations—tongue solidly in cheek?—Justice Kennedy firmly endorsed the defense position for a unanimous court.<sup>67</sup>

*Miller-El* involved the intersection of two of Justice Kennedy's largest apparent concerns in criminal cases: racial bias<sup>68</sup> and the death penalty. It may be that Justice Kennedy's strongest historical legacy will rest with the same-sex cases that others in this Symposium have discussed.<sup>69</sup> Yet a close second may be his opinions that repeatedly place limitations on the imposition of the death penalty by those states that still impose it. A list of just a few of his impactful decisions in this area must include *Roper v. Simmons*, *Kennedy v. Louisiana*, *Montgomery v. Louisiana*, *House v. Bell*, and more.<sup>70</sup>

Justice Kennedy's large impact in the area of capital punishment has been well-recognized,<sup>71</sup> although I think the major work analyzing his contributions has yet to be written.<sup>72</sup> Here, his deep concern for liberty and dignity outweighed his instinctive deference to state prerogatives and law enforcement interests, and he found that habeas restrictions, such as *Teague v. League*,<sup>73</sup> should not bar relief. For example, relatively early in his Supreme Court tenure, Kennedy wrote for a 6–3 Court in *Stringer v. Black* that *Teague* was no bar to a capital defendant's claim that the government's reliance on the vague "especially heinous, atrocious or cruel" aggravating factor in his case should invalidate his

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66. 537 U.S. 322.

67. *Id.* at 340, 343–44, 347.

68. Some have taken issue with Justice Kennedy's votes in race-based-remedy *civil* cases, although once again, when assigned to *write* the opinion Justice Kennedy recently came out in favor of an affirmative action argument. *See Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198 (2016); *see also, e.g.*, Theodore Shaw, *Justice Anthony Kennedy's Race Jurisprudence*, SCOTUSBLOG (June 29, 2018, 3:31 PM), <https://www.scotusblog.com/2018/06/justice-anthony-kennedys-race-jurisprudence/> (noting that Justice Kennedy "voted to strike down almost every-race conscious measure before him, with the exception of [*Fisher*]"). This Essay does not venture further into that thicket.

69. *E.g.*, Matt Coles, *The Profound Political but Elusive Legal Legacy of Anthony Kennedy's LGBT Decisions*, 70 HASTINGS L.J. 1199 (2019).

70. *Roper*, 543 U.S. 551 (2005) (holding that death penalty may not be applied to persons who committed their offense when under eighteen); *Kennedy*, 554 U.S. 407 (2008) (holding that death penalty may not be imposed even for an aggravated rape); *Graham*, 560 U.S. 48 (2010) (holding that juvenile offenders may not be sentenced to life without parole for non-homicide offenses); *Montgomery*, 136 S. Ct. 718 (2016) (holding that prior ruling that a mandatory life without parole sentence may not be applied to persons who committed their offense when under eighteen, is retroactive), *House*, 547 U.S. 518 (2006) (holding that when significant DNA evidence comes to light after death penalty case is final, the case may be re-opened under the new evidence standard even if defaulted under state law).

71. *See, e.g.*, Carter, *supra* note 4, at 1 (referring to Justice Kennedy as a "leader" in the area).

72. *See supra* note 6. For example, most of my review here has been limited to Justice Kennedy's work on the Supreme Court, with little review of the 144 opinions he wrote in criminal cases in twelve years as a circuit judge.

73. 489 U.S. 288 (1989) (holding that "new rules" of law may not be applied, or developed, on habeas, if the case was already "final"; and noting narrow exceptions).

death sentence.<sup>74</sup> While the *Stringer* opinion is (like all *Teague* analyses) almost impenetrably technical, Kennedy noted that “close appellate scrutiny” should be given to achieve the “individualized consideration” that the Eighth Amendment demands.<sup>75</sup>

