

**TWAS THE DEVIL: HEARING THE
CONSTITUTIONAL INFIRMITY OF THE
MODERN AMERICAN DEATH PENALTY IN
THE BYGONE SONGS OF OZARK
FOLKLORE**

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*I'll sing you a song
It ain't much long
It's in the case of murder
~Reel 106, Item 2*

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INTRODUCTION

Times are not what they used to be.¹ In the nineteenth century, a folklore of mysticism² ran deep through the Ozark region.³ Some was of mere trifles. Blue jays were said to fly down to hell on Fridays to help the devil gather kindling.⁴ Redbud trees, like the one in which Judas hanged himself, were thought better avoided after dark in the springtime.⁵ Perhaps few believed such things. But the collective lore of the Ozarks,⁶ as a primary means of learning and sharing attitudes, values, and beliefs, shaped the way hillfolk thought about and interpreted the world.⁷ According

¹ Carol Elizabeth Jones, Ginny Hawker & Hazel Dickens, *Times Are Not What They Used to Be*, on HEART OF A SINGER (Rounder Records 2005).

² See VANCE RANDOLPH, OZARK MAGIC AND FOLKLORE 3-9 (1964) (describing the prevalence of mystical folklore in the Ozarks).

³ A “widely accepted illustration of the physical boundaries of the Ozarks region” can be found in the writings of Milton D. Rafferty, former Professor of Geography at Missouri State University. See WAYMAN HOGUE, BACK YONDER: AN OZARK CHRONICLE, xxxiv n.19 (2016). This Article utilizes Rafferty’s map, which includes Northwest and Northcentral Arkansas, a wide swath of Southern Missouri, a far corner of Northeast Oklahoma, and perhaps a tiny tip of Southeast Kansas. See MILTON D. RAFFERTY, THE OZARKS: LAND AND LIFE 2 (1980). But there is much debate among geographers over the exact boundaries of the region. See BROOKS BLEVINS, HILL FOLKS: A HISTORY OF ARKANSAS OZARKERS & THEIR IMAGE xi (2002). In fact, the Ozarks being neglected by social scientists and historians might be due in part to uncertainty over whether the Ozarks can even be said to belong to the South, the Midwest, or the West. See *id.* It seems the Ozark region is so cloaked in mystery that experts can hardly point to it on a map.

⁴ See RANDOLPH, *supra* note 2, at 248.

⁵ See *id.* at 263 (describing the “great storm of criticism” that followed the Oklahoma Legislature naming the Redbud Oklahoma’s State Tree in 1937, because “[s]ome hillfolk . . . fe[lt] that the redbud or Judas tree is bewitched, at least in the spring, and it is well to keep away from blooming redbuds after dark.”).

⁶ Genres of study in folkloristics include “myth, folktale, legend, ballad, proverb, riddle, superstition, etc.” ALAN DUNDES, FOLKLORE MATTERS viii (1989). This Article primarily examines material at the intersection of ballads and superstition. However, it should be noted that “[a]lthough folklorists often speak in terms of folklore genres, many aspects of culture may derive from or include folkloristic elements,” Olufunmilayo B. Arewa, *Youtube, UGC, and Digital Music: Competing Business and Cultural Models in the Internet Age*, 104 NW. U. L. REV. 431, 461 (2010), such as the law.

⁷ Folklore is “a primary vehicle for the communication and continuation of attitudes and values” and “represents a people’s image of themselves.” ALAN A. DUNDES, INTERPRETING FOLKLORE viii, 174 (1980). “Folklore as a mirror of culture provides unique raw material for those eager to better understand themselves and others.” *Id.* at viii. It “reflects a society,” *id.* at 174, and has long “served a powerful role

to that prolific but wily folklorist Vance Randolph, Ozarkers had "little interest in the mental procedure that the moderns call science" and their "ways of arranging data and evaluating evidence [were] very different from those . . . favored in the world beyond the hilltops."⁸ Though not true of all Ozarkers, his observation was certainly true of some. When in 1896 a devilish image appeared mysteriously on the cupola of a church in the Ozark town of Fair Grove, Missouri, the *Springfield Republican* reported, "Some were quite sure it was the work of the devil; others believed it the work of God. Some thought it the work of human hands, and some thought it had been caused by a leak in the roof."⁹ From early on, reason and the supernatural—the earthly and the unearthly—walked hand-in-hand in the Ozarks.

Then came radios and railroads, televisions and highways. To hear Randolph tell it, the region had been frozen in time before their arrival.¹⁰ Afterwards, new thoughts flowed in, along with new ways to think them.¹¹ He portrayed the hill country as an enchanted land of backwoods peculiarity, beset by the newfangled ways of the modern world.¹² Historians have set about debunking Randolph's Ozark exceptionalism.¹³ But certainly things changed in the Ozarks of the twentieth century, as things are wont to do. After the First Great War, Americans "[f]aced with the burdens of the modern age" were drawn to the Arcadian imagery of the Upland South.¹⁴ So too after the Second, Americans yearned for a simpler, preatomic time.¹⁵ They came in search of quiet porch swings and slow rivers. And with generations of postwar and Cold

in shaping ideology about culture and cultural production." Arewa, *supra* note 6, at 461.

⁸ RANDOLPH, *supra* note 2, at 3.

⁹ *Id.* at 229-31 (quoting the *Springfield Republican* as inviting anyone who might "entertain the idea that superstition is forever banished from the minds of the American people" to "visit just now the little town of Fair Grove in Greene county").

¹⁰ Randolph referred to a "standardizing transformation" in the thinking and behavior of Ozarkers "[w]herever railroads and highways penetrate[d], wherever newspapers and movies and radios [were] introduced." *Id.* at 9.

¹¹ *See id.*

¹² *See* BLEVINS, *supra* note 3, at 1-7.

¹³ *See, e.g.*, SIMON J. BRONNER, FOLLOWING TRADITION: FOLKLORE IN THE DISCOURSE OF AMERICAN CULTURE 226-27 (1998); BLEVINS, *supra* note 3, at 1-7.

¹⁴ *See* BLEVINS, *supra* note 3, at 2.

¹⁵ *See id.*

War dreamers came a broad diversity of thought. Randolph, who had first visited the Ozarks in 1899 and later moved there in 1920 to live among his research subjects for the better part of his life,¹⁶ observed—perhaps a little despondently—“educated young folk are certainly less concerned with witchcraft and the like than were their parents and grandparents.”¹⁷ Yet, in one of his shrewder moments, Randolph also predicted, “A great body of folk belief dies very slowly.”¹⁸

So it does. Ozark-born soldiers who wore rings forged from gallows nails based on the superstition that they protected against a violent death (and, conveniently, venereal disease)¹⁹ were not, as one might think, wielding muskets for the Confederacy at Fort Sumter; they were wielding M1 Carbines for the Allies on the Western Front.²⁰ That is to say, these were not the Rebels of the 1860s, but United States Army soldiers of the 1940s.

The nails came from the hanging platform in Galena, where at dawn on May 21, 1937, the Ozark State of Missouri had made Rosco “Red” Jackson²¹ the last capital defendant in the nation to be executed publicly.²² It was reported that a crowd of hundreds “hummed with a gruesomely festive air,”²³ as onlookers fought for better vantages from “the good perches in the trees”²⁴ around the gallows. Lore of such provenance does not vanish overnight.

I grew up in the Ozarks of the late twentieth century, where there was still superstitious folklore to be found.²⁵ My parents had

¹⁶ See RANDOLPH, *supra* note 2, at 4.

¹⁷ *Id.* at 7-8.

¹⁸ *Id.* at 9.

¹⁹ See *id.* at 152.

²⁰ See *id.*

²¹ See Stephanie Simon, *McVeigh's Coming Execution Recalls Morbid 1937 Spectacle*, L.A. TIMES (May 6, 2001), <http://articles.latimes.com/2001/may/06/news/mn-60519> [<https://perma.cc/9VBU-B4PB>].

²² See *id.* (“That was the last public execution in the United States: the last time the government killed a convict before so large a crowd.”).

²³ *Id.*

²⁴ Tim O’Neil, *Galena's Gruesome Claim to Fame*, ST. LOUIS POST-DISPATCH, March 20, 2001, at E1.

²⁵ See, e.g., Jack Weatherly, *MBJ BUSINESS PERSON OF THE YEAR: Joe Max Higgins of the Golden Triangle's LINK*, MISS. BUS. J. (Dec. 28, 2016), <http://msbusiness.com/2016/12/mbj-business-person-year-joe-max-higgins-golden-triangles-link> [<https://perma.cc/2RRZ-NXN3>] (referring to the practice of water witching occurring during this time).

come to Northwest Arkansas with that same longing that today's foremost Ozark historian Brooks Blevins refers to as a "foggy-eyed nostalgia" for "some physical and spiritual connection to a frontier long vanished."²⁶ Though not exactly a barefoot hayseed, I did, at one time or another, eat hog's jowl by the campfire and drink moonshine in the cellar, where they keep the stories. More to the point, I witnessed—and had little cause to question—the practice of water witching, exemplified well by the Bond Engineering Company of Marion, Arkansas, once hiring a witch (chosen from four applicants²⁷) to assist with a water system installation and following the quivering divinations of the witch's "'wigggle-stick' or 'doodle-bug'"²⁸ to a four-hundred gallon-per-minute gusher that a spokesman reported as recently as December of 2015 was "still a dependable water source."²⁹

I also was warned, like so many before me, that the ghosts of the defendants sentenced to death by the Old West's Hanging Judge, Isaac C. Parker,³⁰ still haunt the federal courthouse in Fort Smith, due to Lewis Holder's death curse.³¹ Judge Parker had Holder hanged in 1894 for murdering his trapping partner, poor George Bickford, with what appeared to be a rather cowardly shotgun blast to the back, while they were alone hunting, high in the San Bois Mountains.³² The scoundrel even stole poor

²⁶ BLEVINS, *supra* note 3, at 2-3.

²⁷ See Weatherly, *supra* note 25.

