

**Anthony D'Amato, The Ultimate Injustice: When a Court Misstates the Facts**, 11 *Cardozo Law Review* 1313 (1990). (Code A90f)

The Symposium of which this essay is a part is entitled "Deconstruction and the Possibility of Justice." If we take the most elementary interpretation of the last term, "justice"-at a level even more basic than that explored by Jacques Derrida when he patiently deconstructed the title of this Symposium-we must acknowledge that justice, in any situation, depends upon a full and fair accounting of the facts of that situation. If, instead of facts, fictions are introduced that are contrary to the facts, then any claimed "just solution" based on such fictions cannot [FN1] achieve justice in the real world. [FN2] The proposition is so elementary that it usually goes without saying.

Consider a trial of a person accused of murder. The purpose of the trial is to present all the relevant facts of a case-facts that are recounted by means of witnesses and evidence. All the elaborate rules of evidence and penalties for perjury are designed to present the fairest possible statement of the true facts to the jury. Suppose that at such a trial the jury heard from witnesses for the prosecution that the defendant was a mile and a half away from the scene of the crime when the murder was committed. Suppose, remarkably, that there is no challenge made to that evidence-not by the prosecutor, who introduced it as part of the prosecution's case, nor by the defendant \*1314 because the evidence exculpates him. Yet, at the end of the trial, the jury brings in a verdict of murder.

This simple hypothetical case immediately leads a deconstructionist-minded reader to wonder how such a situation in a trial could ever come about in the first place. Wouldn't the police and state attorneys have interviewed the witnesses who established that the defendant was somewhere else when the crime was committed? Why, then, was the defendant arrested, indicted, and brought to trial? But, in thinking through these possibilities, we must acknowledge our underlying assumption that the police and prosecutor are acting in good faith. If they are not-if, for example, the arrest and indictment of the defendant were arranged for political reasons-then such a scenario is indeed possible.

We can also be perplexed about the trial judge in the case. Surely a trial judge would direct a verdict for the defendant as soon as the prosecution's witnesses at trial established that the defendant could not possibly have committed the crime. Yet it is also possible to imagine that the judge was corrupt. In *Branion v. Gramly*, [FN3] the case I will be describing in this essay, the trial judge, Reginald Holzer, was subsequently convicted of extortion in the Chicago Greylord investigations, [FN4] and the prosecutor in the *Branion* case subsequently provided an affidavit detailing suspicious post-trial conduct by Judge Holzer. [FN5] A corrupt judge looking to extort money from the defendant might very well refuse to direct a verdict in the defendant's favor even if there was overwhelming exculpatory evidence. [FN6]

What about the jury? How could the jury convict a defendant who could not possibly have committed the crime? Suppose, however, that at the trial, the prosecutor was extremely effective and the defense attorney manifestly ineffective. Suppose further that the defendant is black, the jury is predominantly white (in the *Branion* case, eleven out of twelve jurors were white [FN7]) and the trial takes place at a time of extreme racial tension (the *Branion* trial occurred in Chicago during the race riots and burnings of

May 1968, the month after the assassination of Martin Luther King, Jr.). Suppose the defendant \*1315 "looked suspicious" and did not take the stand. [FN8] These facts could explain, though certainly not excuse, the jury's behavior.

It may be objected that the chain of coincidences I have described- politically motivated arrest and indictment plus corrupt trial judge plus incompetent defense counsel plus prejudiced jury-is extraordinarily unlikely to occur in real life. Indeed, it is unlikely. Criminal law experts have told me that they have never read or heard about a case where innocence was conclusively proven at trial by the prosecution! I have done a great deal of research on the Branion case, and the case has received national publicity. [FN9] Yet no other case of proved innocence at trial has come to my attention. To be sure, there are numerous cases of alleged gross miscarriages of justice, [FN10] and undoubtedly among this number are innocent persons who were convicted. [FN11] But in all those cases, the exculpatory evidence was obtained after the trial: evidence, for example, that the prosecution's witnesses were suborned-as depicted in the motion picture *The Thin Blue Line*-or DNA tests proving that the defendant did not engage in sexual intercourse with the rape victim-as in the case of Gary Dotson of Illinois. [FN12] In the Branion case, however, the prosecution, in presenting the state's case against Dr. Branion, conclusively proved that Dr. Branion could not possibly have committed the crime.

This essay deals with what "the law" did to Dr. Branion after the jury convicted him of murder in 1968. Under the American legal system, a defendant is entitled to have his case reviewed by a higher court, and, under certain circumstances, if the appellate review is unsuccessful, to present a petition for habeas corpus to a state or federal court. Dr. Branion's murder conviction was reviewed and affirmed by the Illinois Supreme Court in 1970. [FN13] That court also denied his request for a rehearing. [FN14] The Supreme Court of the United States denied \*1316 Dr. Branion's request for certiorari in 1971. [FN15] Fourteen years later, I became involved in his case for the first time. After extensive investigation, I filed a petition for habeas corpus in federal court in 1986; [FN16] there was no available habeas corpus remedy in the Illinois state courts. [FN17] I will focus primarily on the stage of Dr. Branion's litigation with which I am most familiar: his pursuit of a habeas remedy in federal court between 1986 and 1989. I will try to explain how one federal judge after another, using reasons wholly inconsistent inter se, managed to affirm the conviction of a provably innocent man. [FN18]

If there was any possibility of justice for Dr. Branion in appealing his case to federal judges, the possibility was extinguished by the issuance of judicial texts that fictionalized the facts of the case. The net result of the federal habeas proceedings on behalf of Dr. Branion is that a man was condemned by law to remain in prison for a crime he did not commit and could not possibly have committed.

## I. THE FACTS

Since this is a paper about justice, I believe it is important to present a brief biographical sketch of John Branion, as well as a brief account of the facts of the morning of the crime. [FN19] Strictly speaking, the biographical sketch may not be "relevant" to a discussion of what happened to Dr. Branion's case in the federal courts. [FN20] But the word "relevant"- surely one of the most used and misused words in the \*1317 annals of law- begs the legal question. Indeed, where justice is concerned,

it invariably begs the question. [FN21]

John Branion's father was raised by a white family who gave him the name John Marshall Branion. Perhaps the name inspired his father to go to law school; he later became Chicago's first black public defender and would have been made chief public defender except for the discrimination of the day against blacks. My client, John Marshall Branion, Jr., was born in 1926. John met his future wife, Donna Brown, at Englewood High School, where John was a star football player. During World War II, John joined the Air Force Engineers and served as a corporal in the South Pacific. He was honorably discharged in 1946 with three service medals. In that year, he and Donna were married. He then attended the University of Illinois on the G.I. bill and earned a degree in pharmacology. He wanted to be a doctor, but it was very difficult for blacks to be admitted to medical school in the United States in the 1950s. John and Donna went to Switzerland where John entered the medical school at the University of Lausanne. Since the classes were conducted in French and German, he had to teach himself both languages. He graduated with a degree in medicine in 1957. The Branion's child, Jan, a girl, was born while they were in Switzerland.

John, Donna, and Jan returned to Chicago and John began an internship at Cook County Hospital as an obstetrician-gynecologist; he also did clinical work at the Ida Mae Scott Hospital. In addition to his work, John was passionately committed to the civil rights movement, in contrast to Donna's lack of interest. Donna, in fact, was the daughter of one of the wealthiest black families in the nation, and the family as a whole did not associate itself with the civil rights movement. During the 1960s, John had an extramarital relationship with a nurse, Shirley Hudson, who shared his devotion to the civil rights cause. During the famous housing marches in Chicago in 1967, John and Shirley marched at the side of the Reverend Martin Luther King, Jr. John acted as Dr. King's personal physician for the marches, and, on one occasion, shielded Dr. King with his own body from bricks and stones that were thrown at the marchers from the nearby rooftops. Despite his friendship with Shirley Hudson, John \*1318 lived at home with Donna and their two children, Jan and Joby, their adopted son, and always spent his vacations together with his family.

John admits that he was on United States Attorney Edward Hanrahan's list of undesirables not only because of his involvement in the housing marches, but also because he had treated members of the Black Panther and Blackstone Rangers organizations for gunshot wounds, inflicted by the police, without reporting those treatments to the police. [FN22]

Donna Branion was murdered on December 22, 1967, three days before Christmas. After breakfast that morning, John drove his four-year-old son, Joby, to nursery school and then went on to the Ida Mae Hospital, arriving at the hospital at 9 A.M. Jan walked to her school. At 10:15 A.M. Donna had a phone conversation with her sister, Joyce Tyler.

An hour later, sometime between 11:15 A.M. and 11:25 A.M., Teresa Kentra, the next-door neighbor, heard shots and a commotion in the Branion apartment. [FN23] At this time, Dr. Branion was the only doctor on duty at the hospital and was seeing one of his last patients in a total of thirteen that he saw that morning in addition to an emergency patient. John saw his thirteenth patient briefly at

11:27 A.M.; he left the hospital at 11:30 A.M. according to the state, but perhaps as late as 11:34 A.M. according to an affidavit from the admission nurse. [FN24] The hospital was about a mile and a half away from his apartment. Thus, at the moment Donna Branion was killed, John Branion was a mile and a half away from the scene of the crime attending his patients at the hospital. I have selected four major points for Dr. Branion's defense of impossibility. Let us call Teresa Kentra's \*1319 earwitness testimony, placing the crime at about 11:25 A.M., Point One of this analysis.

Point Two of the impossibility defense concerns durations of time: what did Dr. Branion do, and how long did it take him to do it, between the time he left the hospital and the time the police were notified by telephone about the murder? When Dr. Branion left the hospital, he got into his car and drove to the nursery school to pick up Joby. The police estimated the driving time from the hospital to Joby's nursery school to be between four and five and one-half minutes. Dr. Branion went into the school, took off his coat, and helped Joby put on his winter clothes. Dr. Branion then put his own coat back on and led Joby out of the school. The nursery school teacher testified for the state that Dr. Branion spent about five minutes dressing Joby.

Dr. Branion then put Joby in the car and drove to the office of Maxine Brown, Donna's cousin. The police estimated the driving time from Joby's nursery school to Maxine's office to be between one and two minutes. Dr. Branion went inside and talked with Maxine. She was supposed to come to lunch, but had some errands to do for her boss so she took a rain check. Maxine testified for the state that her conversation with Dr. Branion did not take more than a couple of minutes.

Dr. Branion then put Joby back in the car and drove to his apartment. The police estimated the driving time from Maxine's office to the Branion home to be between one and two minutes. It should be noted that all the police tests estimating driving times between events were conducted a month or two after the crime when the streets were not as crowded. On the morning of the murder, however, the streets were crowded: it was just before noon on the next-to-last shopping day before Christmas in the retail area of Hyde Park. The police also stated at trial that they only computed the actual driving time, and not the time it took to get in and out of the car, handle the child, start up the car, or find parking places. [FN25]

\*1320 Dr. Branion took his son into the apartment and called for Donna. There was blood on the kitchen wall and in the master bedroom sixty feet away from the utility room. Dr. Branion and Joby found Donna's body in a pool of blood in the utility room off the kitchen. Lifting Joby to shield him from the sight, Dr. Branion ran out onto the back porch and called for a neighbor. Joby was left in the care of a neighbor on the second floor, and a doctor from the third floor came down and viewed the body. The doctor's brother called the police. The call was logged at 11:57 A.M.