Ten years later, and perhaps more confident in his role, Justice Kennedy gave fuller voice to his Eighth Amendment concerns in *Roper*, categorically barring the death penalty for offenders who were eighteen-years-old when they committed their offenses, and “reconsider[ing]” a contrary 1989 ruling.<sup>76</sup> He began by noting that “the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons,” and emphasized that on Eighth Amendment questions, Supreme Court Justices must exercise their “own independent judgment.”<sup>77</sup> Capital cases are different, for Kennedy, than other criminal cases: “Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force.”<sup>78</sup> Kennedy’s opinion included an expansive consideration of the position of juveniles in the capital system, and concluded that although “the State can exact forfeiture of some of the most basic liberties” from a juvenile criminal offender, “the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity.”<sup>79</sup> This metaphysical phrasing from Justice Kennedy in 2005 undoubtedly finds echoes in his writings about abortion in *Casey* and same-sex relationships in *Lawrence* and *Obergefell*.<sup>80</sup>

Among Kennedy’s major capital punishment cases I would include *House v. Bell*, a case not as widely remarked upon in the literature.<sup>81</sup> House presented a claim of “actual innocence” (although, Justice Kennedy was careful to note, “not a case of conclusive exoneration”), and Kennedy concluded that a “more likely than not” standard should apply to allow habeas consideration even if his petition was successive.<sup>82</sup> The opinion is notable, and similar to *Miller-El*, for its special consideration of habeas relief in a capital context.

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74. 503 U.S. 222, 228–29 (1992).

75. *Id.* at 230–31.

76. *Roper v. Simmons*, 543 U.S. 551, 556, 574 (2005) (ruling that the Court’s previous decision in *Stanford v. Kentucky*, 492 U.S. 361 (1989), is “no longer controlling”). In *Stanford*, Justice Kennedy, who had been on the Court for only three months, silently joined Justice Scalia’s opinion affirming a death penalty imposed on a sixteen-year-old.

77. *Roper*, 543 U.S. at 560, 564.

78. *Id.* at 568. Of course, “death is different” has been the rule for a number of other Justices, as well as the Court, for many years. See, e.g., *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

79. *Roper*, 543 U.S. at 573–74.

80. Relevant to my “criminal cases” review, Justice Kennedy ended his *Roper* opinion with even broader themes, remarking on “innovative principles original to the American experience” that are “essential to our present-day self-definition and national identity,” and among which he included the Constitution’s “specific guarantees for the accused in criminal cases.” *Id.* at 578.

81. Full disclosure: I filed an amicus brief on behalf of Mr. House for the American Bar Association. See Brief for the American Bar Association as Amicus Curiae Supporting Petitioner, *House v. Bell*, 547 U.S. 518 (2006) (No. 04-8990), 2005 WL 2367032.

82. *Bell*, 547 U.S. at 553–54.

Lastly, let us note Kennedy's decision in *Kennedy v. Louisiana* (a decision that gives life to an "unwritten rule" I smilingly tell my students exists at the Court: when a defendant has the same last name as a Justice, that Justice must write the decision). *Kennedy* prohibits imposition of the death penalty for a non-homicide rape, no matter how offensive the underlying crime might be (here, aggravated rape of an eight-year-old girl).<sup>83</sup> Capital punishment for rape is, of course, intertwined with a shameful history of racial prejudice in this country,<sup>84</sup> thus invoking dual concerns for Justice Kennedy (even as he noted "the hurt and horror inflicted" and "the revulsion [of] society" regarding this specific rape).<sup>85</sup> Justice Kennedy's ruling for the defendant found voice for his expansive "individual dignity" view: "[e]volving standards of decency must embrace and express respect for the dignity of the person, and the *punishment of criminals must conform to that rule*."<sup>86</sup> Invoking concern for "moral grounds" as well as "decency," Justice Kennedy ended by explaining his special consideration for capital verdicts within the universe of criminal cases: "In most cases justice is not better served by terminating the life of the perpetrator rather than confining him and preserving the possibility that he and the system will find ways to allow him to understand the enormity of his offense."<sup>87</sup>

Thus in the end, Kennedy is not against limiting the liberty of those convicted, or even accused, of crime. But the finality of the death penalty could override that "balanced liberty" for Kennedy, just as racial bias could override the need for finality of criminal judgments.