²⁸ In 1936, the Texas Court of Civil Appeals explained that a divining rod was "usually referred to as a 'wigggle-stick' or 'doodle-bug,'" *Schram v. Pearl Oil Corp.*, 90 S.W.2d 846, 847 (Tex. Civ. App. 1936), while denying the claim of a water-witch plaintiff to share in the profits of a productive oil well that he had witched out for an oil company. See *id.* at 846-47. The court simply did not believe that a wigggle-stick could be used to find oil, regardless of whether that is exactly what the plaintiff had done, magically or not. See *id.* at 847. The court took "judicial knowledge of the scientific fact that there is no virtue whatever" to the practice, and that was the end of it. *Id.* at 851.

²⁹ See Weatherly, *supra* note 25.

³⁰ "Isaac Charles Parker is among America's best-known judicial figures." MICHAEL J. BRODHEAD, ISAAC C. PARKER: FEDERAL JUSTICE ON THE FRONTIER xv (2003). His tenure as judge of the United States District Court for the Western District of Arkansas ran from his appointment in 1875 by President Ulysses S. Grant to his death in 1896. *Id.* He earned the name "Hanging Judge" due to the great many death sentences he handed down, seventy-nine of which were carried out, see LOLA SHROPSHIRE, FORT SMITH AND SEBASTIAN COUNTY 32 (1998), in an effort to tame the hopelessly lawless Indian Territory he presided over from Fort Smith, Arkansas.

³¹ BRODHEAD, *supra* note 30, at 69.

³² See July 25, 1894 Execution, NATIONAL PARK SERVICE,

Bickford's clothes and horse.³³ Before he was hanged, Holder "swore that his ghost would return to haunt [Judge] Parker and all others connected to the court."³⁴ Later, deputy marshals were afraid to investigate mournful sounds emanating from the gallows at night, for fear that it might be Holder's ghost, returned for vengeance.³⁵ Some mythopoeic events reverberate long in lore.

But there are limits on what meaning we can take away from the persistence of a superstitious folk belief in the Ozarks. Whether such things as Holder's ghost and Jackson's charmed nails are truly believed, or just entertained with a playful wink and good humor, is hard to say. The relationship between superstitious folklore and genuine belief is notoriously abstruse, and has long frustrated scholars undertaking interpretive analysis of folklore.³⁶

Even that consummate man of science and Nobel Prize-winning physicist Niels Bohr kept a horseshoe.³⁷ Once, when asked if he believed it to be lucky, he quipped that of course he did not, but that he understood it to work regardless of whether one believed.³⁸ Like Bohr, rational people sometimes reject superstition, but enjoy playing along. So too has the North Dakota Supreme Court mixed its repudiation of superstition with a small dose of acceptance, stating that "[n]o trial judge should yield to a litigant's insistence that he be allowed to use an expert on witchcraft or water-well dowsing or astrology, at least until it is established that the reliability of such testimony is accepted by the scientific community and the courts."³⁹ Rational people sometimes deny superstition, while not closing the door to it entirely.

Further, there is evidence that otherwise rational people cannot help but be given to magical thinking, even when they

<https://www.nps.gov/fosm/learn/historyculture/execution072594.htm>
[<https://perma.cc/E7HB-N7AL>] (last updated Apr. 10, 2015).

³³ *See id.*

³⁴ BRODHEAD, *supra* note 30, at 69.

³⁵ SHROPSHIRE, *supra* note 30, at 32.

³⁶ *See* DUNDES, *supra* note 7, at viii-ix.

³⁷ *See* Matthew Hutson, *The Science of Superstition*, THE ATLANTIC (Mar. 2015), <https://www.theatlantic.com/magazine/archive/2015/03/the-science-of-superstition/384962> [<https://perma.cc/LU2N-438C>].

³⁸ *See id.*

³⁹ *Stein v. Ohlhauser*, 211 N.W.2d 737, 743 (N.D. 1973).

make a conscious effort to suppress it. A 2013 study published in the *Journal of Experimental Psychology* indicates that it is difficult for MIT physicists, chemists, and geologists to keep from attributing intentions to events in the natural world.⁴⁰ In a 2014 study published by *Child Development*, atheists who were asked to dare god to do horrible things to their families became stressed and perspired, as much as subjects who were believers.⁴¹ A 2005 study published in *Developmental Psychology* shows that individuals who indicate they trust in science are nevertheless loath to invite a supposed witch to put a curse upon them.⁴²

People who make up social institutions supposedly built on reason and scientific rationality are not immune to superstition. Randolph noted that, in his time, "the most famous water witch who ever lived in southwest Missouri was a physician, a graduate of Washington University."⁴³ Like the United States Courts of Appeals for the Fourth and Eighth Circuits have regarded Randolph as an authority on matters of folklore,⁴⁴ I will take Randolph at his word on this point. But there are more modern examples, as well.

In 1995, the rational folks at the Central Intelligence Agency admitted to having spent \$20 million on a twenty-year endeavor, begun in 1978 and preposterously codenamed the Stargate Program, in which the U.S. Army attempted to spy on Moscow via

⁴⁰ See Deborah Kelemen, Joshua Rottman & Rebecca Seston, *Professional Physical Scientists Display Tenacious Teleological Tendencies: Purpose-Based Reasoning as a Cognitive Default*, 142 J. EXPERIMENTAL PSYCHOL. 1074, 1074-83 (2013).

⁴¹ See Konika Banerjee & Paul Bloom, "Everything Happens for a Reason": *Children's Beliefs About Purpose in Life Events*, 86 CHILD DEV. 503 (2015).

⁴² See Eugene Subbotsky, *The Permanence of Mental Objects: Testing Magical Thinking on Perceived and Imaginary Realities*, 41 DEV. PSYCHOL. 301, 301-18 (2005).

⁴³ RANDOLPH, *supra* note 2, at 6.

⁴⁴ In the 2006 capital case *Conaway v. Polk*, the defendant maintained that one of his jurors had a conflict of interest due to the fact that the juror was "double first cousins, once removed" with his co-defendant. 453 F.3d 567, 573 n.4 (4th Cir. 2006). The Fourth Circuit looked to one of Randolph's essays on folk speech to determine what that allegation meant, which, incidentally, is "[w]hen two brothers marry two sisters, the children of these two unions are known as double cousins." *Id.* In *WSM, Inc. v. Hilton*, the Eighth Circuit helped resolve a trademark dispute involving the word "Opry" by relying on Randolph's book *Down in the Holler*, which had actually been put into evidence in the case, for the proposition that the word was widely used. See 724 F.2d 1320, 1326 (8th Cir. 1984).

psychic remote viewing from Fort Meade,⁴⁵ some 8,000 miles away. The program ended with an independent study from the American Institutes for Research, with the stick-in-the-mud conclusion that psychic remote viewing was probably not real.⁴⁶

In a far less famous yet very curious case from 2011, a former member of the Washington State Bar,⁴⁷ who sued Allstate Insurance Company for water damage caused by basement flooding, described in a deposition the use of water dowsing to calculate the extent of her damages:⁴⁸

It's—you know how people search for water with sticks? You can use sticks, twigs, and as you cross the point where water is, it will cross. Well, you can do it for anything So what you do is ask the questions, and the more specific you are, the answers are "yes" or "no." And with a quick mind and with the knowledge you have, you can find out all kinds of things.⁴⁹

It seems that when Randolph predicted "some vestiges of backwoods superstition will be with us for a long time to come,"⁵⁰ he had at least that much right, and not only with regard to the Ozarks. Some have and will. Randolph's prediction came true.

But perhaps it did not come "*complexly* true."⁵¹ Randolph brushed aside the tricky relationship between lore and belief by simply declaring, "I do not presume to define the exact limits of credulity."⁵² But the persistence of lore and superstition cannot be rightly understood without recognizing that it is not necessarily a result of earnest belief in the facts of the lore itself. The truth of the matter is more complex, as truth likes to be. It simply cannot

⁴⁵ See Stuart Vyse, *How Superstition Works*, THE ATLANTIC (Oct. 22, 2013), <https://www.theatlantic.com/health/archive/2013/10/how-superstition-works/280649> [<https://perma.cc/Z5DT-EZ3H>].

⁴⁶ See *id.*

⁴⁷ See *In re Disciplinary Proceeding Against Koehler*, 750 P.2d 254 (Wash. 1988).

⁴⁸ See *Koehler v. Allstate Ins. Co.*, 163 Wash. App. 1002 (Wash. Ct. App. 2011).

⁴⁹ *Id.* at n.3 (plaintiff "testified that it would cost \$54,000 to conduct the water damage remediation" and "explained that she derived this value by 'dowsing.'").

⁵⁰ See RANDOLPH, *supra* note 2, at 9.

⁵¹ George Saunders, *Who Are All These Trump Supporters?*, NEW YORKER (July 11, 2016) <https://www.newyorker.com/magazine/2016/07/11/george-saunders-goes-to-trump-rallies> [<https://perma.cc/U74G-VCSS>] (emphasis in original) (coining this term to refer to truthful but misleadingly reductive arguments surrounding the 2016 presidential election).

⁵² RANDOLPH, *supra* note 2, at 7.

be known how much folklore and superstition are driven by true belief, or by lark, or by a duplicitous shrug of the shoulders, or by a subconscious susceptibility to magical thinking. So to understand what Ozark lore teaches about Ozarkers, the question must be asked, if it is not belief that keeps lore and superstition hanging around, what then is it?

One good answer is fear.⁵³ Perhaps the sweaty atheists are an indication, but not they alone. Many serious people have been driven to superstition by fear. In the wake of the attempted assassination of her husband following his 1980 election, Nancy Reagan became, in her words, "terrified" of the "historical pattern" known as the twenty-year death curse, by which every president since 1840 elected in a year ending in zero had been assassinated or died in office.⁵⁴ She took to consulting an astrologist about affairs of state, resulting in a very awkward public debate over the extent to which her husband's presidency ended up being dictated by the alignment of the stars.⁵⁵

Jackson's gallows nails and Holder's death curse also show how fear can drive lore and superstition. Whether World War II soldiers genuinely believed that they could not die when wearing the nails or whether Fort Smith deputy marshals truly believed Holder made good on his promise to return as a ghost, the grisly public spectacle of Jackson's execution and the eeriness of Holder's crime and promise to return after death seemed to find enough footing in the psyche of Ozarkers to change, albeit in small ways, how they felt about and interpreted the world. The soldiers were comforted by the rings. The deputies feared the gallows at night. Fear of death, murder, and execution has the power to shape thinking and behavior in strange ways, which, like Bohr's horseshoe, works despite earnest belief. Fear keeps superstition and folklore alive.