The time from when Dr. Branion left the hospital to the time the police were called can be recounted in minutes as follows:

Nursery school drive (state's estimate)	5
Dress Joby (state's estimate)	5
Drive to Maxine (state's estimate)	2
Talk with Maxine (state's estimate)	2
Drive to apartment (state's estimate)	2
Find body, summon neighbors, call police (state's estimate)	4
Times to get in and out of car and park (4 times, my estimate)	3
Total Duration	27

Since the state's view of the window of opportunity for Dr. Branion began at 11:30 A.M. and ended at 11:57 A.M., the above chart accounts for every minute of the twenty-seven minutes without allowing any time for the alleged commission of the murder.

Point Three of the impossibility defense came as a surprise at the trial. The state's forensic pathologist testified that he found a deep groove bruise mark around Donna's neck, suggesting that Donna was restrained before she was shot. The pathologist estimated the garroting time to be between fifteen and thirty minutes. Hence the killer or killers were restraining Donna-perhaps by the ironing cord that was found looped around her arm-for at least fifteen minutes before they killed her. If we take the minimum estimation of fifteen \*1321 minutes, we would have to add that time to the table of durations, giving a total of forty-two minutes.

Indeed, when we consider the duration that must have been necessary to murder Donna Branion, we find that it must have taken five or six minutes longer than the fifteen minutes of garroting time. This additional time could be labelled Point Four in the impossibility defense. Point Four consists of various "transaction times," and we will consider these "transaction times" and how the court dealt with them later.

For Dr. Branion to have committed the crime would have required a minimum of 27 + 15 + 6 minutes, or a total of forty-eight minutes. The state told the jury that Dr. Branion committed the crime between 11:30 A.M. and 11:57 A.M., allowing Dr. Branion a total of only twenty-seven minutes. Thus, even if some of the durations that I have had to estimate in this reconstruction are modified and reduced-or even if all my estimated times are eliminated (a physical impossibility) and only the state's conceded times are counted-it was still clearly impossible for Dr. Branion to have had the time to murder his wife.

## II. HOW THE REVIEWING COURTS HANDLED THE FACTS

### A. Point One: Earwitness Testimony

Point One alone proves that Dr. Branion did not murder his wife: Teresa Kentra heard the shots at or about 11:25 A.M. when Dr. Branion was seeing patients in a hospital over a mile away. Before examining how Judge Easterbrook dealt with this exonerating fact, let us briefly consider how two previous courts handled Mrs. Kentra's earwitness testimony. The Illinois Supreme Court, which turned down Dr. Branion's appeal of his conviction in 1970, [FN26] stated that Mrs. Kentra came home from a shopping trip at 11:05 A.M. According to the court's statement of the facts, Mrs. Kentra, about twenty minutes later, heard a loud sound followed by two or three similar sounds and then a commotion of some sort. According to the court, " t he time was then about 11:30 A.M." [FN27]

The court then turns to other matters, separating this account of the earwitness testimony from a later statement that Dr. Branion told the police that he left the hospital "by 11:30 A.M." [FN28] If the reader has forgotten the earlier mention of 11:30 A.M. as the time Mrs. Kentra \*1322 heard the shots, the court does not remind the reader of that fact. Instead, the court has tampered with the facts in three ways. First, by making a simple mistake in addition, the court was able to conclude that the time Mrs. Kentra heard the shots was "about 11:30 A.M." even though the court had earlier stated that Mrs. Kentra came home at 11:05 A.M. and heard the shots about twenty minutes later. [FN29] Accurate addition, of course, would place the time of her hearing the shots at about 11:25 A.M. Secondly, the court states that Dr. Branion told the police that he left the hospital "by 11:30 A.M.," [FN30] suggesting that the time of 11:30 A.M. turned on what Dr. Branion said. There was ample evidence, however, that the earliest Dr. Branion left the hospital was at 11:30 A.M., and he may have left later; the prosecution-in order to pinpoint the time as early as possible-told the jury that Dr. Branion told the police that he left the hospital at 11:30 A.M. Independent evidence, available to the prosecution but not brought out at trial, would have put Dr. Branion's time of leaving the hospital about four or five minutes after 11:30 A.M. [FN31] Third, the court uses the phrase "by 11:30 A.M.," [FN32] suggesting that even if Branion told the truth he could have left the hospital a lot earlier and still have been able to say that he left the hospital "by 11:30 A.M." But Dr. Branion never told the police that he left the hospital "by" 11:30 A.M. At the trial, Detective Michael Boyle testified for the state that Dr. Branion told him he left the hospital at 11:30 A.M., and cited the police's interview with the last patient and the clinic records. [FN33] In addition, the prosecutor told the jury in his opening statement that the evidence \*1323 would show that Dr. Branion said he left the hospital "at 11:30 A.M." [FN34] Changing the word "at" to the word "by" was a clever misrepresentation by the Illinois Supreme Court of the record evidence, since the word "by" is so small that the change could later be explained, if necessary, as an error resulting from a typographical substitution of the word "by" for the word "at." [FN35]

Another court looking at the earwitness testimony was the federal district court in Chicago where I brought the habeas petition on Dr. Branion's behalf. [FN36] Judge Susan Getzendanner took Mrs. Kentra's earwitness testimony at face value and concluded that Donna Branion was shot before 11:30 A.M. [FN37] Unlike the Illinois Supreme Court, which failed to mention the huge fifteen- to thirty-minute duration cited by the state's pathologist as the garroting time, Judge Getzendanner took that duration into account. Therefore, Judge Getzendanner concluded that Dr. Branion must have left the hospital considerably earlier than 11:30 A.M. Judge Getzendanner based her conjecture on the

possibility that Dr. Branion lied to the police when he told them that he left the hospital at 11:30 A.M. Her presumed scenario was that Dr. Branion left the hospital at about 11:00 A.M., raced home, garroted his wife for fifteen minutes, shot her, and then raced back to the hospital to resume seeing his morning patients. \*1324 Then, at or about 11:30 A.M., Dr. Branion left the hospital, picked up Joby, visited Maxine Brown, and then went home and proceeded to "discover" Donna's body.

At least Judge Getzendanner's scenario does not contradict any of the durations and times that I have previously listed. But in order to account for Dr. Branion's having committed the crime, it was necessary for Judge Getzendanner to create an even greater fiction. She ignored the fact that the police detectives interviewed the personnel at the hospital and determined that Dr. Branion saw patients continuously up to about 11:27 A.M. when Dr. Branion saw his last patient, Mr. Jordan. Mr. Jordan was questioned by the police. Thus, the state's evidence, not Dr. Branion's, placed the time Dr. Branion left the hospital at 11:30 A.M. Indeed, the prosecutor in his opening remarks told the jury that Dr. Branion left the hospital at 11:30 A.M., perhaps to use the earliest possible time—one which Dr. Branion inadvertently (and erroneously) told the police in his emotional state soon after discovering Donna's body. [FN38]

Judge Getzendanner impliedly used the following reasoning:

1. Dr. Branion could not have committed the crime between 11:30 A.M. and 11:57 A.M.; there was not enough time.
2. Dr. Branion committed the crime, despite the lack of any direct evidence whatsoever that he did so.
3. Therefore, Dr. Branion must have committed the crime earlier than the prosecution and the police say he did. Dr. Branion must have left the hospital at 11:00 A.M., driven home, garroted and murdered his wife, then gone back to the hospital, resumed seeing his patients, and then left the hospital at 11:30 A.M. to pick up Joby and do the other things the state said he did.

But if we look behind the third step in this reasoning, we see immediately that the police and the prosecutor knew that Teresa Kentra heard the shots at 11:25 A.M. The prosecution, therefore, had a strong incentive for finding any evidence that would show that Dr. Branion left the hospital earlier in the morning, went home, murdered his wife, and went back to the hospital. If there was any "gap" in Dr. Branion's morning schedule of seeing patients—so that he could have \*1325 slipped out of the hospital, driven home, committed the crime, and slipped back unnoticed—the state's detectives would have zeroed in on it. But there was no such gap. Dr. Branion was the only doctor on duty in the clinic. He saw thirteen patients in all, but there were always patients waiting in the waiting room to see him. Consequently, there was no way Dr. Branion could have slipped out for twenty-five minutes or so without either the patients in the waiting room or the patient in his examination room noticing it. The police had the opportunity to interview all the patients, check all the records, see that no one patient was in Dr. Branion's office for twenty-five minutes, and so forth. In brief, Dr. Branion's alibi that morning for the time prior to 11:30 A.M. was as airtight as any person's in Chicago. Judge Getzendanner's scenario was so fictitious that it was given no credibility by the Seventh Circuit on appeal. Yet, by inventing this scenario, Judge Getzendanner was able to deny Dr. Branion's petition for habeas corpus. Her denial made the Seventh Circuit's job easier; all they had to do was to affirm the district court

judge. To be sure, the Seventh Circuit rejected Judge Getzendanner's scenario. Replacing her opinion with a different scenario was only a matter of crafting an opinion.

On appeal to the Seventh Circuit, Judge Easterbrook could not have adopted Judge Getzendanner's scenario without straining credulity to the breaking point. Hence, Judge Easterbrook faced the problem of how to handle Mrs. Kentra's earwitness testimony that the shots were fired at about 11:25 A.M. He handled it by omitting it from his statement of the facts, except for an oblique reference in a later section about the disposition of the case by Judge Getzendanner. This oblique reference, which says nothing about Mrs. Kentra hearing shots, is as follows:

Judge Getzendanner had a different theory: Branion left the Hospital before 11:30 and killed his wife (a neighbor reported hearing a commotion in the Branion apartment before 11:30), returned to the Hospital to establish his presence away from the scene of the crime, and only then picked up his son. [FN39]

This remark about a neighbor hearing a commotion, placed in parentheses and tucked into a brief discussion of an erroneous theory of the court below, is the only reference-if it can actually be called a reference-to Mrs. Kentra's testimony as a witness for the prosecution that she heard the shots no later than 11:25 A.M.

Anyone reading the transcript of the trial would see the importance and prominence of Mrs. Kentra's testimony, which established \*1326 the time at which the murder took place. Moreover, it established that time conclusively: Mrs. Kentra was the state's own witness, and what she said was not controverted by any other witness. Judge Easterbrook, however, could be quite confident that no reader of his opinion would take the trouble to go back to the original transcript of the trial. [FN40] He had good reason to rely on the general practice of readers of judicial opinions (whether lawyers, law professors, students, or even judges on a higher court) to take the court's statement of facts as accurate. Thus, the earwitness testimony, which established the fact that the shots were fired at a time when Dr. Branion was over a mile away treating patients, becomes a non-fact because Judge Easterbrook's factual recitation is otherwise rich in detail. He tells the story so well that it is virtually unimaginable to an uninformed reader that he would leave out the most important fact of all. Moreover, one should never lose sight of the fact that Judge Easterbrook's opinion is printed in the magisterial tomes of court reports, our secular society's equivalent of sacred texts. This gives it an impression of great importance, precision, authority, and accuracy.