## 2. Justice Kennedy's Sophisticated Understanding of "Willful Blindness"

Let's end this Essay with a less depressing, I hope, topic. In 1975, just weeks after being appointed to the U.S. Court of Appeals for the Ninth Circuit, Anthony Kennedy found himself listening to en banc arguments in a case called *United States v. Jewell*.<sup>88</sup> The eleven-judge court found itself in agreement that a concept of criminal mens rea called "willful blindness" or "deliberate ignorance" should be accepted.<sup>89</sup> The case involved a defendant who had noticed an odd partition in the trunk of a car he'd been asked to drive across the border in suspicious circumstances, and chose not to look behind the partition (where

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83. 554 U.S. 407, 421 (2008).

84. See, e.g., Carol S. Steiker & Jordan M. Steiker, *The American Death Penalty and the (In)Visibility of Race*, 82 U. CHI. L. REV. 243 (2015).

85. *Kennedy*, 554 U.S. at 413.

86. *Id.* at 420 (emphasis added). Thus in the later Eighth Amendment case of *Montgomery v. Louisiana*, Kennedy was able to apply this same view to life without parole ("LWOP") sentences. See 136 S. Ct. 718, 725. Again, see *supra* note 61 for my view that LWOP is really just a "slow death penalty."

87. *Kennedy*, 554 U.S. at 447.

88. The ultimate decision in the case was published some months later. See 532 F.2d 697 (9th Cir. 1976) (en banc).

89. *Id.* at 704.

around one hundred pounds of marijuana were hidden).<sup>90</sup> The applicable federal criminal statute required that the jury find “knowledge” to convict, and the court adopted the common-law view (which it noted was also endorsed by the Model Penal Code and some prior Supreme Court decisions), that a conscious decision to avoid learning the truth, coupled with the knowledge of a high-probability that the truth (of criminal proportions) exists, can define knowledge.<sup>91</sup>

But Kennedy found himself in disagreement with the majority as to the precision of the jury instructions actually given on the topic; thus his first-ever recorded dissent in a criminal case was confidently given in the en banc context.<sup>92</sup> Although he wryly noted the aphorism that “[a]bsolute knowledge can be had of very few things,” . . . and the philosopher might add “if any,”<sup>93</sup> young Judge Kennedy cautioned that courts must be careful and precise when using a willful blindness instruction. The danger is that the jury will substitute some lesser mental state for knowledge, and convict on an impermissible negligence, or “should have known better,” theory. Judge Kennedy opined that to avoid unfairness, three additional elements should be required for a willful blindness instruction to be given.<sup>94</sup>

My point in recounting *Jewell* is twofold. First, Kennedy’s three dissenting qualifications for a willful blindness instruction have become the law today in every circuit that has discussed the concept.<sup>95</sup> All circuits “admonish that caution is necessary in giving a willful blindness instruction” and that the instruction should be used only “rarely” and only in unusual cases where “specific evidence” suggests that a defendant actively suspected criminal activity and chose to not investigate.<sup>96</sup> Justice Kennedy’s dissent, written when just a “baby judge,” has had strong and ameliorative impact on the shaping of American criminal law for all of his forty-three years.

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90. *Id.* at 698–99 & nn.1–2.

91. *Id.* at 700–03; *see also* MODEL PENAL CODE § 2.02(7) (AM. LAW INST. Proposed Official Draft 1962); *Barnes v. United States*, 412 U.S. 837, 845 & n.10 (1973); *Turner v. United States*, 396 U.S. 398, 416 & n.29 (1970); *Leary v. United States*, 395 U.S. 6, 46 & n.93 (1969).

92. *Jewell*, 532 F.2d at 705 (Kennedy, J., dissenting). A historical note of perhaps some interest: one of Kennedy’s law clerks in that first year was Alex Kozinski, who later served as an intellectually stimulating, if also flawed, judge on the Ninth Circuit.

93. *Id.* at 706 n.6 (quoting R. PERKINS, CRIMINAL LAW 78 (2d ed. 1969)).

94. *Id.* at 705–06.

95. *See, e.g.*, U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT, MODEL CRIMINAL JURY INSTRUCTIONS § 5.06 (Apr. 2015), <https://www.ca3.uscourts.gov/model-criminal-jury-table-contents-and-instructions>; *see also* *Global-Tech Appliances Inc. v. SEB S.A.*, 563 U.S. 754, 767–68 (2011) (“[E]very Court of Appeals—with the possible exception of the District of Columbia Circuit—has fully embraced willful blindness . . .” (citation omitted)).