Two lessons follow this understanding. First, superstitious folklore is not necessarily about ignorance, and neither are the Ozarks. There was a stereotype underlying Randolph's claim that the "isolated illiterates" of the Ozarks were "the most deliberately

⁵³ See Hutson, *supra* note 37 ("Fear is another driver of irrationality.").

⁵⁴ See Vyse, *supra* note 45.

⁵⁵ See *id.*

unprogressive people in the United States.”⁵⁶ Blevins cautions that the Ozarks “ha[ve] never been as isolated and as unconsciously immune or consciously resistant to modernizing influences . . . as folklorists and travel writers had suggested.”⁵⁷ But their suggestions left the Ozarks “riddled with paradox,”⁵⁸ because the negative stereotype of a pathetic, backwoods hillbilly was a product of the same romanticization of the Ozarks that created its pastoral image. Blevins explains that “the degraded and backward state of the hillbilly helped expel, or at least soften, any doubts that depression-era and Cold War Americans might harbor concerning the innate goodness of science and ‘progress.’”⁵⁹ The hillbilly’s supposed ignorance reassured them. And so “the barefooted moonshiner stared out from comic strips and postcards to sober the nostalgic spirit and reaffirm the resolve toward progress and modernization,”⁶⁰ even as his mockers coveted his home. Over time, “the hillbilly stereotype emerged as a powerful marketing tool.”⁶¹ There are still theme parks in the Ozarks built on his shoulders.⁶²

The paradox grew complex dimensions over time, as the Ozarks proved to be a place that can somehow “simultaneously produce a J. William Fulbright and an Orval Faubus, provide the setting for a young Bill Clinton’s first political race, spawn Fortune 500 companies such as Wal-Mart and Tyson Foods, and still be saddled with an image of static backwardness.”⁶³ That image makes it tempting to attribute the persistence of superstitious folklore in the Ozarks to a regional ignorance. But the evidence is to the contrary. Like the writer said, “the Ozark

⁵⁶ RANDOLPH, *supra* note 2, at 3.

⁵⁷ BLEVINS, *supra* note 3, at 4.

⁵⁸ *Id.* at 6.

⁵⁹ *Id.* at 2.

⁶⁰ *Id.* at 3.

⁶¹ See C. BRENDEN MARTIN, TOURISM IN THE MOUNTAIN SOUTH: A DOUBLE-EDGED SWORD 161 (2007).

⁶² See *id.* (referring to “the prominence of the hillbilly image in Dogpatch U.S.A.” and “the hillbilly image [being] reinforced . . . at the region’s main theme park, Silver Dollar City”); *New Life Ahead for Abandoned Dogpatch Theme Park*, ARKANSAS MATTERS, <http://www.arkansasmatters.com/news/entertainment/new-life-ahead-for-abandoned-dogpatch-theme-park/206470797> [<https://perma.cc/6QD3-33XA>].

⁶³ BLEVINS, *supra* note 3, at xi.

Mountains are all things to all people.”⁶⁴ Somehow, reason and superstition, science and magic, industry and rurality, progress and tradition, fact and lore achieve a marvelous harmony in the Ozarks. Somehow, the old, magic-filled mind of the hill country has room for modern thinking.

The second lesson we learn from the understanding that folklore is driven by more than genuine belief applies beyond the hills. Folklore still lives in and moves this nation’s social institutions⁶⁵ like prison systems,⁶⁶ banks,⁶⁷ schools,⁶⁸ colleges,⁶⁹ information technology systems,⁷⁰ sports,⁷¹ the United States Congress,⁷² and the justice system.⁷³ Given that fear is an

⁶⁴ See *id.* at 3 (citing Louisa Comstock, *How to Leave Home and Like It*, HOUSE BEAUTIFUL, Mar. 1949, at 190).

⁶⁵ The folklore of social institutions takes many forms. “Although the popular conception of folklore as a set of reassuring tales that . . . celebrates a simpler time may enjoy wide currency, . . . folklore and the folk practices of contemporary groups, particularly occupational groups, are often filled with the irreverent and the subversive.” Carol Burke, *A Response to Professor Rose’s Deconstructing Truth*, 12 WM. & MARY J. WOMEN & L. 491, 495 (2006).

⁶⁶ See, e.g., *Catalano v. United States*, 383 F. Supp. 346, 349 (D. Conn. 1974) (explaining that bureau of prisons caseworkers rely “on the ‘folklore’ of prison practices” in the absence of institutional standards).

⁶⁷ See, e.g., *Morgan v. McLaughlin*, 260 So. 2d 890, 892 (Fla. Dist. Ct. App. 1972) (lamenting a lack of adherence to legal rules by financial institutions, given that “so much folklore passes for law in banks”).

⁶⁸ See, e.g., *Brown v. Woodland Joint Unified Sch. Dist.*, No. S-91-0032WBS/PAN, 1992 WL 361696, at *10 (E.D. Cal. Apr. 2, 1992), *aff’d*, 27 F.3d 1373 (9th Cir. 1994) (finding that “[w]itches and spells and charms are part of American Folklore” that may be taught in schools without violating the Establishment Clause).

⁶⁹ See Vyse, *supra* note 45 (explaining that while “conventional wisdom suggests that the highly educated should be more skeptical,” due to the “fear of failure” in academia, “college students are indeed a superstitious group,” doing such things as bringing talismans to exams, “such as rabbit’s feet, dice, and coins, as well as teddy bears and other cuddly toys”).

⁷⁰ See, e.g., *In re Nicholas B.*, 454 N.Y.S.2d 426, 427 (N.Y. Fam. Ct. 1982) (addressing “the mass of folklore and the body of esoteric custom and usage which [arose] in [the] wake” of a computerized court administration system that was to execute automated dismissals pursuant to a statutory provision that required no court action).

⁷¹ See Vyse, *supra* note 45 (“sports and gambling, is a traditional stronghold of superstition”).

⁷² Senator Claiborne Pell, a great supporter of higher education and founder of the Pell Grant, was a great believer in psychic research, paying C. B. Scott Jones an annual salary of \$48,000 to investigate “paranormal phenomena in the national interest.” See *id.*

especially strong driver, we might consider how lore and superstition driven by fear influences the workings of modern social institutions, such as the legal outcomes of the justice system. Below, I do just that with a favorite subject of Ozark lore—murder.⁷⁴

To that end, this Article proceeds in five parts. Part I describes how the musical folklore of the Ozarks created and reinforced a way of viewing murderers by—in song after song, narrative after narrative—repetitively portraying the same image of a killer. Part I deconstructs Ozark murder ballads to distill from them six characteristics consistently attributed to the character who commits murder: a monstrous lack of humanity, evilness justifying eternal damnation, an inevitable deservingness of the death penalty, simplicity or one-dimensionality, deceptiveness, and a propensity to kill out of senseless whimsy and a delight in the suffering of others. Part II searches for echoes of these folkloric attributes in news reports, commentary, rhetoric, and prosecutorial arguments surrounding twenty-first century executions in which the condemned defendants were tried in counties situated in the Ozark regions of Missouri, Arkansas, and Oklahoma. The discourse reflects that modern day Ozarkers tend to ascribe superstitious folkloric attributes to defendants convicted of murder, despite the availability of neurological and psychological explanations for their crimes. Part III describes how modern Eighth Amendment law requires jurors to view convicted murderers when assessing their deservingness of the death penalty with rationality and humanism that contradict the superstitions of Ozark lore. Part IV examines evidence of folk knowledge influencing the decisions of capital jurors in ways that conflict with legal instructions effectuating Eighth Amendment precepts. In other words, Part IV asks whether Ozark jurors see

⁷³ See, e.g., *House v. Giant of Maryland LLC*, 232 F.R.D. 257, 262 (E.D. Va. 2005) (addressing “folklore within the bar” regarding discovery obligations and when a litigant may amend an answer, and admonishing that “the folklore is wrong”).

⁷⁴ “The idea that the fairy tale is worthy of study by legal scholars may seem uncomfortable to many.” Katherine J. Roberts, *Once Upon the Bench: Rule Under the Fairy Tale*, 13 *YALE J.L. & HUMAN.* 497, 497 (2001). But there has been legal scholarship on both how lore appears in law and how law appears in lore. See *id.* at 498. For instance, a scholar might consider how folktales “demand[] that good characters are duly rewarded and evil ones justly punished.” *Id.*

the fictional killer of Ozark myth when they regard a capital defendant. The Article concludes by considering how the conflict between lore and law in Ozark capital sentencing is representative of a folklore-based constitutional infirmity that exists in the nation beyond the hilltops. After all, if the anti-exceptionalists are correct, the Ozarks are not so unlike the rest of the country.

This Article arose out of one, rather whimsical thought, inspired by listening to the University of Arkansas' Ozark Folksong Collection: could it be that the failure of today's jurors to abide by the highest ideals of capital sentencing might have a root cause most clearly reflected in—of all places—a little-known record from a forgotten place and time, where the specter of a mythological killer once ran the high ridges and lurked in the low creek bottoms?

The thesis that age-old folksongs could influence the thinking of present-day capital jurors may seem outlandish. But there is compelling evidence that deeply rooted folk knowledge can persist through the years to heavily influence the decisions of jurors, despite being contrary to developments in the law, and there is also compelling evidence that musical folklore has the power to affect the human mind in profound and lasting ways, which could serve to create such deeply rooted folk knowledge.

A 1999 study of juror decision-making led by Benjamin D. Steiner, funded by the National Science Foundation, and reported in the *Law and Society Review*, demonstrated that “folk knowledge about crime and punishment influences the exercise of juror discretion in capital sentencing,”⁷⁵ “despite court admonitions that *such considerations are not to play a role.*”⁷⁶ Courts cannot command away jurors' deeply held folk knowledge, even when life and death depend on it, because it is “[e]mbedded in contemporary cultural common sense”⁷⁷ and made of “the everyday, taken-for-granted understandings . . . that shape people's perceptions, actions, and reactions to events and

⁷⁵ Benjamin D. Steiner, William J. Bowers & Austin Sarat, *Folk Knowledge as Legal Action: Death Penalty Judgments and the Tenet of Early Release in a Culture of Mistrust and Punitiveness*, 33 L. & SOC'Y REV. 461, 464 (1999).