#### B. Point Two: Squeezing Time

Having rejected Judge Getzendanner's scenario that Dr. Branion committed the crime prior to 11:30 A.M., Judge Easterbrook had to confront the twenty-seven minutes of time between 11:30 A.M. and 11:57 A.M. when the state told the jury that Dr. Branion murdered his wife, and find a way in which Dr. Branion could have committed the crime therein. Point Two of my impossibility defense to the Seventh Circuit was a submission, down to the half-minute, of everything Dr. Branion did between 11:30 A.M. and 11:57 A.M. Judge Easterbrook took up the challenge by inventing a new kind of deconstruction of fact- "squeezing" time. He wrote:

Time can be squeezed out of Branion's account quite easily. Suppose the clock at the Hospital was a few minutes fast (digital watches were rare in 1967)-or suppose Dr. Branion entered the time on patients' records just a little inaccurately. He could have started his journey at 11:30 if not a few minutes earlier. Suppose he was not punctilious about finding legal parking spaces. Then the time for the whole trip is only a minute or two longer than the \*1327 minimum driving time: at the legal speed, six minutes. Add one minute to grab Joby and one minute to meet Maxine Brown and you still have only 8 minutes. If Branion started a little before 11:30, there is enough time left over to kill someone-even to detour home first, as the prosecution contended. [FN41]

Judge Easterbrook is an impressive stylist; the very cadences of this passage indicate hurriedness-the prose speeds us along through crowded streets with Dr. Branion as he carries out his fiendish mission. However, if we pause to examine each of the items mentioned, we will find that haste has gotten in the way of accuracy. Consider:

(a) If we are going to assume that the clock at the hospital was inaccurate because it wasn't digital, the inaccuracy could just as easily have been on the side of running late as compared to running early. [FN42]

(b) Judge Easterbrook supposes that Dr. Branion could have entered the time on patients' records inaccurately. But nurse Betty Adger in the waiting room was aware of the time. In addition, Judge Easterbrook does not mention that the last patient Dr. Branion saw, Mr. Jordan, corroborated the time Dr. Branion saw him, which was at 11:27 A.M. [FN43] Finally, if the clock in any hospital waiting room is running fast, patients will be aware of it because they are waiting for badly needed medical treatment and can be expected either to bring the matter to the attention of the hospital authorities or at least to mention the fact to detectives if there is a subsequent investigation.

(c) Judge Easterbrook supposes that Dr. Branion might not have been punctilious about finding legal parking spaces. Later, in a portion of the same paragraph that I did not quote, Judge Easterbrook suggests that Dr. Branion would have exceeded the speed limit to save time. [FN44] Under Judge Easterbrook's theory, Dr. Branion first sped home directly from the hospital and murdered Donna and then, \*1328 only after that, sped through the streets to pick up Joby at nursery school, sped to Maxine Brown's office to take her back with him for lunch, and sped home so that he and his four-year-old son could discover Donna's body. If Dr. Branion had just murdered his wife, would he have risked attracting police attention by driving in excess of the speed limit as well as illegally parking and running to and from his car? And even if Dr. Branion were unintelligent enough to exceed the speed limit, how could he have done so even if he wanted to? The streets were choked with retail traffic and pedestrians at the noon hour on the next-to-last shopping day before Christmas, and it was snowing. [FN45]

(d) Judge Easterbrook says, "[a]dd one minute to grab Joby." [FN46] But the state's uncontroverted testimony at the trial was that Dr. Branion went into the nursery school, found Joby in the waiting room, took off his own coat, dressed his four-year-old son in winter outer-clothes, put his own coat back on, and led his son back to the car. The teacher on duty testified to this account at the trial. [FN47] She estimated that the entire process took about five minutes. [FN48] Like Mrs. Kentra, the teacher was a

witness for the state and her testimony was not challenged by either side.

From a rhetorical point of view, it is interesting that Judge Easterbrook says "one minute to grab Joby." Throughout his opinion there is an implicit portrait of Dr. Branion as simultaneously cunning and maniacal. He murders his wife violently for no discernible reason and then pretends to discover the body with his child at his side. He speeds through crowded streets risking arrest. He "grabs" his four-year-old son. Dr. Branion is portrayed as having superhuman abilities when it comes to speed and efficiency of murder, and subhuman stupidity in murdering his wife for no discernible reason at the cost of foregoing the fortune she would have soon inherited, "grabbing" his four-year-old son, and exceeding the speed limit in a manner that might attract police attention. There is certainly no notion here that the defendant is a man of healing, one who works in a hospital clinic for poor persons, one who loves his children. [FN49]

**\*1329** (e) Judge Easterbrook also says "[add] one minute to meet Maxine Brown." [FN50] But Maxine Brown's uncontradicted testimony for the prosecution was that her conversation with Dr. Branion took a couple of minutes. She recounted the gist of the conversation with Dr. Branion. She also said that Joby was with Dr. Branion at the time. Under Judge Easterbrook's portrait, Dr. Branion could only have grabbed Joby from the car, whisked him into the office, breathlessly said a quick "hello-goodbye" to Maxine, and raced back to the car, probably attracting everyone's attention by such abnormal and suspicious behavior. Judge Easterbrook later says in the same paragraph, "If Branion killed his wife, he planned to kill her; the assumption of planning helps to evaluate the time sequence." [FN51] But why would his plan include the necessity of acting so hurriedly and suspiciously as to attract public notice, or parking illegally and speeding in a way that might attract the police? Presumably, Dr. Branion is as crazy as he is cunning. In the portrait that emerges from Judge Easterbrook's opinion, Dr. Branion is simultaneously rational and irrational. [FN52]

Judge Easterbrook was undoubtedly aware that his time-squeezing approach might not be wholly convincing as a matter of rhetoric. He adds a paragraph of what we might call "legal analysis" to justify his reasoning. Here it is very important to recognize that there are two implicit target audiences in Judge Easterbrook's treatment of the facts of the Branion case. [FN53] Jacques Derrida's writings call our attention **\*1330** to the ambiguities that result from a confusion of target audiences. The first target audience is Judge Easterbrook's own readers-has he persuaded us that Dr. Branion was probably guilty? The second target audience is the jury in the Branion case: what could they have rationally concluded based on the evidence presented to them? Now, of course, these are rhetorical target audiences; there is only one real audience, the reader. But Judge Easterbrook implicitly asks the reader to divide her mind into two components: what she herself thinks, and what she thinks the jury could rationally have thought. [FN54] By using the jury target audience to deflect the reader's own doubts, Judge Easterbrook relies on a double-filter effect: even if we, as readers, might have doubts about a given assertion, we are sufficiently sensitive to the thought processes of other persons, such as jurors, to presume that if they had no such doubts then they have somehow passed upon the rationality of the given assertion. If the jury found it rational, then perhaps it is rational. Judge Easterbrook shows himself to be an artful user of deconstructionist method, using multiple presumed audiences to complicate the ultimate reader's interpretation of the facts of the Branion case.

A passage from Judge Easterbrook's opinion illustrates this double- filter effect:

At all events, the jury was entitled to disbelieve anyone it pleased.... Permitting such disbelief would make a shambles of Jackson, [FN55] Branion insists, because it would relieve the state of its obligation to prove the crime. Through selective disbelief, the jury could create the state's case out of thin air. Not so. A trier of fact may disbelieve or reject any evidence. Disbelief is not evidence of the opposite of the thing discredited, however. A jury that disbelieved everything would be compelled to acquit the defendant. Selective disbelief, however, is an ordinary incident of trial.... [FN56]

Let us consider the complex legal proposition being asserted here. The witnesses that the jury was entitled to selectively disbelieve, under Judge Easterbrook's analysis, were all witnesses for the state. They all gave uncontradicted testimony for the prosecution. The portions of their testimonies that Judge Easterbrook says the jury was \*1331 legally entitled to disbelieve are all those portions that tend to prove that it was impossible for Dr. Branion to commit the crime. Now, as a matter of law, in a case of circumstantial evidence, it is the state's burden to prove opportunity-that is, the state must show that the defendant had an opportunity to commit the crime, and was not somewhere else when the crime was committed. In the Branion case, the sum of the state's own uncontradicted testimony showed that Dr. Branion was indeed somewhere else when Donna was murdered. But Judge Easterbrook now argues that the jury could selectively disbelieve all the evidence by the state's own witnesses that Dr. Branion was somewhere else when his wife was murdered.

If this is so-if the jury is legally entitled to disbelieve all the evidence of impossibility-then, according to Judge Easterbrook's rationale, Dr. Branion could have committed the crime. If the jury disregards the fact that Dr. Branion was in the hospital when his wife was murdered, then, according to Judge Easterbrook, the jury could imagine that Dr. Branion was in his apartment committing the murder. By systematically excluding all evidence that there was no opportunity to commit the crime, the jury is left with the opportunity to assume its opposite, namely, that there was opportunity. To disbelieve the state's evidence showing that it was impossible for Dr. Branion to commit the crime is to open up the possibility of belief that Dr. Branion was guilty.

To put the matter a different way, should the state be able to discharge the burden of proving opportunity by presenting witnesses who conclusively prove lack of opportunity and then relying on the jurors to disbelieve those witnesses? Suppose D is a defendant in a circumstantial-evidence case; there is no direct evidence that D was at the scene of the crime. The state produces witness W, a shifty-looking person with a criminal record. W tells the jury that D was with W a mile away from the scene of the crime. The jury then disbelieves W. Does the jury's disbelief of W establish that D was at the scene of the crime? Obviously it does not. [FN57] Does the jury's disbelief of W at least establish that D may be a liar because a witness testifying favorably to him appeared to be lying to the jury? No, because W is the state's witness, not D's witness.

Judge Easterbrook shows his awareness of this problem when he says, as above quoted, "Disbelief is

not evidence of the opposite of the thing discredited, however." [FN58] The sentence is disarming in its combination \*1332 of surface clarity and conceptual complexity. The sentence presents a triple negative: not-belief is not-evidence of the not- discredited thing. The sentence is accurate, but difficult to unpack, especially since it is sandwiched between references to "selective disbelief" in the paragraph above quoted. The reader may be led to believe that Judge Easterbrook has taken care of the problem by acknowledging it.

Yet it is clear that Judge Easterbrook is, in fact, doing what he says the jury cannot do. Although his sentence about disbelief appears to be aimed at the reader target audience, and not the juror target audience, Judge Easterbrook uses the double-filter effect to his advantage in asserting a proposition of law that should constrain juries and not readers. To see this, let us expand Judge Easterbrook's statement to read: "Juries are not entitled to find affirmatively that the defendant had the opportunity to commit the crime on the basis of their disbelief of witnesses who testify that he did not have the opportunity." But Judge Easterbrook cannot make this statement because, if he made it, he would have to conclude that the state failed to prove that Dr. Branion had the opportunity to commit the crime; there was no evidence in the Branion case that Dr. Branion had the opportunity to commit the crime unless the jury was entitled to infer that evidence from its selective disbelief of the state's witnesses whose testimonies demonstrated that lack of opportunity.