96. *See, e.g.*, *United States v. Alston-Graves*, 435 F.3d 331, 340–41 (D.C. Cir. 2006) (internal quotation marks omitted) (quoting *United States v. Cassiere*, 4 F.3d 1006, 1023 (1st Cir. 1993)); *United States v. Heredia*, 429 F.3d 820, 824 (9th Cir. 2005) (quoting *United States v. Baron*, 94 F.3d 1312, 1318 n.3 (9th Cir. 1996)), *rev’d en banc on other grounds*, 483 F.3d 913, *cert. denied*, 552 U.S. 1077. Judge Kozinski, *see supra* note 92, wrote the en banc decision in *Heredia*, *see Comment*, 121 HARV. L. REV. 1245 (2008).

My second point in mentioning *Jewell* is to note that Justice Kennedy remained consistent regarding the willful blindness concept throughout his judicial career.<sup>97</sup> Thirty-five years after his dissent in *Jewell*, Justice Kennedy once again found himself at odds with a majority that, in his view, failed to comprehend the subtleties of the willful blindness concept. The case of *Global-Tech Appliances, Inc. v. SEB S.A.* involved “induced patent infringement,” not criminality—but “knowledge” was still required.<sup>98</sup> Justice Alito’s opinion for the Court appeared to endorse the same incomplete definition of the concept that the *Jewell* majority had in 1975—so Justice Kennedy had to, once again, dissent (characteristically politely, “with respect”).<sup>99</sup> He immediately invoked his *Jewell* dissent from thirty-five years earlier, and gave the Court a short primer on the subtle difference between “knowledge” and “willful blindness,” even though “[f]acts that support willful blindness are often probative of actual knowledge.”<sup>100</sup> Consistent to the end, through whatever “evolving” others might perceive,<sup>101</sup> Justice Kennedy warned once again that courts should not “substitut[e] . . . willful blindness for [a] statutory knowledge requirement.”<sup>102</sup> He was surely correct then, and now.

#### CONCLUSION

In forty-three years as a federal judge, thirty of them on the U.S. Supreme Court, Justice Kennedy authored over 350 majority opinions in cases addressing criminal law issues. His jurisprudence was impactful in many areas. His approach in criminal cases was consistent over time, although an increasing overall balance toward pro-defense positions can be seen during the last twelve years when he occupied the position of Senior Associate Justice on the Court. While his non-criminal opinions enshrined important principles bound up in his expansive concept of constitutional “liberty,” his criminal case decisions were typically counterbalanced by concerns for societal safety and security and deference to executive branch law enforcers. I call this Justice Kennedy’s “balanced liberty” approach to criminal cases. I do not intend this term to be normatively critical, but rather merely descriptive. Justice Kennedy’s desire to balance expansive liberty interests against the community’s self-protection from law breakers likely reflected general attitudes of society at large. Nevertheless, his balanced liberty approach when writing for a majority of the Supreme Court in criminal cases allowed progressive advances in a number of significant

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97. *Accord* Bibas, *supra* note 4, at 211 (arguing that Kennedy’s jurisprudential “approach is remarkably consistent and principled”).

98. 563 U.S. 754, 765 (2011).

99. *Id.* at 772, 775 (Kennedy, J., dissenting).

100. *Id.* at 774.

101. *See, e.g.*, Dan Roberts & Sabrina Siddiqui, *Anthony Kennedy: How One Man’s Evolution Legalized Marriage for Millions*, GUARDIAN (June 26, 2015, 3:43 PM), <https://www.theguardian.com/us-news/2015/jun/26/kennedy-ruling-gay-marriage-supreme-court>.

102. *Global-Tech Appliances*, 563 U.S. at 773 (Kennedy, J., dissenting).

doctrinal areas, such as capital punishment, race issues, plea bargaining, and prison reform. His forty-three years of service to the country were impactful and creditable, and history is sure to rank him among the most influential Justices of our time.

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