⁷⁶ *Id.* at 461 (emphasis added).

⁷⁷ *Id.* at 496.

situations.”⁷⁸ It is what Henri Lefebvre called “the truth in a body and a soul.”⁷⁹ Folk knowledge is in the nature of things that feel self-evident and beyond questioning. It manifests as bone-deep intuition. “It is inseparable from the interests, goals, and understandings that deeply shape or make up social life.”⁸⁰ And it underlies “the consciousness of crime and punishment.”⁸¹

Unavoidably, the “[l]aw lives as much in folk knowledge as in the pronouncements of appellate courts, in the quotidian as well as the majestic.”⁸² Might the law not live in that quotidian feature of Ozark lore—the killer of myth—or he in the law?

When Ozarkers struggle to interpret, come to terms with, find meaning in, and make sense of tragic Ozark murders—as the bereaved, as citizens, as jurors—they dig deep for those fundamental, body-and-soul truths of Lefebvre’s. Let no one doubt that what they find in those depths could have been forged long ago from stories put to music.

According to research conducted by Sheila Woodward at the University of Cape Town, we start learning music in the womb.⁸³ We develop auditory systems at seventeen weeks of age and, “[a]lready . . . in a world of sound,” enjoy those “natural rhythms of the body—heartbeat and pulse and breath,”⁸⁴ while waiting to be born. After birth, we cry music. “[T]he cries of babies just a few weeks old . . . contain some of the basic intervals common to Western music.”⁸⁵

According to Barbara Else of the American Music Therapy Association, music is “hardwired’ in our brains and bodies.”⁸⁶ In her book *The Power Of Music*, Elena Mannes documented the many ways that music can “change the brain and affect the way it

⁷⁸ *Id.* at 461.

⁷⁹ *See id.* at 462 n.3 (internal quotation marks omitted).

⁸⁰ *Id.* at 461.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *See ‘The Power Of Music’ To Affect The Brain*, NPR (June 1, 2011, 1:00 PM) <http://www.npr.org/2011/06/01/136859090/the-power-of-music-to-affect-the-brain> [<https://perma.cc/2Z75-BX3Q>].

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Honor Whiteman, *The Power of Music: How It Can Benefit Health*, MEDICAL NEWS TODAY (Nov. 19, 2015) <http://www.medicalnewstoday.com/articles/302903.php> [<https://perma.cc/6L74-QVA7>] (quoting Else).

works.”⁸⁷ In fact, neurological research shows “that music stimulates more parts of the brain than any other human function.”⁸⁸ Music, more than anything, is the whole mind. So it is no wonder that music has been proven time and again to shape our mental health.⁸⁹

The vast scientific research into how music affects the brain has even been given a folkname of its own. The “Science of Song” symposium is hosted annually by Vanderbilt University Medical Center.⁹⁰ According to Reyna L. Gordon, director of the Music Cognition Lab, the symposium is “an opportunity to showcase the tremendous breadth of music-related research”⁹¹

Of course, music-lovers were millennia ahead of scientists in appreciating music’s power. Plato described music as “*the movement of sound to reach the soul for the education of its virtue.*”⁹² Confucius believed music to consist of that “which human nature cannot do without.”⁹³

Later, Martin Luther suspected that music was invented by God so humans would have a means of driving the devil away.⁹⁴ Nietzsche suggested that music was the only thing keeping life from being a mistake.⁹⁵ Longfellow called it “the universal language of mankind,”⁹⁶ Tolstoy called it “*the shorthand of*

⁸⁷ ‘*The Power Of Music’ To Affect The Brain*, NPR (June 1, 2011, 1:00 PM) <http://www.npr.org/2011/06/01/136859090/the-power-of-music-to-affect-the-brain> [<https://perma.cc/2Z75-BX3Q>].

⁸⁸ *See id.*

⁸⁹ *See id.*

⁹⁰ Jim Patterson, *Science of Song Symposium Set for Sept. 12 at Vanderbilt*, VANDERBILT U. MED. CTR. REP. (Aug. 23, 2016) <https://news.vanderbilt.edu/2016/08/23/science-of-song-symposium-set-for-sept-12-at-vanderbilt> [<https://perma.cc/3KVY-YNBR>].

⁹¹ *Id.*

⁹² JESSICA PALLINGTON WEST, WHAT WOULD KEITH RICHARDS DO?: DAILY AFFIRMATIONS FROM A ROCK ‘N’ ROLL SURVIVOR 63 (2009).

⁹³ DANIEL J. LEVITIN, THE WORLD IN SIX SONGS: HOW THE MUSICAL BRAIN CREATED HUMAN NATURE (2008).

⁹⁴ 20 THE INTERNATIONAL LIBRARY OF MASTERPIECES, LITERATURE, ART AND RARE MANUSCRIPTS 7357 (New York, The International Bibliophile Society 1899).

⁹⁵ Natalia Dagenhart, *DuPage Symphony Orchestra presented “Three B’s, with a Twist”*, CHICAGO TRIBUNE (Nov. 25, 2016, 2:26 PM).

⁹⁶ Wayne Clapier, *Music: Universal Language of Mankind*, DAILY RECORD (Ellensburg, Wash.) (July 26, 2014) http://www.dailyrecordnews.com/religion/music-universal-language-of-mankind/article_ef95074a-1475-11e4-85a9-0019bb2963f4.html [<https://perma.cc/6V48-Q7NW>].

emotion,”⁹⁷ Hans Christian Andersen called it the thing that speaks “where words fail,”⁹⁸ Frederick Delius called it “[a]n ‘outburst of the soul,’”⁹⁹ and Leonard Cohen called it “the emotional life of most people.”¹⁰⁰ Tennessee Williams noted that “[i]n memory everything seems to happen to music,”¹⁰¹ which was quite right—Mannes documented how humans associate music and memories.¹⁰²

Even one of our own great figures of the law, Supreme Court Justice Oliver Wendell Holmes, himself a bit of a poet, advised taking a “music-bath” regularly, because “it is to the soul what the water-bath is to the body.”¹⁰³

As to whether past Ozark murder ballads could lead to today’s folk knowledge, Thoreau is instructive. He felt that by listening to music people were “related to the earliest times, and to the latest.”¹⁰⁴ As to whether lasting folk knowledge might sway the decisions of Ozark jurors contrary to jury instructions, Camus is instructive. He believed music “banishes all reason and analysis,” because “Art does not tolerate Reason.”¹⁰⁵ In a related, more recent, musing from Elvis Costello, who is no stranger to the

⁹⁷ Patrick G. Hunter & E. Glenn Schellenberg, *Music and Emotion*, in MUSIC PERCEPTION 129 (Springer Science and Business Media 2010); Katie Derham, *The Shorthand of Emotion*, BBC (Aug. 20, 2011) <http://www.bbc.co.uk/programmes/b013n2ms> [https://perma.cc/R6SE-27DE].

⁹⁸ David Weininger, *In a Stellar Year for Classical Recordings, Some Boston Standouts*, BOSTON GLOBE (Dec. 29, 2016), <https://www.bostonglobe.com/arts/music/2016/12/28/stellar-year-for-classical-recordings-some-boston-standouts/C5ZOA0tKoBNMR2YmTtaRxO/story.html> [https://perma.cc/PL6C-KF6Z] (quoting Anderson as saying “where words fail, music speaks”).

⁹⁹ Matthew Lasar, *Turns Out That Music Really is Intoxicating, After All*, ARS TECHNICA (Jan. 18, 2011, 6:41 AM) <https://arstechnica.com/science/2011/01/turns-out-that-music-really-is-intoxicating-after-all> [https://perma.cc/FJT9-D8Y5].

¹⁰⁰ Mark Beech, *Leonard Cohen Dies At Age Of 82*, FORBES (Nov. 10, 2016, 9:11 PM) <http://www.forbes.com/sites/markbeech/2016/11/10/leonard-cohen-dies-at-age-of-82/#23ab11091521> [https://perma.cc/2GT8-EFQH].

¹⁰¹ TENNESSEE WILLIAMS, *THE GLASS MENAGERIE* 5 (1945).

¹⁰² See *The Power Of Music To Affect The Brain*, NPR (June 1, 2011, 1:00 PM) <http://www.npr.org/2011/06/01/136859090/the-power-of-music-to-affect-the-brain> [https://perma.cc/6L74-QVA7].

¹⁰³ NAT SHAPIRO, *AN ENCYCLOPEDIA OF QUOTATIONS ABOUT MUSIC* 186 (1977).

¹⁰⁴ WILLIAM ELLERY CHANNING, *THOREAU: THE POET-NATURALIST* 332 (1902).

¹⁰⁵ NEIL FOXLEE, ALBERT CAMUS’S ‘THE NEW MEDITERRANEAN CULTURE’: A TEXT AND ITS CONTEXTS 246 (2010).

murder ballad,¹⁰⁶ Costello admitted that music cannot change minds, but noted, “a song can infiltrate your heart and the heart may change your mind.”¹⁰⁷

Yet, of all these, when it comes to murder ballads, perhaps Tom Waits said it best: “I like beautiful melodies telling me terrible things.”

So did Ozarkers. Ozarkers shared hundreds of murder ballads for generations. From countless dark narratives, amplified by the soul-piercing power of music, Ozarkers internalized a musical lore of murder—quite literally. According to violinist Daniel Bernard Roumain, the human brain is so greatly affected by music because music actually penetrates and physically resonates in our bodies.¹⁰⁸ Thus, the sounds of Ozark murder ballads resonated in Ozarkers’ brains, while the meanings resonated in their minds. Voices stirred their bones, while stories stirred their souls. I reckon this is how folk knowledge is made.