Thus, if the reader of Judge Easterbrook's opinion asks how jury disbelief of the evidence of impossibility can discharge the state's burden of proving opportunity, the reader finds no clue in Judge Easterbrook's opinion other than the blanket assertion, "Disbelief is not evidence of the opposite of the thing discredited." But this sentence is in obvious contradiction to the entire methodology of Judge Easterbrook's opinion. His discrediting of the temporal sequences is itself an attempt to convince the reader of the opposite of the thing discredited. The process is rhetorically quite interesting: by flatly denying the very thing that he is in the process of doing, Judge Easterbrook succeeds in switching off those synaptical circuits in the reader's mind that are beginning to say, "Wait a minute, isn't Judge Easterbrook himself doing this?"

When Judge Easterbrook said that the jury could have disbelieved the nursery school teacher's testimony that Dr. Branion took about five minutes to dress Joby, and instead could have believed that it took Dr. Branion "one minute to grab Joby," where does Judge Easterbrook get the one minute? The nursery school teacher testified for the state. It was the state's burden to show opportunity. If the jury disbelieved the state's witness, what entitled the jury to \*1333 "squeeze" her time from five minutes to one minute? Why one minute and not ten minutes? Judge Easterbrook is actually using the possibility of disbelief of the teacher's testimony to establish affirmatively the state's case, namely, that Dr. Branion took "one minute to grab Joby." Judge Easterbrook is contradicting his own statement that "disbelief is not evidence of the opposite of the thing discredited." He accomplished this in part by the double-filter: it is the jury that is somehow entitled to disbelieve the teacher and somehow entitled to make up evidence necessary to discharge the state's burden of proof.

All the layers of complexity in Judge Easterbrook's opinion-the double-filter, the triple negative, the statement that he is not doing that which he proceeds to do-make the reader's task of interpretation

quite difficult. The layers of complexity work in Judge Easterbrook's favor because the Branion case itself is quite simple: Dr. Branion could not have committed the crime. Yet Judge Easterbrook cannot acknowledge that this is a simple case for fear of giving away the game. Thus, he resorts to the rhetoric of complexity. [FN59]

**\*1334 C.** Point Three: The Garroting Time

Even if the reader accepts Judge Easterbrook's operation on the twenty-seven minutes-squeezing a couple of minutes here and a couple of minutes there-the state pathologist's testimony remains as a barrier to the state's assertion that Dr. Branion committed the crime. This is Point Three of my defense of impossibility: that the fifteen- to thirty-minute garroting time clearly renders it impossible, no matter how vigorously the twenty-seven minutes are squeezed, that Dr. Branion murdered his wife.

The state's pathologist was the only person to examine Donna's body. He testified for the state that he found a 3/8-inch deep bruise around the victim's neck which would have taken fifteen to thirty minutes to form. Judge Easterbrook dealt with this testimony in two ways. [FN60] First, Judge Easterbrook plants a seed of doubt by speculating that " a physician planning murder would have inflicted a kind of injury that looks like it took longer to cause than it did." [FN61] The image here is a riveting one: Dr. Branion, rushing home in order to fit the murder of his wife into an already crowded morning schedule, decided to strangle Donna prior to shooting her, and did so in such a clever way as to purposely mislead a state pathologist subsequently in thinking that the garroting time took longer than it did. This is not only careful planning; it is prescience of a high order. To waste precious time in strangling Donna, when shooting was all that was necessary, on the off-chance that a pathologist would carefully examine the body and estimate the garroting time to provide Dr. Branion with an alibi, is itself extremely unlikely. This unlikelihood is compounded if we assume that the state pathologist can be duped by the clever way in which Dr. Branion inflicted the injury. What is required is a state pathologist clever enough to discover the bruise and estimate the time **\*1335** it was inflicted, but not quite clever enough to avoid being misled by the clever way in which Dr. Branion inflicted the bruise. Of course, Judge Easterbrook does not indicate what that clever way would be.

Second, Judge Easterbrook states: "The jury could have concluded that Branion strangled his wife with a cord briefly at 11:40 and then shot her, and that bruises continued forming until the police arrived at noon." [FN62] Here is a further use of the double-filter; the jury serves as a surrogate target audience, presumably separate from the reader. The reader of Judge Easterbrook's opinion might at first conclude that the garroting process occurred fifteen to thirty minutes before Donna Branion was shot by the murderer or murderers. [FN63] But consider the alternate scenario suggested by Judge Easterbrook: [FN64] Dr. Branion wrapped the cord around his wife's neck, squeezed it (but not too hard, since there were no broken bones in her neck), and immediately shot her. Dr. Branion left his dead wife and went on to his other business of the morning. Then, Donna's bruises continued to form for fifteen- to thirty-minutes until the police found her body. There would be no reason, under this scenario, for Dr. Branion to wait around to kill his wife until after the bruise had formed.

The trouble with Judge Easterbrook's theory is that it is a medical impossibility. In fact, the state's

pathologist testified that it was a medical impossibility. [FN65] Further, I specifically addressed this matter in my brief to the court. A bruise forms because of blood pressure that forces blood into the damaged capillaries under the skin (capillaries that are damaged as a result of the blow to the body that causes \*1336 the bruise). When blood pressure ceases, the body cannot continue to bruise. In Donna Branion's case, the bullet wounds were immediately fatal. She was shot by six or seven bullets; one bullet pierced her aorta, the other bullets pierced both jugular veins and both carotid arteries in her neck, and one bullet went through her eye. With such a barrage of fatal wounds, the heart might have pumped blood for a couple of seconds, but certainly not for fifteen minutes. Donna's body was found in a pool of blood.

In the briefs we filed with Judge Easterbrook, I wrote: "Bruising requires a heart that is pumping blood into the capillaries." [FN66] Judge Easterbrook ignored this statement and the established medical logic behind it. Instead, he wrote that the jury "could have concluded that Branion shot his wife ... and that bruises continued forming until the police arrived at noon." [FN67] Judge Easterbrook's focus on the jury as a target audience in this instance has two purposes. First, it insulates Judge Easterbrook from later criticism that he adopted a demonstrably incorrect position that a dead person can continue to bruise; he can presumably reply that he never said so—he only said that a jury could have so concluded. Second, attributing this irrationality to the jury draws attention away from a reader's possible doubt about medical impossibility by placing the acceptance of the idea on a jury of average citizens. A reader might say that she herself could not believe that dead persons continue to bruise, but that a jury might believe it. Of course, this deflects the fundamental question: if a jury is not legally entitled to convict a man based upon its belief in a demonstrable medical impossibility, then the man has been wrongly convicted and his conviction should be reversed in federal court.

If a court were to rule in a paternity case that the jury is entitled to disbelieve the results of a blood test that prove conclusively that the defendant does not have the same blood type as the child and therefore could not be the child's father, that court's opinion would be unconvincing to say the least. The court's opinion would be subject to reversal on appeal, or, if it is the ruling of the highest court in the jurisdiction, a legislative committee might investigate the judge's competence to hold office. In the Branion case, Judge Easterbrook states that the jury was entitled to believe that a bruise continued to form on Donna's neck for fifteen to thirty minutes after she was shot through the aorta, two jugular veins, and two carotid arteries. In short, the only way that Judge Easterbrook explained away the problem of the \*1337 fifteen-minute garroting time was by resorting to a belief in a clear medical impossibility. By attributing this belief to the jury, Judge Easterbrook deflected the question away from himself. Yet the only person who counts in federal court is the judge; the jury, after all, has long since disbanded. The entire thrust of Judge Easterbrook's decision is to say that the jury was entitled to find Dr. Branion guilty beyond a reasonable doubt. We now see, with respect to the garroting time (as we have seen earlier with respect to Points One and Two), that the question of what the jury was entitled to do has been submerged in a welter of questions about what the jury may, in fact, have done and how the reader of the opinion might view what the jury, in fact, did. But when these layers of complexity are sorted out, the conclusion remains that Dr. Branion's habeas petition was denied for a stated reason that is nonsense.

#### D. Point Four: The Transactional Times

Point Four is comprised of the following temporal elements. Dr. Branion would have spent at least one minute to find a parking space and park his car near his apartment, run up to the door and open it, [FN68] go inside, and confront his wife. At least two more minutes can be added by examining the "route" of the crime in the Branion apartment as evidenced by the photos taken by the police. [FN69] These photos show signs of violence throughout the Branion's spacious apartment: blood in the master bedroom, a closet door knocked off its hinges, blood smeared on the kitchen wall, and the fact that Donna's body was found in the utility room, approximately eighty-five feet away from the bedroom. Then we must consider the "cleaning up" after the crime. If Dr. Branion committed the crime, he would have had to have washed his hands of blood and presumably changed clothes and disposed of his old clothes. [FN70] He also would have had to dispose of the murder weapon in a secure enough fashion so the police would not discover it. Two minutes seems reasonable to assign to this \*1338 "cleaning up" process. Finally, one more minute should be added for Dr. Branion to lock the front door and leave the house, go to his car and start it up, and continue on to the nursery school. [FN71] Hence, a minimal duration to be assigned to Point Four of the impossibility defense is six minutes.

Even though there was no witness to account for these "transactional times," this does not mean that the jury was entitled to conclude that these transactions took no time. It would indeed be irrational for a jury to conclude, for example, that Dr. Branion drove his car to the front of Joby's nursery school, left the engine running, disappeared, and immediately reappeared in the waiting room where he was observed by the nursery school teacher in the process of dressing Joby. A rational jury must be assumed to allocate some positive amount of time for Dr. Branion to find a parking place, park the car, lock the doors, walk into the nursery school, locate Joby, and begin to dress Joby in winter clothes. Whatever this amount of time must be, it cannot be zero time. This is also true of all the other "transaction times." Yet Judge Easterbrook's opinion assigns no time at all to these "transaction times." Presumably, the court is counting on the reader not to notice that the "transaction times" have been omitted from the recounting of the twenty- seven minutes that the state said were available to Dr. Branion.

### III. THE EMOTIONAL CASE AGAINST DR. BRANION

So far, what I have recounted of Judge Easterbrook's opinion is only its negative side. He has taken uncontroverted evidence of impossibility and transformed it into possibility. Yet such a transformation, in itself, might not convince the reader of Judge Easterbrook's opinion that Dr. Branion murdered his wife. Since there is no positive evidence that Dr. Branion murdered his wife, a considerable task of persuasion remains. It is incumbent upon Judge Easterbrook, if he wants to persuade the reader, to take up the positive side of his opinion: an emotional indictment against Dr. Branion.

It is well known that emotional demonstrations can sway juries as much or more than hard physical evidence. There is no reason to suppose that the same is not true of readers of judicial opinions. At the outset of his opinion, before even stating the facts of the case, Judge Easterbrook makes five assertions that are calculated to color in \*1339 the case against Dr. Branion. Let me quote and then comment on each of these items in turn.

[1] [T]here were no signs of forced entry into the apartment, from which nothing was stolen....  
[FN72]

Judge Easterbrook incorrectly summarizes the evidence the jury heard when he says that nothing was stolen from the Branion's apartment. Nelson Brown, Donna's brother, testified at trial that Dr. Branion told him two guns were stolen from the apartment, a Walther PPK and a collector's item worth between \$1,500 and \$2,000. Although Nelson Brown was a defense witness and the jury was entitled not to believe him, his testimony as to the missing items was uncontroverted at trial. There is nothing to warrant Judge Easterbrook to conclude that nothing was stolen. In addition, I included an affidavit from Dr. Branion in the appendix to our brief, stating that, in addition to the two guns, Dr. Branion informed the officer at the scene that \$500 in cash was missing. [FN73]

While there were no signs of forced entry into the Branion apartment, the fact was that the murder occurred three days before Christmas. A caller would merely have to say that he was delivering a package from a Chicago department store. Or, if the killer was a police or FBI official, he could show identification and be admitted into the apartment readily.

[2] Branion called the police after finding his wife sprawled in a pool of blood. Although a physician, he did nothing to investigate her condition or assist her. He told the police that he knew from the lividity of Donna's legs that she was dead. A pathologist testified that Donna Branion's legs did not display lividity. [FN74]

The inference here is spelled out later by Judge Easterbrook: "Branion failed to investigate his wife's prone body because, having murdered her, he knew her condition." [FN75] But Judge Easterbrook omits a fact well known to him and stressed throughout the proceedings: that when Dr. Branion discovered the body, his four-year-old son was at \*1340 his side. As a doctor who had seen dead bodies before, Dr. Branion could tell from observation that Donna was dead from the fact that she was lying in a pool of discolored blood and that cyanosis had obviously set in. There was no need to further "investigate" her condition. Had Dr. Branion done more, Joby would have formed an indelible impression of his brutally murdered mother. Instead, Dr. Branion reacted quickly to shield Joby; he turned off the light in the utility room, lifted Joby up, and carried him to the back porch where Dr. Branion shouted for help. Had Judge Easterbrook told the complete story-that Joby was at Dr. Branion's side when Dr. Branion found Donna's body-it might have damaged the credibility of Judge Easterbrook's opinion in two ways. First, it would provide an explanation why Dr. Branion did nothing to assist his wife who was clearly dead. [FN76] And second, it might elicit the reader's sympathy for Dr. Branion. Would any murderer actually plan to "discover" his wife's body with his four-year-old son standing at his side?

Judge Easterbrook repeats the story about "lividity," which was a major point of contention throughout Dr. Branion's case in the Illinois Supreme Court and in the federal courts. Nelson Brown testified that Dr. Branion used the word "cyanotic" to the police, a word which accurately described the condition of the dead body; "lividity" is not technically accurate, although it is a layman's synonym for "cyanotic." [FN77] Nevertheless, Judge Easterbrook allows the reader to believe that Dr. Branion used the word "lividity" without explaining why a doctor would have made such an error in the use of the word

"lividity," especially if-as Judge Easterbrook holds-he carefully planned the crime.

[3] Ballistics experts determined, from the rifling of the slugs and marks on the casings, that the murder weapon was a 9mm, .38 caliber Walther PPK, a rare gun. John Branion, a gun collector, owned a 9mm, .38 caliber Walther PPK. When the police asked whether Branion had a 9mm weapon, he said yes and gave the police a Luger. Later the police asked whether he had a .38 caliber weapon; he said yes, one, and turned over a Hi Standard pistol. He \*1341 did not mention his Walther PPK, which was never found-yet could not have been stolen by an intruder on December 22, for the family's weapon cabinet was locked when the police arrived. [FN78]

There are numerous factual misstatements in this paragraph. First, it is not true that the Walther PPK is a 9mm, .38 caliber weapon. It is a 9mm weapon; it is sometimes capable of firing .38 caliber ammunition, but only with frequent jamming. Second, the Walther PPK was not a "rare" gun at the time of the murder; it was the popular "James Bond" gun. [FN79] Third, when the police asked Dr. Branion if he had a .38 caliber weapon, Judge Easterbrook states he failed to mention his Walther PPK. But as a gun collector, Dr. Branion knew that a Walther PPK is not a .38 caliber weapon and, for that reason, did not mention it. Every time the police asked Dr. Branion for a particular weapon, he gave them precisely what they asked for. Finally, there were many guns around Dr. Branion's apartment that were not locked in the family's weapon cabinet. The Walther PPK was on a closet shelf. Judge Easterbrook's inference that the Walther PPK was locked in the weapon cabinet is contrary to the trial testimony and unsupported by any evidence. Finally, the state never proved at trial that it was Dr. Branion's own Walther PPK that was used as the murder weapon.

[4] The cabinet contained a clip, target, and brochure for Branion's Walther PPK together with two boxes of .38 caliber ammunition. One box was full. The other was short four shells. Four shell casings were found near Donna Branion's body. [FN80]

The assertions in the first sentence are false. The boxes of ammunition were 9mm, not .38 caliber. Moreover, the ammunition was not in the cabinet; the police at the trial stated that they found three boxes of ammunition in the den closet. [FN81] Most importantly, although the police did recover four shell casings near Donna's body, more than four bullets were fired at Donna. There were thirteen wounds on the victim's body, as detailed in the state pathologist's autopsy report. One bullet lodged in Donna's body; the others entered and exited. It would have taken five or six other bullets to have inflicted the remaining \*1342 twelve wounds. [FN82]

That there were only four missing shells destroys the connection between the bullets used to kill Donna and the bullets missing from Dr. Branion's box of shells. Yet the Illinois Supreme Court regarded the "matching" four-shots-and-four-shells as the most telling evidence of all against Dr. Branion. [FN83] Judge Easterbrook simply did not mention the demonstrations and charts presented showing that at least six bullets were fired at Donna, and that no fewer could have inflicted the thirteen wounds in her body.

[5] Branion had a mistress, a nurse at the hospital where he worked, and the Branion home was not a model of domestic tranquility. Branion married his mistress shortly after his wife's death. [FN84]

In fact, the jury did not know that Dr. Branion married someone else shortly after his wife's death because Dr. Branion did not marry Shirley Hudson until five months after the jury returned its verdict.

What the jury actually heard was Donna's sister, Joyce, answering the prosecutor's question, "Over the years, Mrs. Tyler, did you ever know of any time or any occasion wherein Dr. Branion ever struck his wife?" [FN85] Joyce Tyler answered, "No, I don't." [FN86] That was the sum total of the testimony from which Judge Easterbrook infers that the Branion \*1343 home was not a model of domestic tranquility. [FN87]

Without knowing the lack of evidence upon which Judge Easterbrook based his assertions, a reader might likely infer a motive on Dr. Branion's part to suddenly murder his wife so he could marry his mistress. [FN88] Yet here is where some of Dr. Branion's biographical information with which I began this essay is important for seeing the complete picture. Dr. Branion's friendship with Shirley Hudson had gone on peaceably for six years prior to Donna's murder. Why would he not consider getting a divorce? Perhaps, most importantly, because Donna was a potential heiress and Dr. Branion wanted Donna's money. But then why would he murder Donna? Certainly, had Donna already received her inheritance from her father, and had Dr. Branion been Donna's sole heir, Dr. Branion's motive for killing Donna would have been self-evident. Donna's death, however, occurred while her father, who would have bequeathed a large part of his estate to her, was alive. Dr. Branion had a very strong financial motive for keeping Donna alive. Accordingly, murdering Donna was, in fact, counterproductive to Dr. Branion's pecuniary interests. By mentioning none of these things, Judge Easterbrook was able to sketch a misleading inference of a motive for murder.

## CONCLUSION

To assert that the law is indeterminate is, these days, an uncontroversial proposition. The legal realists, especially Karl Llewellyn, tell us that legal rules come to us in the form of paired opposites. [FN89] Duncan Kennedy has emphasized the elementary notion of "fundamental contradiction." [FN90] But that idea of legal indeterminacy does not wholly describe the Branion case. Judge Easterbrook did not find or invent any proposition of law requiring the denial of a habeas remedy to an innocent prisoner. [FN91] Instead, he adopted the far more persuasive \*1344 approach of agreeing that an innocent prisoner is entitled to his freedom, but denying that John Branion was innocent.

Since the determination of "not innocent" is assumed to be a neutral, factual determination, Judge Easterbrook was undoubtedly quite confident that the legal community would pay little attention to his process of fact-determination. That community-academics, judges, students-has taught itself that facts are not important, that the only thing worth grappling with is "the law." Three years of law school education are devoted almost entirely to parsing the logic of appellate court opinions. Hardly any attention is paid to the "facts" of a case; the "facts" are simply accepted as consisting of what the court says they are. Law review members are sublimely uninterested in the facts; they assert what the correctness or incorrectness of this or that case has to do with the application of law to the facts as stated by the court. Law review editors are so accustomed to taking the judge's word for the facts that they are uninterested in reviewing the facts of any given case. They feel that only "the law" of the case is for true professionals, and that is what we have taught them. By the way we teach "the law" in law schools, we are producing a disregard for the facts. We are training our students, who will someday fill the ranks of the judiciary, to consider the actual facts of a case to be unimportant. Most of the activity

of law-teaching is devoted to the intellectual "fun" of rationalizing cases and not to understanding, or even regarding as relevant, the actual real-life events behind the cases. [FN92]

Judge Easterbrook's deconstruction of the facts of the Branion case displays great stylistic skill in persuading the reader of Dr. Branion's guilt, but it also displays a curiously casual attitude—an attitude that even demonstrably false things can be stated as factually accurate in a judicial opinion because the reader typically would not question the accuracy of what a judge reports as the facts. This casual attitude is, itself, perhaps a by-product of legal education. When a student is asked to make a legal argument on behalf of a party who, according to the given facts, should clearly lose, professors will not accept a student who says that the party should simply lose. Instead, they encourage students to come up with any arguments, however contrived, on behalf of the party who should lose. We encourage glibness, we penalize honesty; we applaud fabrication, we discourage sensitivity of justice. We tell our students that it is not the attorney's job to make a judgment about right and wrong, but rather to represent \*1345 the client irrespective of right or wrong. [FN93] That training, which we take pleasure in imparting in our classes, has its effect upon those one or two students sitting in the classroom who will someday become judges. They too can become cynical by our pervasively amoral, technocratic approach to legal solutions. [FN94]

Do judges routinely display a casual attitude toward the facts of the case? I suggest that practicing attorneys be asked whether they have had cases where the judge's statement of the facts were false. Every practicing attorney to whom I have asked this question has responded in the affirmative; some have told me that the practice is, unfortunately, quite common, and that judicial misrepresentation of the facts of cases has produced a crisis in their professional lives. They feel that their work is subject to the whim of judges who play God with the facts of a case, changing them to make the case come out the way the judge desires. Some say that if they had known that the practice of law would be like this, they would have gone into a different profession. Professor Monroe Freedman recently stated in a speech to the Federal Circuit Judicial Conference:

Frankly, I have had more than enough of judicial opinions that bear no relationship whatsoever to the cases that have been filed and argued before the judges. I am talking about judicial opinions that falsify the facts of the cases that have been argued, judicial opinions that make disingenuous use or omission of material authorities, judicial opinions that cover up these things with no-publication and no-citation rules. [FN95]

Professor Freedman wrote a letter to me in which he stated that at the \*1346 luncheon immediately following his speech, a judge sitting next to him said (apropos of the passage above quoted), "You don't know the half of it!" [FN96]

Apart from these professional concerns, we should also ask ourselves what kind of a judiciary system this society has produced where judges can misstate the facts of a case and then proceed to apply the law to those fictitious facts. Can any person be safe in court if this practice is allowed to continue? If judges can listen to the evidence and then tell a contrary story, what remains of justice? The vaunted security we have in a free country and a just legal system turns to quicksand. Our case may be factually proven, legally required, and morally compelled, but we can still lose if the judge changes the facts. And

if we complain-no matter how loudly-higher courts will not be interested in reviewing a "factual" controversy, and the legal community, as well as the general public, will assume that the facts were those stated by the judge.