But I must confess, when I was a law clerk in the Western District of Arkansas—in that same federal court that Judge Parker had made famous in the time of the Indian Territory and Lewis Holder had cursed before he hanged—I thought very little about how the potent folk knowledge of the region, rooted in a rich musical storytelling tradition of the past, could inform the present workings of the law. My disregard persisted despite a wise judge’s repeated urgings for me to learn Fort Smith’s history, a subject on which his father-in-law happened to have written the book in 1967.¹⁰⁹ It was not until later, while practicing capital postconviction defense, that I managed to get both oars in the river on this issue.

¹⁰⁶ Costello wrote a song for his 1989 album *Spike*, on Rhino Records, about the 1952 murder of a police officer involving the British teenager Derek William Bentley, who was later hanged. See Elvis Costello, *Let Him Dangle* (Rhino Records 1989). Bentley was said to be an epileptic with the mental age of an eleven-year-old. See *1953: Derek Bentley Hanged for Murder*, BBC (Jan. 28, 2016) http://news.bbc.co.uk/onthisday/hi/dates/stories/january/28/newsid_3393000/3393807.stm [https://perma.cc/R77P-LEFA].

¹⁰⁷ ELVIS COSTELLO, UNFAITHFUL MUSIC & DISAPPEARING INK 393 (2015).

¹⁰⁸ See ‘The Power Of Music’ To Affect The Brain, NPR (June 1, 2011, 1:00 PM) <http://www.npr.org/2011/06/01/136859090/the-power-of-music-to-affect-the-brain> [https://perma.cc/6L74-QVA7].

¹⁰⁹ See J. FRED PATTON, THE HISTORY OF FORT SMITH: 1817-1967 (1967).

It finally happened while I was exploring an archive of Ozark folksongs, the collection of which was the life's work of one remarkable and trailblazing woman. She was a folklorist of the midcentury Ozark Highlands, wife to one Vance Randolph, and professor of the University of Arkansas. That she made possible the forgoing analysis is lucky as a barn swallow,¹¹⁰ because, after all, what would an article about folksongs be without a heroine?

I. THE FOLKMURDERER OF THE ERSTWHILE OZARKS

Mary Celestia Parler was a tireless hunter—not of boar or duck, but of songs. As director of the University of Arkansas Folklore Research Project, Parler spent some fifteen years from 1949 to 1965 traversing the Ozark hill country with a reel-to-reel tape recorder and microphone.¹¹¹ She asked Ozarkers to sing the songs and spin the tales of their ancestors, and, over the years, no less than 700 obliged.¹¹² She sat patiently in country homes, barbershops, and churches, holding out her microphone. All told, Parler, with assistants like Merlin Mitchell, collected an astounding 4,500 recordings,¹¹³ spanning 137,400 feet of tape,¹¹⁴ requiring 442 reels.¹¹⁵

Many of her subjects sang with cracked voices and fumbled nervously for lyrics.¹¹⁶ As Mitchell put it during a conversation on Reel 7, “[m]ost people sorta stumble along, you know, and they

¹¹⁰ See RANDOLPH, *supra* note 2, at 47 (“Barn swallows are supposed to bring good luck to cattlemen.”)

¹¹¹ See *Ozark Folksong Collection*, UNIV. OF ARK., <http://digitalcollections.uark.edu/cdm/landingpage/collection/OzarkFolkSong> [https://perma.cc/PZ83-8UVC].

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ See Mary Celestia Parler (1904-1981), ENCYCLOPEDIA OF ARK. HISTORY & CULTURE, <http://www.encyclopediaofarkansas.net/encyclopedia/entry-detail.aspx?entryID=3616> [https://perma.cc/CHN8-4SMD] (last visited Aug. 17, 2018).

¹¹⁵ *Id.*

¹¹⁶ An example of this can be heard in a rather charming moment of confusion at the end of an otherwise lovely performance of *Brinkley Storm* by Zula Crymes in DeVall's Bluff, Arkansas, in July of 1954, found on Reel 202, Item 6. See *The Brinkley Storm*, OZARK FOLKSONG COLLECTION, <http://digitalcollections.uark.edu/cdm/singleitem/collection/OzarkFolkSong/id/3335/reel/1> [https://perma.cc/DUD2-7L8T].

remember part of it”¹¹⁷ At least one, old Fred High, felt quite alright about his performance. According to transcripts, after his rendition of *Edward in the Lowlands Low* on February 20, 1950, he announced, “That’s all of that. I done perty well.”¹¹⁸ To this Mitchell replied amiably, “You shore did. That’s as fine a-singing of those old songs as I ever heard.”¹¹⁹ Although, before High launched into his next number, *Sadie Ray*, which he “use to like to sang so well,” he admitted he would have to “study a minute.”¹²⁰

But confident or not, studied or not, gifted or not, eager or not, Parler’s subjects sang for her, and by the time she was done holding out that microphone nearly all of the Ozarks had passed through her hands.

In 2015, the University of Arkansas Libraries, with assistance from the Arkansas Humanities Council, the Happy Hollow Foundation, and the Reagan Cole Memorial Fund, completed the monumental undertaking of digitizing the audio and transcripts of the Ozark Folksong Collection and publishing it online.¹²¹ The Collection represents “the largest and most complete collection of traditional music and associated materials from Arkansas and the Ozarks in the nation.”¹²² Large as it may be, and staggeringly so, the Collection is, in another sense, wonderfully small. In the atmospherics of the thousands upon thousands of tiny-room recordings that make up the Collection, listeners can sense a personal intimacy, the nearness of voices and creaking furniture, the tranquil air of the Ozark homestead.

In the Collection, there are “traditional songs of English and Scottish origins,”¹²³ such as the so-called Child Ballads¹²⁴ and

¹¹⁷ See Transcript, *Edward in the Lowlands Low*, OZARK FOLKSONG COLLECTION, <http://digitalcollections.uark.edu/cdm/singleitem/collection/OzarkFolkSong/id/1388/rec/66> [<https://perma.cc/JS8R-WWJ4>].

¹¹⁸ *Id.* (spellings from original transcript).

¹¹⁹ *Id.* (spellings from original transcript).

¹²⁰ *Id.* (spellings from original transcript).

¹²¹ See *Ozark Folksong Collection*, UNIV. OF ARK., <http://digitalcollections.uark.edu/cdm/landingpage/collection/OzarkFolkSong> [<https://perma.cc/SG65-JZ3E>] (last visited Aug. 17, 2018).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ The Child Ballads are a collection of 305 traditional folksongs of England and Scotland collected by Francis James Child in the late 1800s. See FRANCIS JAMES CHILD, *THE ENGLISH AND SCOTTISH POPULAR BALLADS*, VOLS. I-V (1904).

their derivatives, and there are “event ballads unique to the region.”¹²⁵ The mixture is to be expected. The Ozarks, as a child of Appalachia,¹²⁶ are a grandchild of Merry England. And it seems the apple does not fall far from the tree. Just as English folklorist Roy Judge once wondered whether the romanticized image of Merry England is “a world that has never actually existed, a visionary, mythical landscape,”¹²⁷ Blevins has wondered, as to the romanticized image of the bucolic Ozarks of the past, “if indeed it ever had existed.”¹²⁸ It seems it is the Ozarks’ birthright to be a place “long obscured, even eclipsed, by myth and stereotype,”¹²⁹ made as much of dreams as stone and earth.

Those familiar with the Child Ballads will recognize songs like *All Down By the Greenwood Side* from Reel 297 as being derived from *The Cruel Mother*, which is “Child #20.”¹³⁰ But the Ozarks also earned a lore of their own, from events like the Brinkley Cyclone of 1909. That year, on the night of March 8, a tornado nearly a mile wide destroyed all but fifteen of the 1000 buildings in Brinkley, Arkansas, and killed fifty-eight people.¹³¹ In the aftermath, an observer commented, “no one could have gone more heroically to the work of rescue than did the people of Brinkley; white and black, rich and poor were working side by side.”¹³² A half century later, and twenty miles west of Brinkley down Highway 70 in the town of DeVall’s Bluff, Parler held out her microphone while Zula Crymes sang *Brinkley Storm* onto Reel 202, at Item 6, recounting how that fateful night “was a mighty time.”¹³³

¹²⁵ *Ozark Folksong Collection*, UNIV. OF ARK., <http://digitalcollections.uark.edu/cdm/landingpage/collection/OzarkFolkSong> [<https://perma.cc/UY4U-TNYL>] (last visited Aug. 17, 2018).

¹²⁶ See RANDOLPH, *supra* note 2, at 3 (describing how residents of Appalachia migrated to the Ozarks).

¹²⁷ Roy Judge, *May Day and Merrie England*, 102 FOLKLORE 131 (1991).

¹²⁸ BLEVINS, *supra* note 3, at 4.

¹²⁹ *Id.* at 5.

¹³⁰ *All Down By the Greenwood Side*, OZARK FOLKSONG COLLECTION, <http://digitalcollections.uark.edu/cdm/singleitem/collection/OzarkFolkSong/id/1359/rec/1> [<https://perma.cc/HHU3-29SH>].

¹³¹ See TERRI L. KUCZYNSKI, *The Cyclone of 1909*, in IMAGES OF AMERICA: MONROE COUNTY (2009).

¹³² *Id.* at 27.

¹³³ *The Brinkley Storm*, OZARK FOLKSONG COLLECTION,

Ozark lore also arose out of bloody family rivalries, such as *The Feud Between the Neils and the Greens*, found on Reel 148, at Item 5.¹³⁴ *The Feud*, as sung by Virgil Lance in Mountain Home, Arkansas, on September 4, 1953, tells of an 1880s family rivalry begun when the patriarch of the Green family, Houghton Green, was shot by the unnamed grandfather of Jimmy Neil.¹³⁵ After that, "all the Greens . . . swore they'd kill . . . [a]ll the Neils in Arkansas," and for years "carried guns where'er they went" in case they might have occasion to do so.¹³⁶ The threats apparently went on for some time, until Jimmy fell in ill-advised, Shakespearian love with none other than "Houghton's daughter Lou."¹³⁷ The discovery of their love affair resulted in a complicated gun battle, described over several verses, during which Lou's brothers tried to shoot Jimmy, Jimmy's dad tried to shoot Lou, and, ultimately, Jimmy, "[w]ith a true and stiddy eye," shot his dad and "watched [him] die."¹³⁸ The folkloric identity of the Ozarks is hard-earned.