What is perspicuous about the Branion case is that the facts were not in dispute. Nevertheless, three separate courts, with three divergent statements of those facts, found Dr. Branion guilty. [FN97] The poorest job was done by the Illinois Supreme Court; its opinion contained blatant contradictions and falsities. Judge Getzendanner had a slightly higher regard for facts: she agreed that Dr. Branion could not have killed his wife in the time the state said he did, but concluded-wholly contrary to the evidence of the police and the claim of the prosecution to the jury-that he must have done it earlier. It took a former law school professor and scholar, Judge Easterbrook, to provide the ultimate verbal formula for keeping Dr. Branion imprisoned. As Judge Easterbrook told The New York Times in an article regarding the Branion case, "I put a long time into writing that opinion." [FN98]

Recent work in legal deconstruction has shown that, if a judge desires a case to come out a certain way, and the judge is adept at legal reasoning and rationalization, the rules of law do not and cannot \*1347 force him to decide the case against his own desire. [FN99] Yet, providing a convincing rationalization for a decision can take intellectual effort and affords a judge a real challenge to the mind. The Branion case takes this challenge a step beyond legal-rationalization. If the facts of a case conclusively prove that a certain thing did not happen (e.g., that Dr. Branion did not shoot his wife), then the facts have to be changed in order to achieve a judge's desired results. In the Branion case, Judge Easterbrook rose to the intellectual challenge of the facts. He was able to write an opinion rationalizing his conclusion that Dr. Branion probably killed Donna Branion despite conclusive factual evidence that Dr. Branion could not possibly have committed the crime.

## FOOTNOTES

[FN<sub>a</sub>]. Judd and Mary Morris Leighton Professor of Law, Northwestern University.

[FN1]. Any "just solution" can only be achieved by sheer coincidence-for example, if the fictions happen to cancel themselves out.

[FN2]. A contrary-to-fact statement is not, I suggest, an "interpretation" of the underlying fact. It may be that all law must be interpreted; some of the more radical deconstructionists among us believe that law is nothing more than interpretation. We assert that the words of law have no independent existence. Our interpretations of the law constitute the law; there is nothing "behind" the interpretation. But it is quite otherwise, we believe, when we come to facts. To be sure, facts have to be interpreted; they are not ding an sich (Kant's term for things-in-themselves).

No matter how generous and loose the interpretation of a fact may be, we cling to the bedrock belief that we cannot simultaneously assert the existence and nonexistence of a fact. We believe that interpretation as a term is misused if it is cited as an operation that can turn a fact into a non-fact. My belief on this score is more ontological than epistemological; it has to do with a conviction that the real world, unlike texts, does not allow for the assertion of the opposite of a fact. If A killed B, an impermissible "interpretation" of this statement is that A did not kill B. Conversely, if A did not kill B, an

impermissible "interpretation" of this statement is that A killed B. This is not so much epistemological as it is ontological because it turns more on what we know about the real world than what we know about language and texts.

[FN3]. 855 F.2d 1256 (7th Cir. 1988).

[FN4]. See J. Tuohy & R. Warden, *Greyford: Justice*, Chicago Style 193- 217 (1989).

[FN5]. *Id.* at 201-204 (discussion of Judge Holzer's activities in the Branion case).

[FN6]. Judge Holzer's actual pattern was to obtain money from the party who was going to win the case anyway. In that manner, he minimized griping from the other party. *Id.* at 193-217. I was also informed of Judge Holzer's practice by State Attorney Scott Turow, to whom I reported the possible extortion in the Branion case as soon as I found out about it in the course of my investigation of the case.

[FN7]. *Id.* at 201.

[FN8]. Dr. Branion did not testify at his own trial. In retrospect, this appears to have been a tactical error on the part of his counsel. But since Dr. Branion's innocence had been conclusively proven by the prosecution in the state's case against him, the defense attorney simply assumed that there was no reason for his client to say anything. The defense attorney overlooked the possibility that the jury might be reacting emotionally to the trial rather than logically.

[FN9]. The Branion case was included in an episode of "Unsolved Mysteries." *Unsolved Mysteries* (NBC television broadcast, Dec. 19, 1989).

[FN10]. See Bedau & Radelet, *The Myth of Infallibility: A Reply to Markman and Cassell*, 41 *Stan. L. Rev.* 161 (1988).

[FN11]. See Warden, *Guilty Until Proven Innocent*, 3 *Chicago Times Magazine* 34 (Jan./Feb. 1990). The cover of this magazine is "Innocent People Go to Jail in America." The story details some fourteen Illinois cases, including the Branion case.

[FN12]. *Id.* at 38.

[FN13]. *People v. Branion*, 47 Ill. 2d 70, 265 N.E.2d 1 (1970).

[FN14]. *Id.* (request for a rehearing denied Dec. 3, 1970).

[FN15]. *Branion v. Illinois*, 403 U.S. 907 (1971).

[FN16]. *Petition for a Writ of Habeas Corpus in the United States District Court for the Northern*

District of Illinois on Behalf of Dr. John Marshall Branion, Jr., 664 F. Supp. 1149 (N.D. Ill. 1987).

[FN17]. United States ex rel. Branion v. Gramly, 664 F. Supp. 1149 (N.D. Ill. 1987) (denying respondent's motion to dismiss for failure to exhaust state remedies).

[FN18]. John Marshall Branion, Jr. is sixty-four years old. He sits today in a cage in a prison in Dixon, Illinois. His judicial remedies have been "exhausted." His heart is failing him; he has end stage ischemic cardiomyopathy, after a long history of coronary artery disease, and has had multiple myocardial infarctions. In July 1990, he was diagnosed as having a malignant brain tumor. On August 7, 1990, Governor James Thompson of Illinois commuted Dr. Branion's sentence to time served.

[FN19]. In this brief summary, I will not include anything that was controverted or even challenged by the state's attorney in any briefs, motions or supporting briefs filed against Dr. Branion's petition for habeas corpus. Furthermore, none of my arguments in the Northern District Court of Illinois or the Seventh Circuit were challenged for their factual accuracy.

[FN20]. See Kelman, Interpretive Construction in the Substantive Criminal Law, 33 Stan. L. Rev. 591 (1981) (choice of temporal frame in criminal cases may determine outcome).

In federal court, "Dr. Branion" is just a name. It is the name of a convict. His personal biography is "irrelevant" to the law. Is this why the federal district court judge handling Dr. Branion's petition for habeas corpus, Judge Susan Getzendanner, repeatedly turned down my requests for an evidentiary hearing? My impression, which may have been mistaken, was that she did not want to have Dr. Branion in her courtroom. Perhaps she realized that she could not look in his face and still do the job she had to do.

[FN21]. Compare Joseph Fletcher's powerfully stated claim that morality can only be decided with respect to a given situation. J. Fletcher, Situation Ethics: The New Morality 43-46 (1966). Viewing justice as a branch of morality, it would be impossible, according to Fletcher, to specify in advance what aspects of the situation are "relevant." *Id.* Hence the use of the word "relevant" begs the question whether a given aspect of the situation is "relevant."

[FN22]. In 1969, Hanrahan, then State Attorney of Illinois, organized a raid on the Black Panther's headquarters. During the incident, the police fired first, killing two members of the Black Panthers and wounding several more. A subsequent civil lawsuit by the families of the murdered individual resulted in a damage award of \$1.85 million and effectively ended Hanrahan's political career. Dr. Branion says he had been warned by Hanrahan's office on several occasions to stop giving medical treatment to the Black Panthers and Blackstone Rangers. Some researchers in Chicago, working on documents obtained through Freedom of Information Act requests, are investigating the possibility that Donna Branion was the victim of a federally directed assassination. Some researchers suggest that Donna was killed in order to deter Dr. Branion from lending assistance to the Black Panther organization. There have been allegations of federally directed murders of civil rights activists in situations similar to and contemporaneously with Dr. Branion's case.

[FN23]. Theresa Kentra was a witness for the prosecution at the Branion trial, and her earwitness testimony was not contradicted by other evidence. Mrs. Kentra testified that it could not have been any later than 11:25 A.M. when she heard the sounds.

[FN24]. Affidavit of Betty Adger, filed in Appendix to Appellant's Brief, *Branion v. Gramly*, 855 F.2d 1256 (7th Cir.) (No. 87-3052), reh'g denied, No. 87-3052 (Sept. 21, 1988).

[FN25]. We discovered that the police report of a minimum driving time total of six minutes could not have been true. I asked a traffic expert to analyze Dr. Branion's driving route. Employing the characteristic of a 1967 Plymouth automobile, which the Chicago police used at the time, the expert figured acceleration and deceleration times and a driving speed at the posted speed limits. The traffic expert also assumed that all nine traffic signals were green and that there was no traffic on the streets. He computed that the route could not have been traversed in fewer than seven minutes. Judge Easterbrook wrote of this analysis that "[p]erhaps traffic patterns (and the number of stop signs and stop lights) changed in the intervening 18 years." *Branion*, 855 F.2d at 1262 n.3. Since the expert's study assumed no traffic at all on the streets, Judge Easterbrook's concern about changing traffic patterns is curious. As for the number of stop signs and stop lights, there was in fact one change—a stop sign in 1967 was changed into a stop light by the time the expert analyzed the route. But the expert took into account only stop signs, since he based his analysis on the unlikely hypothesis that all the traffic lights were green—the hypothesis most favorable to the state. The change from one stop sign to a stop light meant that the expert's time was slightly understated and hence conservative.

[FN26]. *People v. Branion*, 47 Ill. 2d 70, 265 N.E.2d 1 (1970).

[FN27]. *Id.* at 71, 265 N.E.2d at 2 (emphasis added).

[FN28]. *Id.* at 72, 265 N.E.2d at 2.

[FN29]. *Id.* at 71, 265 N.E.2d at 2.

[FN30]. *Id.* at 72, 265 N.E.2d at 2.

[FN31]. The police records show that Dr. Scott, administrator at the Ida Mae Scott Hospital, had a conversation with Dr. Branion before Dr. Branion left the hospital. Dr. Scott told the police that Dr. Branion stated that he was going to pick his son up from nursery school and then was going to take his wife out to lunch. Dr. Scott said that Dr. Branion left the hospital at about 11:30 A.M. Permanent Retention File, Report of 23 December 1967, filed in Appendix to Appellant's Brief, *Branion v. Gramly*, 855 F.2d 1256 (7th Cir.) (No. 87-3052), reh'g denied, No. 87-3052 (Sept. 21, 1988). While Dr. Scott's account of what Dr. Branion told him falls squarely within the hearsay rule, the importance of this conversation is not what Dr. Branion said or what his intentions were, but rather that a conversation did take place, and that Dr. Branion was seen leaving the hospital at about 11:30 A.M. In addition, three affidavits from members of the hospital staff show that Dr. Branion left the hospital three or four minutes after 11:30 A.M. because Dr. Branion had an emergency patient (for whom he

prescribed morphine) after the hospital closed at 11:30 A.M. Affidavits of Robert Wadley, Betty Adger, and LaHarry Norman, filed in Appendix to Appellant's Brief, *Branion v. Gramly*, 855 F.2d 1256 (7th Cir.) (No. 87-3052), reh'g denied, No. 87-3052 (Sept. 21, 1988).

[FN32]. *People v. Branion*, 47 Ill. 2d 70, 72, 265 N.E.2d 1, 2 (emphasis added).

[FN33]. Transcript at 305. Detective Boyle further testified that he obtained a Xerox copy of the hospital records of the patients that morning, and interviewed Robert Jordan, Dr. Branion's last patient. Id. at 306-07.

[FN34]. Id. at 159.

[FN35]. Compare the recent decision by the Illinois Supreme Court in *In re Peel*, 126 Ill. 2d 397, 534 N.E.2d 980 (1989), rev'd, *Peel v. Attorney Reg. & Disciplinary Comm'n*, 110 S. Ct. 2281 (1990). An attorney placed on his letterhead the words "Certified Civil Trial Specialist By the National Board of Trial Advocacy." The Illinois Attorney Registration and Disciplinary Commission recommended that the attorney be censured for holding out to the public that he was "certified" as a specialist. In imposing the sanction of censure on the attorney, the Illinois Supreme Court's opinion cited the Webster Dictionary's definition of "certificate" as "a document issued by ... a state agency ... certifying that one has satisfactorily ... attained professional standing in a given field and may officially practice or hold a position in that field." Id. at 405, 534 N.E.2d at 984 (emphasis added) (citing Webster's Third New International Dictionary 366 (1986)).

When the United States Supreme Court granted certiorari, the Court's attention was drawn to the elisions in the Illinois Supreme Court's quotation from Webster's definition. The full definition of "certificate" is: "a document issued by a school, a state agency, or a professional organization certifying that one has satisfactorily completed a course of studies, has passed a qualifying examination, or has attained professional standing in a given field any may officially practice or hold a position in that field." 110 S. Ct. at 2289 (emphases added to portions omitted from Illinois Supreme Court's opinion). In short, the portion of the definition omitted by the Illinois Supreme Court justifies the attorney's use of "certified" in his letterhead instead of impeaching it!

[FN36]. *Petition for a Writ of Habeas Corpus in the United States District Court for the Northern District of Illinois on behalf of Dr. John Marshall Branion, Jr.*, 664 F. Supp. 1149 (N.D. Ill. 1987).

[FN37]. *Branion v. Gramly*, No. 87-3052, 1987 WESTLAW 16602 (N.D. Ill. Aug. 27, 1987), reconsideration denied, 1987 WESTLAW 27 (N.D. Ill. Sept. 22, 1987).

[FN38]. The prosecutor at trial was concerned about every minute in the twenty-seven minute window of opportunity in which the state contended that Dr. Branion murdered his wife. If the detectives could have established any evidence whatsoever that Dr. Branion left the hospital prior to 11:30 A.M., they would have done so. The evidence at trial made it quite clear, however, that 11:30 A.M. was the earliest time Dr. Branion could have left the hospital. As for Dr. Branion's statement to the investigating detective in his apartment soon after the police arrived, he was-according to the testimony of a police

investigator at the trial- "broken up." He may have entirely forgotten the emergency patient, and assumed that he left the hospital when he usually did, which was at the closing hour of 11:30 A.M.

[FN39]. Branion, 855 F.2d at 1261.

[FN40]. For many years as adviser to Northwestern's law review, I urged the editors- to no avail- to require student writers of "case notes" to go back and read the original trial transcripts. Such a practice might really make a difference; the readership of law reviews might want to know what really happened at the trial. Instead, the students take the easy way out; they write up a "case note" based on the facts as stated by the court, and the case notes they publish are invariably ignored.

[FN41]. Branion, 855 F.2d at 1262.

[FN42]. Indeed, if any given clock is assumed to be inaccurate, there is, in the absence of direct evidence, a fifty percent chance that the clock states a time that is earlier than the actual time and a fifty percent chance that it states a time that is later than the actual time. Yet the appropriate probability for the test of "beyond a reasonable doubt" applied to a defendant in a criminal case, according to Judge Easterbrook's statement in the Branion decision, is about ninety percent. *Id.* at 1263 n.5. A jury instructed to convict only if the evidence proves the defendant guilty beyond a reasonable doubt would be violating the reasonable-doubt standard if its verdict depended on a fifty percent probability that the hospital clock was running fast.

[FN43]. Judge Easterbrook also does not mention that the detectives' report of interviews the day following the murder shows that Dr. Scott, the administrator of the hospital, told the detectives that Dr. Branion left at 11:30 A.M. Judge Easterbrook was well aware of this report- contained in the appendix to our brief- because he mentions a different item contained in the detectives' report. *Id.* at 1270-71.

[FN44]. As Judge Easterbrook wrote, "[Dr. Branion] would have fudged the time records at the Hospital, exceeded the speed limit and parked illegally to save minutes ...." *Id.* at 1262.

[FN45]. All police test of driving times were conducted weeks later, when there was no such congestion on the streets.

[FN46]. Branion, 855 F.2d at 1262.

[FN47]. Transcript at 316-20.

[FN48]. *Id.*

[FN49]. A further element in this picture is Judge Easterbrook's attempt to associate Dr. Branion with the brutal dictator Idi Amin. Dr. Branion left the country in 1971 after the Illinois Supreme Court turned down his appeal, and wound up in Uganda. He practiced obstetrics and gynecology there. Judge Easterbrook says that Dr. Branion "became Idi Amin's personal physician." Branion, 855 F.2d at 1259.

In our briefs, we pointed out to Judge Easterbrook the following:

Dr. Branion was never private physician to Idi Amin. Dr. Branion practiced medicine for a time in Mbarara, Uganda, and not in the capital city of Kampala, Uganda, the latter being the home of Idi Amin. Dr. Branion's practice was exclusively that of gynecology and obstetrics. At no time did he render any medical care to or even examine Idi Amin.

Appellant's Brief, *Branion v. Gramly*, 855 F.2d 1256 (7th Cir. 1988) (No. 87- 3052).

The respondent did not challenge any of these assertions. Moreover, we argued that a doctor has a professional responsibility to treat all patients; the morality of his patients cannot be held against him. Despite all these arguments and observations, Judge Easterbrook apparently thought it important to associate Dr. Branion with Idi Amin in the minds of the readers of his opinion, even though he had to disregard our briefs. Presumably, readers of his opinion would never see the briefs we filed in the case. Cf. *supra* note 40.

[FN50]. *Branion*, 855 F.2d at 1262.

[FN51]. *Id.*

[FN52]. See G. Allport, *The Nature of Prejudice* (1937) (listing characteristics attributed to persons who are victims of prejudice).

[FN53]. As used in this Article, the term "target audience" refers not necessarily to the direct reading processes of the readers of Judge Easterbrook's opinion, but rather to the persons whom Judge Easterbrook maintains could believe a certain fact or factual conclusion. Thus, the "reader target audience" asks the reader of Judge Easterbrook's opinion to determine what she finds reasonable with respect to a fact or factual conclusion. In contrast, the "jury target audience" asks the reader to rely on a juror's ability to determine a particular fact or factual conclusion and hence form a conclusion indirectly through the eyes of the imagined juror.

[FN54]. Of course, the reader might discard this bifurcation as nonsense; she could reason that if she has to think what the jury rationally could have thought, then that would be equivalent to her own thought processes if she were a juror. But not all readers will presumably be able to sort this out for themselves.

[FN55]. *Jackson v. Virginia*, 443 U.S. 307, 313-24 (1979) (setting forth a "rational trier of fact" test for granting habeas petitions on the ground of innocence).

[FN56]. *Branion*, 855 F.2d at 1263 (citations omitted).

[FN57]. If it did, then the state could successfully prosecute any person for any crime. All it would have to do is produce a witness in the defendant's behalf who is an obvious liar!

[FN58]. *Branion*, 855 F.2d at 1263.

[FN59]. Perhaps Judge Easterbrook would have preferred to write an opinion using the following logic: (1) Dr. Branion is of course clearly innocent; (2) However, if we grant his habeas petition on the basis that the jury verdict in his case was clearly irrational, thousands of other prisoners will be encouraged by our decision and will flood this court with habeas petitions claiming that the jury verdicts in their cases were similarly irrational; (3) Convicted people have plenty of time to prepare habeas petitions selectively quoting from the trial transcripts in their cases, ostensibly showing that it was impossible for them, as it was for Dr. Branion, to have committed the crimes for which they were convicted; (4) Although most of these petitions will be spurious, federal judges simply do not have the time to reread trial transcripts to determine whether one case in fifty thousand might be a Branion-like case of proven innocence; (5) Hence, considerations of docket- control require us to sacrifice Dr. Branion's life for the greater goal of preventing federal judges from being swamped with habeas petitions. I have pondered long and hard about why Judge Easterbrook and the other two judges on his panel failed to free a provably innocent man. The above "rationale" is one that I think explains their decision. It is a utilitarian explanation, sacrificing one innocent man for the greater good of not drowning the courts in habeas petitions. However, I fail to understand why federal judges could not appoint magistrates to sift through the expected flood of petitions; it is not clear that judicial resources would necessarily be strained by a decision in Dr. Branion's favor. But the utilitarian rationale, although perhaps persuasive to conservative judges with an economist's appreciation of social costs and benefits, would clearly be unacceptable to the public. Judge Easterbrook could not realistically issue an opinion along the five lines I have just mentioned without incurring public wrath. Therefore, he faced the much harder task of casting doubt on Dr. Branion's innocence.

Indeed, Judge Easterbrook's ultimate message might be a very subtle one indeed. He may be saying to attorneys such as myself, who could become convinced of the innocence of a convicted person, that no matter how hard we investigate the case and no matter how good our briefs are and no matter how well we argue, the federal courts simply will not risk opening the floodgates by granting habeas petitions that allege proven innocence at the trial level. The proof of the lengths to which the Seventh Circuit was willing to go to convey this message to practicing attorneys is found in the artfulness and complexity of Judge Easterbrook's opinion! If even a clearly innocent man like Dr. Branion is nevertheless made out to be guilty in an appellate court decision, then what chance does anyone have who may be innocent but whose case is not as crystal clear as Dr. Branion's? The message over the courtroom door of the Seventh Circuit, in short, is like Dante's at the gates of Hell: "All hope abandon, ye who enter here." D. Alighieri, *The Divine Comedy: Inferno*, Part iii, line 9.