Also in the Collection are derivations of widely popular songs spliced with elements of Ozark lore. For instance, that ageless classic blues and jazz standard *Careless Love* makes a few appearances. But instead of the Dixieland overdrive of Bessie Smith's 1925 hit or the boogie-woogie vigor of Fats Domino's 1950 rendition, the Collection's versions of *Careless Love* take a dark turn towards—what else?—murder. On Reel 342, at Item 28, in a January 12, 1960, recording, Teddy Souter sings the usual verses about what careless love has done to the downcast narrator, but then ends the song with an unexpected twist, singing, "It's on this railroad bank I stand, I know I'm gonna kill a railroad man."¹³⁹ Similarly, in Mamie Pridemore's version, recorded in Lincoln, Arkansas, on August 18, 1959, and found on Reel 315, at Item 6,

<http://digitalcollections.uark.edu/cdm/singleitem/collection/OzarkFolkSong/id/3335/rec/1> [<https://perma.cc/727T-QZSH>].

¹³⁴ *The Feud between the Neils and the Greens*, OZARK FOLKSONG COLLECTION, <http://digitalcollections.uark.edu/cdm/singleitem/collection/OzarkFolkSong/id/1828/rec/1> [<https://perma.cc/8H8R-PQ99>].

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Careless Love*, OZARK FOLKSONG COLLECTION, <http://digitalcollections.uark.edu/cdm/singleitem/collection/OzarkFolkSong/id/269/rec/4> [<https://perma.cc/WN2V-74UB>].

she adds that one of the things “careless love will do” is “make you kill yourself and your sweetheart too.”¹⁴⁰ The ubiquitous murder theme of Ozark lore creeps into even the most well-established lyrical narratives.

The Collection is a mixture of influences and themes inherited from Appalachia and England, incorporated with local events and themes that assert their prevalence across genres, time, and geography. But whether the songs are borrowed or original, each performance in the Collection reflects attitudes, values, and beliefs that existed in the heart and mind of an Ozarker at the moment their voice passed through Parler’s microphone and onto that magnetic tape.

Even though not written in the Ozarks, the “[h]ymns and other church songs document important religious beliefs of that era.”¹⁴¹ Songs that touch on race document the open racism of the era. For instance, on one of the Collection’s latest reels, Reel 440, at Item 2, Ollie Riggins sings *Big Black Nigger* in 1964 Fayetteville, Arkansas.¹⁴² In that same town, ten years earlier on Reel 189, at Item 3, Mary Jo Davis teaches her adorable-sounding daughter Barbara Jo to sing *Crazy Bowlegged Chinese*.¹⁴³ They sing that “mama told [her daughter] to put him to bed,” but when she did he for some reason “cut off his head, [t]hat crazy bowlegged [C]hinese.”¹⁴⁴ When mama then instructed the daughter to “bury him deep,” he again complicated matters when he “stuck out his feet.”¹⁴⁵ And when mama sought to resolve this by having the daughter “cut off his feet,” the daughter took it upon

¹⁴⁰ *Careless Love*, OZARK FOLKSONG COLLECTION, <http://digitalcollections.uark.edu/cdm/singleitem/collection/OzarkFolkSong/id/1134/rec/3> [<https://perma.cc/8TGR-A5HC>].

¹⁴¹ *Ozark Folksong Collection*, UNIV. OF ARK., <http://digitalcollections.uark.edu/cdm/landingpage/collection/OzarkFolkSong> [<https://perma.cc/4GG3-FBJU>].

¹⁴² *Big Black Nigger*, OZARK FOLKSONG COLLECTION, <http://digitalcollections.uark.edu/cdm/singleitem/collection/OzarkFolkSong/id/2452/rec/5> [<https://perma.cc/CQL2-9LY2>].

¹⁴³ *Crazy Bowlegged Chinese*, OZARK FOLKSONG COLLECTION, <http://digitalcollections.uark.edu/cdm/singleitem/collection/OzarkFolkSong/id/3017/rec/50> [<https://perma.cc/PT7P-Q2SF>].

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

herself to then “fr[y] ‘em for meat.”¹⁴⁶ It is with good cheer that the notions of suicide, dismemberment, and cannibalism are passed along to little Barbara Jo.

Similarly, songs about a’courtin’ tend to reflect the rape culture of that era. On Reel 292, at Item 10, Harrison Burnette sings an unsettling *Along About the Time When They’re Sweet Sixteen*, on July 3, 1958.¹⁴⁷ In *Sweet Sixteen*, the narrator assures “all you Missouri boys” that girls “will always tell you ‘no’ but [their] actions tells you ‘yes’” and they will “always strike at you and be sure to miss you too.”¹⁴⁸ And so, the singer assures the Missouri boys, if you “[l]ay your arm around their neck,” they “will soon forget” and “on you they will lean, [a]long about the time when they’re sweet sixteen.”¹⁴⁹

Not all of the Collection’s themes are so horrifying. But few make the point better: the Collection has something profound to teach us about the views held and shared by Ozarkers of the past. Each song provides a snapshot of Ozark culture, with some meaning and insight. And, no surprise, many of them songs are about murder.

As part of the University of Arkansas Libraries’ digitization project, the Collection’s songs are marked with themes and keywords. A search for “murder” returns 297 results.¹⁵⁰ I first explored the search results not as a lawyer, but as a musician. Like so many star-gazing children of the Ozarks, I grew up a singer-songwriter and flatpicker in the Old Time tradition. After a 2014 album I recorded with fellow capital litigator Nicole Noël was described by one journalist and critic as “a raw and timeless slice of Americana”¹⁵¹ and another as “a patchwork quilt of rustic influences carefully woven together” to create “an unapologetic

¹⁴⁶ *Id.*

¹⁴⁷ *Along About the Time When They’re Sweet Sixteen*, OZARK FOLKSONG COLLECTION, <http://digitalcollections.uark.edu/cdm/singleitem/collection/OzarkFolkSong/id/1293/rec/4> [<https://perma.cc/8UAC-GSFY>].

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Search term “murder,” OZARK FOLKSONG COLLECTION, <http://digitalcollections.uark.edu/cdm/search/collection/OzarkFolkSong/searchterm/murder/order/title> [<https://perma.cc/EQ63-F6C7>].

¹⁵¹ Ben Crandell, *Who Says Lawyers are Good for Nothing*, SUN-SENTINEL (Fort Lauderdale, Fla.), July 31, 2014.

bow to simpler times,”¹⁵² I was inspired to further strengthen my connection with the musical heritage of the Ozarks. I went to the Collection in search of melodies, themes, or entire songs to reclaim as a revivalist of the tradition. But all I heard was the death penalty.

Of the hundreds of murder ballads in the Collection, many end with an imposition of the death penalty by hanging.¹⁵³ Surveying the narratives reveals six defining characteristics—six features or traits—that are commonly, if not uniformly, attributed to characters that commit murder.¹⁵⁴ Once upon a time, the consistent, repetitive portrayal of these characteristics in Ozark folklore created, affirmed, and reaffirmed notions about murderers for generations of Americans in the Upland South. Folk knowledge about murder was passed across the region and through the years. From the folksongs of their parents, Ozarkers learned what a murderer is and how they should think about murder, just like little Barbara Jo learned to think of that *Crazy Bowlegged Chinese* as a ridiculous and inhuman thing that might as well be cut up and fried.

I have drawn a sampling of the Collection’s murder ballads that represents each of the six essential characteristics of the murderer found in Ozark folklore and how each characteristic is consistently repeated across narratives. In effect, the songs describe the full aspect of the killer of Ozark lore, who was once imagined to roam the hill country, ever in search of unwary victims. Across many songs, he can be found stepping into many roles, taking many forms, and adopting many names, but his unchanging traits make him better thought of as one character, whom I will call the folkmurderer. Journeying through the narratives of Ozark folksongs brings his image into focus. By the end of it, we will know him very well.

Let us get underway by reaching for Reel 432, spooling it onto the player deck, and giving it a spin at Item 3, where Pearl Brewer of Ravenden Springs, Arkansas, sings a haunting *Blood on*

¹⁵² Lee Zimmerman, Nicole Noël & Chance Meyer: “Just a Guitar, Harmonica, and Two Voices”, NEW TIMES (Hollywood, Fla.), Aug. 22, 2014.

¹⁵³ See discussion *infra*, Part I.

¹⁵⁴ See discussion *infra*, Part I.

Your Coat Sleeve on February 23, 1964.¹⁵⁵ The song opens with a mother asking her son “[h]ow come that blood on your coat sleeve?”¹⁵⁶ The boy says the blood is from his little guinea hawk, that “flew away from me-me-me.”¹⁵⁷ But Mother is unconvinced. She thinks the blood is “too red” to be hawk’s blood, so she poses her question again. Now the boy reports that it is the blood of his old yellow dog, that “tree’d the squirrel for me-me-me.”¹⁵⁸ The boy had lied about the hawk, and could well be lying about the dog, too. So it is with increasing unease that Mother continues asking her horrid question. The two go on like this for many verses, over which the boy attributes the blood to all manner of farm animal and wildlife.¹⁵⁹ But Mother keeps pressing him, until finally the boy confesses: “It is the blood of my little brother” who “walked the roads with me-me-me.”¹⁶⁰

In the final verse, Mother’s question changes:

*Where did you bury your little brother
Oh, son, come tell to me
I buried him under the weeping willow
Where many others be-be-be
Where many others be*¹⁶¹

The song ends abruptly with these words hanging in the air. The listener is left in silence to ponder the implication that the boy has murdered his little brother and then confessed to his mother that he is a serial killer, who hides his victims in the ground beneath a willow tree.

What is known of the son in *Coat Sleeve*? Who is he? Why did he kill his brother? The listener is not told. As a songwriting device, the son’s opacity is powerful. He is made more frightening by leaving his innerworkings to the listener’s imagination, along

¹⁵⁵ *Blood on Your Coat Sleeve (Bloody Guinea Hawk)*, OZARK FOLKSONG COLLECTION, <http://digitalcollections.uark.edu/cdm/singleitem/collection/OzarkFolkSong/id/2323/rec/371> [<https://perma.cc/H5CZ-6JYY>].