[FN60]. In addition to the two ways discussed in the text, Judge Easterbrook also suggested that the pathologist was giving a rough, and not an accurate, estimate. At the trial, when asked how long the bruise would take to form, the pathologist answered, "I would say fifteen minutes to a half hour." Branion, 855 F.2d at 1262. Judge Easterbrook construes this sentence to indicate that "the pathologist was in any event throwing off a rough estimate rather than giving the physical limits." *Id.* Of course, Judge Easterbrook cannot know that this is what the pathologist was doing. Moreover, one would expect that Dr. Belmonte, the state's pathologist, was well aware that his testimony would weaken the state's case. Thus when he said, "I would say fifteen minutes to a half hour," he may have been especially careful to state the minimal physical limit. Finally, many expert witnesses routinely use phrases such as "I would say" in presenting their opinions to a jury. Their use of such phrases is not intended to

convey doubt or uncertainty.

[FN61]. *Id.*

[FN62]. *Id.*

[FN63]. It is difficult to imagine how or why a single murderer would have restrained Donna for fifteen to thirty minutes by holding a cord around her neck, and then, presumably shot her while still holding the cord. If there were two killers, however, then the scenario makes sense. One of the murderers could have physically restrained Donna with the ironing cord around her neck while the other murderer searched the apartment either for valuables or for evidence of Dr. Branion's records of treating Black Panthers. The latter then found Dr. Branion's Walther PPK on a closet shelf and came back into the utility room. He fired into Donna's body while she was still being restrained and held up by the cord. The evidence that she was still being held up by the cord is the bunching of the seven entry wounds; if Donna was falling as she was shot, the wounds probably would have been spaced wider apart and would have entered her body from different angles.

[FN64]. In fact, it was the same scenario that the prosecutor suggested to the jury in his closing argument at the trial.

[FN65]. Dr. Belmonte was asked about this at trial, but the question was elliptical and the jury may not have understood its significance:

Q: Now, doctor, there is something that I want to ask you that I am curious about. If I placed a rope about the neck of a person who was dead, could I turn it pinkish-blue by choking him?

A: No, you would not.

Transcript at 475.

[FN66]. Appellant's Reply Brief at 5, *Branion v. Gramly*, 855 F.2d 1256 (7th Cir. 1988) (No. 87-3052).

[FN67]. *Branion*, 855 F.2d at 1262.

[FN68]. According to Dr. Branion's cousin, Oscar Brown, Jr., in a television interview concerning the Branion case, if Dr. Branion had planned to run into his apartment that morning, and then run back out to his car after murdering his wife, he would have severely risked having the neighbors see him.

Documentary: *Presumed Guilty* (Chicago WCCW-TV television broadcast, July 15, 1990). Dr. Branion would have been more conspicuous than the actual murderer or murderers, who might have driven a small truck and pretended to be delivering a package at Christmas time.

[FN69]. These photos are available at Police Headquarters at State and Eleventh Streets, Chicago, Illinois; they were not formally introduced into the trial as evidence.

[FN70]. Donna was shot at point-blank range; one of the bullets penetrated her aorta, and her body

was found lying in a pool of blood. Presumably, there would have been blood all over a murderer who shot his victim at close range.

[FN71]. Recall that the police estimates of driving times each begin with a car with its motor running, and end when the car reaches its destination before the car is parked and stopped.

[FN72]. *Id.* at 1257.

[FN73]. Judge Easterbrook read this affidavit and referred to it in his opinion, but ruled that it was not properly before the appellate court and ordered it stricken from the record. *Id.* at 1261. Even so, when it served his purpose, Judge Easterbrook later used information from the part of the appendix that he had ordered stricken. *Id.* at 1267-68.

[FN74]. *Id.* at 1258.

[FN75]. *Id.* at 1261. The information that Dr. Branion did not investigate his wife's condition came solely from Dr. Branion himself. He told the investigating detectives exactly what he had done. He told the detectives that he had seen the body, saw that it was still and lying in a pool of blood and that it was cyanotic, and acted to shield Joby from the sight. Clearly, if Dr. Branion planned the murder, as Judge Easterbrook says he must have, he would have invented a story about helping and assisting his wife instead of what he actually told the police.

[FN76]. The first patrol officer on the scene of the crime testified to the jury that he knew the victim was dead without having to take her pulse. The police evidence technician told the jury he knew the victim was dead when he got within two feet of her.

[FN77]. After investigating the case, it is my personal belief that what occurred was that the police officer did not know what "cyanotic" meant or how to spell it and therefore asked Dr. Branion what it meant. Dr. Branion probably replied that it was similar to lividity. The police officer then wrote down the word "lividity." The policeman's note then took on an aura of exact quotation. Although the police questioned Dr. Branion on many occasions the day of the murder, at no time did they use a stenographer or court reporter to take down what he said.

[FN78]. *Branion*, 855 F.2d at 1258.

[FN79]. We included in the appendices presented to the federal courts a copy of one Chicago gun shop's inventory which was obtained by the police. The inventory showed that twenty-five Walther PPKs were sold to customers over a one month period.

[FN80]. *Branion*, 855 F.2d at 1258.

[FN81]. Transcript at 265. Detective Boyle testified for the state that he recovered three boxes of .380 caliber ammunition, two of them of Geco manufacture. One of the latter contained twenty-five shells of

ammunition and was full; the second contained twenty-one shells and was missing four shells. *Id.* at 265-67.

[FN82]. The number of bullets and wounds was the subject of an exhaustive analysis by Dr. Douglas Shanklin, contained in the appendix to the brief filed with Judge Easterbrook. However, Judge Easterbrook struck Dr. Shanklin's affidavit from the record on the technicality that a formal motion to enlarge the record was not made. Earlier in his opinion, Judge Easterbrook states, "If we were sure someone is innocent, perhaps we should dispense with procedural folderol." *Branion*, 855 F.2d at 1261. By using procedural technicalities to dispense with evidence that could prove Dr. Branion's innocence, Judge Easterbrook's refusal to consider Dr. Shanklin's affidavit is hardly an example of dispensing with procedural folderol. In addition, under the procedural history of the case, it was only Judge Easterbrook's voiding of the stage of the proceedings before Judge Plunkett-at which stage the Shanklin affidavit was duly introduced-that made it necessary to have a different motion (a motion to enlarge the record). Since Judge Easterbrook's voiding of Judge Plunkett's proceedings could not have been anticipated, however, and since Judge Easterbrook announced his voiding of those procedures in the same opinion in which he declared that a formal motion to enlarge the record should have been made, counsel was afforded no opportunity to comply with the procedural technicalities.

[FN83]. The notion that four bullets were missing from the box and four shells were found near Donna's body was the single most important piece of evidence that the Illinois Supreme Court found against Dr. Branion. That court stated, "[e]xactly four bullets were found in and around the body, and when the police found, a month later, a box of .380 caliber bullets designed to hold 25 bullets, with exactly four missing, the evidence was convincing." *People v. Branion*, 47 Ill. 2d 70, 78, 265 N.E.2d 1, 5 (1970).

[FN84]. *Branion*, 855 F.2d at 1258.

[FN85]. Transcript at 166.

[FN86]. *Id.*

[FN87]. Nelson Brown, Donna's brother, testified as a character witness on behalf of Dr. Branion. If there was unrest and unpleasantness in the Branion home, it would be strange to imagine that the victim's brother would testify as a character witness for the defense.

[FN88]. Perhaps the reader is expected to think that Dr. Branion was too irrational to consider divorce as a preferable alternative to murder, and instead planned a supremely "rational" perfect crime.

[FN89]. See D'Amato, Karl Llewellyn, 7 *Guide to American Law* 207 (1984).

[FN90]. See Kennedy, *The Structure of Blackstone's Commentaries*, 28 *Buffalo L. Rev.* 205, 211-13 (1979); Kennedy, *Form and Substance in Private Law Adjudication*, 89 *Harv. L. Rev.* 1685, 1700 (1976).

[FN91]. I have tried to show that no legal theory can constrain a judicial decision. See D'Amato, Can Any Legal Theory Constrain Any Judicial Decision? 43 U. Miami L. Rev. 513 (1989). I have also tried to indicate reasons why no rule of law can constrain a judicial decision. See D'Amato, The Pursuit of Epistemic Indeterminacy, 84 Nw. U.L. Rev. (forthcoming 1990).

[FN92]. D'Amato, The Decline and Fall of Law Teaching in the Age of Student Consumerism, 37 J. Legal Educ. 461, 483-88 (1987).

[FN93]. I am concerned that in many "legal clinics" in law schools, students are asked to work on cases where obviously and admittedly guilty people are seeking to overturn their convictions on a constitutional technicality. When a student puts in a lot of work on such a case, what is the effect if the case is eventually won? In that event, the student may take away from the enterprise the feeling that she has only contributed to the frustration of real justice by using her intellectual talents to obtain the freedom of a person who should be in jail. Yet the underlying message of such "clinical" experience seems to be: win for your client irrespective of justice. When our students go forth into the real world to practice, they may very well have to take on "unjust" cases in order to support themselves in the legal profession. But why should law schools choose unjust cases for free legal-clinic defense work when there is no economic justification for doing so?

[FN94]. The notion that a lawyer has an obligation to defend a client whether the client is right or wrong tends, over time, to devastate the lawyer's own sense of morality. We should begin to consider whether there is any such "obligations." I admit that if I am "the last lawyer in town," I have an obligation to represent a client irrespective of the morality of the client's position. But in a pluralistic society with many lawyers, the only "obligation" appears to be a rationalization for the attorney's financial incentive.

[FN95]. M. Freedman, Speech to The Seventh Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit (May 24, 1989), reprinted in 128 F.R.D. 409, 439 (1989).

[FN96]. Letter from Monroe Freedman to Anthony D'Amato (Oct. 14, 1989) (quoted by permission of Professor Freedman). See also *supra* note 35.

[FN97]. Judge Paul Plunkett also wrote an opinion in the Branion case for the Northern District Court of Illinois. Judge Plunkett held that since Dr. Branion could not have murdered Donna at the earlier time that Judge Getzendanner said, Dr. Branion must have murdered Donna later when the state said Dr. Branion did it. Judge Plunkett's opinion, however, was dismissed by Judge Easterbrook on the grounds that the district court lacked jurisdiction because Dr. Branion's appeal was filed more than thirty days after Judge Getzendanner's judgment became final. Branion, 855 F.2d at 1260.

[FN98]. Margolick, At the Bar, N.Y. Times, Oct. 13, 1989, at B5, col. 2 (reporting on this paper shortly after it was delivered at the Benjamin N. Cardozo Law Review's symposium on Deconstruction).

[FN99]. See Balkin, Deconstructive Practice and Legal Theory, 96 Yale L.J. 743 (1987) (analysis of

Derrida and Deconstruction within the context of legal philosophy); Spann, A Critical Legal Studies Perspective on Contract Law and Practice, 1988 Ann. Surv. Am. L. 223 (discussing the indeterminacy thesis of critical legal studies); see also D'Amato, Can Any Legal Theory Constrain Any Judicial Decision? 43 U. Miami L. Rev. 513 (1989) (discussing the effects legal theory has on judicial decisions).

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