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *See id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

with the undulating bows of that eerie willow over its secret graves, and the image of a little brother loyally walking the roads with his future murderer, no doubt hand-in-hand.

Nothing is known of the son's human experience, what tragedy there might be in his formative years, whether he was once victimized himself, whether there were influences over his behavior. Details are denied the son in *Coat Sleeve*, the better to fear him, and indulge in loathing him. Humanizing the son would make it less satisfying to condemn him. It would compromise the dread and moral outrage that come much more easily knowing him only as the slayer of his dear brother, with no motivations other than wickedness, seemingly more monster than human.

The storytelling technique of withholding a murderer's human traits in order to elicit an emotional response in the listener is responsible for the first defining characteristic of the folkmurderer: his inhumanity, or dehumanization. The folkmurderer is not given any of the human traits or virtues that might inspire some degree of empathy for or understanding. He is predator not prey, victimizer not victim. The listener is not challenged to consider that he might be both.

Along our journey through the narratives of Ozark murder ballads, we will see the folkmurderer's other defining characteristics come into focus, but we will also see this first defining characteristic remain constant. In song after song, the listener is encouraged to fear a faceless, anonymous specter of a murderer—to dehumanize, to demonize, and to loathe.

Let us jump now to Reel 297, Item 5, where the folkmurderer shows up in *All Down By the Greenwood Side*¹⁶² on the opposite side of a dialogue similar to that of *Coat Sleeve*. There, he was a bloody little boy, lying to his mother. Here, he plays a mother, with blood on her hands, lying to her children.¹⁶³ *Greenwood Side* is also sung by Pearl Brewer, on August 28, 1958,¹⁶⁴ some six years before her *Coat Sleeve* performance in Revenden. For this

¹⁶² *All Down By the Greenwood Side*, OZARK FOLKSONG COLLECTION, <http://digitalcollections.uark.edu/cdm/singleitem/collection/OzarkFolkSong/id/1359/rec/1> [<https://perma.cc/7US6-R4NH>].

¹⁶³ *See id.*

¹⁶⁴ *See id.*

song, we meet Brewer about twenty miles east of there down Highway 62 in Pocahontas, Arkansas.¹⁶⁵

In Brewer's *Greenwood Side*, a woman sees two children playing in a field, and tells them that if they were her children she would dress them up "in silk so fine."¹⁶⁶ But, much to her surprise and horror, the children inform her, "dear mother, we once *were* yours" but "[y]ou killed and buried us under a stone."¹⁶⁷ The ghosts of her murdered children stand before her, and she can no longer recognize them, or has suppressed the memory of having murdered them herself, "All down by the greenwood side."¹⁶⁸ There is nothing said of why she killed her children. The listener can only assume—as with the boy in *Coat Sleeve*—a lack of humanity, a monstrosity, is to blame.

In the final verse, we are introduced to a second defining characteristic of the folkmurderer, when the children repay Mother's deed by levying a death curse:

*For seven long years you shall hear a bell,
All alone and alone,
And at the end of seven years you shall land in Hell,
All down by the greenwood side.*¹⁶⁹

It is a defining characteristic of the folkmurderer that he be condemned to damnation. Sometimes implicitly, often explicitly, the late verses of Ozark murderer ballads tend to send him to hell for his spiritual, otherworldly punishment. It happens in *Greenwood Side*, and it happens again and again in the songs examined below.

The listener learns something important about the folkmurderer from the fact that he is deserving of eternal damnation. Religious belief has always been strong in the Ozarks,¹⁷⁰ and it had long been held that hell is for the very evil.

¹⁶⁵ *See id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* (emphasis added).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Ozark Folksong Collection*, UNIVERSITY OF ARKANSAS, <http://digitalcollections.uark.edu/cdm/landingpage/collection/OzarkFolkSong>

It was in the fourteenth century that Dante Alighieri consigned murderers to an eternity in the Seventh Circle's river of boiling blood and fire (the same number as the children's curse of seven years),¹⁷¹ and around the first that the Book of Revelation placed them in "the fiery lake of burning sulfur."¹⁷² To deserve this, the folkmurderer must have been evil, indeed.

Greenwood Side does not call for the listener to question whether the folkmurderer is repentant; repentance is a human quality he cannot have. There is no need to question whether there were influences over his behavior, mitigating his culpability, because if he was not entirely morally deserving, then he would not have "land[ed] in Hell" in the first place.¹⁷³ The listener knows that hell is not in the business of making mistakes.

Interestingly, we encounter Brewer again in the Collection, six years after her *Greenwood Side* performance in Pocahontas, and just a few weeks before the *Coat Sleeve* recording in 1964. We find her on Reel 431, Item 9, back in Ravenden, sitting with one of Parler's assistants, Sue Jackson, once again singing *Greenwood Side*.¹⁷⁴ Perhaps it was an error to capture her singing this song twice, but if so it was a fortuitous one. By the time of this recording, Brewer had picked up a new first verse, in which we learn from the outset that Mother had two children, who she "laid . . . down hand in hand, [a]nd witha knife cut off their heads."¹⁷⁵ The narrative surprise of later learning that the children belong to Mother is eliminated. But the dreadful nature of the killings—decapitation—is added, supporting the listener's sense that Mother's damnation is well-deserved.

Trading out Reel 431 for Reel 313, at Item 6, the same damnation befalls the folkmurderer in *Arthur Clyde*.¹⁷⁶ Here, the

[<https://perma.cc/CM4L-VVR3>] (referring to the "important religious beliefs of that era").

¹⁷¹ See DANTE ALIGHIERI, *INFERNO* 108 (Pantheon Books 1909).

¹⁷² *Revelation* 21:8.

¹⁷³ *All Down By the Greenwood Side*, OZARK FOLKSONG COLLECTION, <http://digitalcollections.uark.edu/cdm/singleitem/collection/OzarkFolkSong/id/1359/rec/1> [<https://perma.cc/SMP8-3WHA>].

¹⁷⁴ *Green Wood Wide*, OZARK FOLKSONG COLLECTION, <http://digitalcollections.uark.edu/cdm/singleitem/collection/OzarkFolkSong/id/2326/rec/101> [<https://perma.cc/5SD4-NDGW>].

¹⁷⁵ *Id.*

¹⁷⁶ *Arthur Clyde*, OZARK FOLKSONG COLLECTION,

folkmurderer reprises his role of sibling, as the sister of a woman betrothed to the title character.¹⁷⁷ Anna M. Percy of Greenwood, Arkansas, sings *Arthur Clyde* on October 18, 1958, the way she learned it from Helen Ruth Brand in Lead Hill, Arkansas, back in 1928.¹⁷⁸ In Percy and Brand's version, the folkmurderer, as the sister and narrator, despises Clyde.¹⁷⁹ But the listener never learns why. A backstory would run the risk of touching upon some empathetic human experience, perhaps even mitigating the folkmurderer's deservingness of damnation, so that side of the story remains hidden. But, while the listener does not learn why the sister hates Clyde, the listener certainly learns what she does about it:

*So I chanced one eve in Autumn
When the pale moon dimly shone
Down beside the rolling river
I met Arthur all alone.
Words that passed, I don't remember
But I in a passion flew
And I drew my sword and dagger
Then and there I Arthur slew¹⁸⁰*

And, as usual, the listener also learns what the folkmurderer, in the role of the sister, deserves in return:

*You will meet your Clyde in heaven
Where there are no tears nor pain
You will meet your Clyde in Heaven
But me you'll never meet again¹⁸¹*

Of course, the folkmurderer will not meet the bereaved sister in heaven, because he will be in a lake of fire, receiving his eternal punishment in return for his great evilness. There is no need to

<http://digitalcollections.uark.edu/cdm/singleitem/collection/OzarkFolkSong/id/1122/rec/3> [<https://perma.cc/4GJF-JZM6>].

¹⁷⁷ *See id.*

¹⁷⁸ *See id.*

¹⁷⁹ *See id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

question what he deserves for killing Clyde, because hell has sorted that out already.

This is not to say, however, that the folkmurderer does not receive earthly punishment as well. After all, the Book of Genesis has something like a millennium's head start on Revelation in teaching that "[w]hoever sheds the blood of man, by man shall his blood be shed,"¹⁸² and Leviticus and Exodus later agree.¹⁸³ It is no surprise to find the folkmurderer on Reel 85, Item 5, mounting the scaffold in Opal Donahue's eerily angelic singing of *Bad Companions* for Merlin Mitchell.¹⁸⁴

Bad Companions is a cautionary tale about moving to the big city, in this instance Chicago, which is described as "[t]he very depths of hell."¹⁸⁵ That characterization seems rather undeserved, though it might derive from the memory of social unrest and violence¹⁸⁶ underlying Chicago's economic growth during the Gilded Age (a cheeky term which, incidentally, was coined by a Missourian, born tragically north of the Ozarks in Monroe County, but later honored in the Ozarks as the namesake of Mark Twain National Forest¹⁸⁷). The listener is warned that in a place like Chicago one will inevitably "[take] to drinking" and "sin[] both night and day."¹⁸⁸ That is, of course, precisely what the folkmurderer does upon his visit, resulting inexorably in a murder,¹⁸⁹ which, in turn, results in Ozark lore once again having to dole out his punishment:

¹⁸² *Genesis* 9:6.

¹⁸³ See *Leviticus* 24:17 ("Whoever takes a human life shall surely be put to death."); *Exodus* 21:12 ("Whoever strikes a man so that he dies shall be put to death.").

¹⁸⁴ *Bad Companions*, OZARK FOLKSONG COLLECTION, <http://digitalcollections.uark.edu/cdm/singleitem/collection/OzarkFolkSong/id/447/rec/4> [<https://perma.cc/4VM3-CGLR>].

¹⁸⁵ *Id.*

¹⁸⁶ See HOWARD ZINN, *A PEOPLE'S HISTORY OF THE UNITED STATES* 272 (2005) (describing the Knights of Labor movement and, during the Great Southwest Railroad Strike of 1886, the Haymarket Square Riot at which bombs were used against policemen attempting to disperse crowds).

¹⁸⁷ See MARK TWAIN, *THE GILDED AGE: A TALE OF TO-DAY* (Hartford, Conn., American Publishing Company 1873).

¹⁸⁸ *Bad Companions*, OZARK FOLKSONG COLLECTION, <http://digitalcollections.uark.edu/cdm/singleitem/collection/OzarkFolkSong/id/447/rec/4> [<https://perma.cc/4VM3-CGLR>].

¹⁸⁹ See *id.*

*As I am doomed for hell.
 'Twas on one beautiful evening,
 The stars were shining bright,
 And with a fatal dagger
 I gave her spirit a flight,
 To justice court they took me,
 And you can all plainly see,
 My soul is due as ever,
 Throughout eternity.
 It's now I'm on the scaffold,
 My moments are not long,
 You may forget this singer,
 But don't forget this song.¹⁹⁰*

The folkmurderer does well here to get a good line of last words in before he hangs and heads for damnation. And it is no wonder that he has an audience to hear his words. After all, Opal Donahue sings her *Bad Companions* in none other than Galena, Missouri,¹⁹¹ just thirteen years after that same town had “hummed with a gruesomely festive air”¹⁹² for the public hanging of Rosco Red Jackson.

Hearing Donahue sing in her gentle voice about a man on the scaffold, just a stone's throw away from the gallows at Galena, leaves little room to doubt how powerfully the mythopoeic events of the Ozarks inform the lore of death and murder that once flowed through the region. How could Rosco's memory not be in that room with Opal and Merlin? How could songs like *Bad Companions* not strike just that much more deeply at the psyche of Ozarkers, given that they had seen necks break at the noose with their own eyes?

That is the power of the third defining characteristic of the Ozark folkmurderer: his criminal sentence. The folkmurderer gets the death penalty. He faces the gallows over and over, in narrative after narrative, affirming and reaffirming his deservingness of a state-sanctioned death. Lore teaches the inevitability of executing murderers.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² Stephanie Simon, *McVeigh's Coming Execution Recalls Morbid 1937 Spectacle*, L.A. TIMES, May 6, 2001.

Another example, found on a very early reel—Reel 7, Item 4—is old Fred High’s *Edward in the Lowlands Low*, sung on February 20, 1950.¹⁹³ In High’s *Lowlands*, the folkmurderer takes the form of two parents, whose daughter “Miss Emmly” has, much to their dismay, fallen in love with a lowly “driver boy” named Edward.¹⁹⁴ One night, after “[y]oung Edward had but got to bed and scarcely got to sleep,” the parents “into his room did creep,”¹⁹⁵ where they “st[a]bbed him, dragged him from his bed and to the sea did go” in order to “sen[d] his body a-sailing down in the lowlands low.”¹⁹⁶ Afterwards, they told poor Emmly that her driver boy was “dead and gone, no tongue can tell,” and his body was “down by the silvery side.”¹⁹⁷

Her desperate response comes straight from the gallows at Galena: “Oh, father, cruel father, you’ll die a public show.”¹⁹⁸ It was just over the state line, not so many years ago, that Rosco Red Jackson had done just that. Emmly parts the curtain that separates folklore from reality once again, as the listener forgets more and more how to draw it back.

The folkmurderer had another crowd of witnesses at his execution in *Fuller and Warren*, which Parler’s assistant Virginia Langley went all the way to Gruver, Texas, to collect from her mother onto Reel 353, Item 3, in March of 1958.¹⁹⁹ In this song, “[p]oor Fuller was condemned by the honor of the court . . . to die [t]he ignominious death on the gallows so high.”²⁰⁰ In the role of Fuller, the folkmurderer meets his criminal punishment well:

*The morning arrived when brave Fuller was to die
He smiled and he bade the crowd adieu,
Like an angel he did stand, for he was a handsome man,*

¹⁹³ *Edward in the Lowlands Low*, OZARK FOLKSONG COLLECTION, <http://digitalcollections.uark.edu/cdm/singleitem/collection/OzarkFolkSong/id/1388/rec/66> [<https://perma.cc/79UD-G5M7>].

¹⁹⁴ *See id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Fuller and Warren*, OZARK FOLKSONG COLLECTION, <http://digitalcollections.uark.edu/cdm/singleitem/collection/OzarkFolkSong/id/930/rec/92> [<https://perma.cc/44MH-TYPB>].

²⁰⁰ *Id.*

*And on his breast he wore a ribbon of blue.*²⁰¹

Here, the folkmurderer gets to go out bravely with a handsome smile. Because it is aberrational for him to have such positive traits, the listener might be confused as to how she should think of him in his role as Fuller. But the rest of the song clarifies the situation, and puts him back in the paradigm in which he is normally cast. It turns out, his “brave[ry]” was only in seeking the affections of a “fickle-minded maid,” who loved another man, Warren.²⁰² The spurn “robbed [Fuller of] his honor,” so he murdered Warren out of petty jealousy and kneejerk bloodlust.²⁰³ That behavior is much more in-line with the character of the folkmurderer that the listener has come to know, and his smile from the gallows takes on a sardonic meaning.

But it is not always on the gallows that the folkmurderer is put to death. Tommy Huffhines sings about the distance the folkmurderer must walk to reach his death in the electric chair in *Thirteen Steps Away*, recorded on December 10, 1950, in Crane, Missouri, starting fresh on Reel 88 as Item 1.²⁰⁴ *Thirteen Steps* tells of the “chair of death,” in which the “juice will flood” the folkmurderer’s body, and after which, of course, “[e]ternity is waiting.”²⁰⁵

It is no surprise to find the Chair folded into Ozark lore. It has a deep folklore tradition of its own. Its technology, entangled with mystical notions about the work of Nikola Tesla, once “seemed like magic” to the public.²⁰⁶ It was believed that the enchanted currents that carried defendants’ souls away to the afterlife left their bodies with “magical healing qualities.”²⁰⁷

The Chair still looms large in the Ozarks. In 2014, a lawyer running for Arkansas attorney general called for the reinstatement

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *See id.*

²⁰⁴ *See Thirteen Steps Away*, OZARK FOLKSONG COLLECTION, <http://digitalcollections.uark.edu/cdm/singleitem/collection/OzarkFolkSong/id/425/rec/1> [<https://perma.cc/D2EN-EMXG>].

²⁰⁵ *Id.*

²⁰⁶ Sydney P. Freedberg, *The Story of Old Sparky*, ST. PETERSBURG TIMES, Sept. 25, 1999.

²⁰⁷ MARK ESSIG, EDISON & THE ELECTRIC CHAIR: A STORY OF LIGHT AND DEATH 312 n.4 (2003).

of the state's electric chair as part of his campaign platform.²⁰⁸ In 2016, the City of McAlester, Oklahoma, where the chair "known as 'Old Sparky'" was "used for more than six decades to execute 82 inmates," threatened to sue the state's Department of Corrections to have the chair returned to McAlester, so it could be used "as a tourist attraction."²⁰⁹ After Old Sparky's retirement, the Department of Corrections had "spirited it away for its own now-shuttered museum" and later refused to return it, even though the City Council of McAlester had "long coveted" the chair.²¹⁰ Old Sparky's mythology had grown rich from a series of morbid events, like the 1966 execution of James French, who, strapped into Old Sparky and waiting to die, offered as his last words, "How's this for your headline? 'French Fries.'"²¹¹

Yet, in the face of a long death penalty tradition in Ozark states, the folkmurderer manages to avoid execution in at least one instance in the Collection—Inez Gibson's *Fair Ellen*, recorded in Fayetteville, Arkansas, on May 18, 1956, and found on Reel 311, Item 1.²¹² In the final verse of the song, he escapes the scaffold:

*But deep into her bosom
He plunged his fatal knife.
And now he lies in prison
The remainder of his life
For in an angry passion
He slew his promised wife.*²¹³

But mercy is short-lived for the folkmurderer in the Collection's narratives. He finds himself right back on that

²⁰⁸ See Andrew DeMillo, *Ark. AG hopeful calls for return of electric chair*, WASH. TIMES (Mar. 30, 2014).

²⁰⁹ Erik Ortiz, *City in Oklahoma Renews Fight for 'Old Sparky,' Electric Chair Taken by State*, NBC NEWS (July 3, 2016), <http://www.nbcnews.com/news/us-news/city-oklahoma-renews-fight-old-sparky-electric-chair-taken-state-n600571> [<https://perma.cc/9HBT-HLZ6>].

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Fair Ellen*, OZARK FOLKSONG COLLECTION, <http://digitalcollections.uark.edu/cdm/singleitem/collection/OzarkFolkSong/id/1262/rec/72> [<https://perma.cc/YBQ8-SRHG>].

²¹³ *Id.*

scaffold in Doney Hammontree's *Charles Guiteau*,²¹⁴ which introduces us to the folkmurderer's fourth defining characteristic.

Spooling up Reel 102, at Item 5, we find Hammontree in Bethel Grove, Arkansas, on March 11, 1951,²¹⁵ singing about the man that assassinated President James A. Garfield. Incidentally, Mrs. Reagan would be quick to remind us that Garfield, murdered by Guiteau in 1881, had been elected one year prior, in 1880, a year ending in zero. Superstitions creating a dehumanized and evil stereotype of a murderer are not the only ones that lurk between the lines of the Collection's lyrics.

Charles Guiteau tells of the man's 1882 execution by hanging, in the first-person.²¹⁶ The narrator invites "all you tender Christians" to listen to his tale about how he is "condemned to die" and on "the thirtieth day of June [he'll] mount the scaffold high."²¹⁷ But even though the folkmurderer has occasion in *Guiteau* to step into the shoes of a historical, non-fictional character, where he might at last take on some biographical information and finally be informed with the complexities of a realistic human experience, the song defines Guiteau only by his crime.

Thus, *Guiteau* evinces a contradiction between the folkmurderer and actual murderers that underlies his fourth defining characteristic: his reductionism. The folkmurderer is purified of any complex detail that might complicate the assessment of his culpability. His simplification is evident in *Guiteau*, because the story of the real man, and the difficult moral and legal calculus required to assess his deservingness of death, is as complex as they come. Indeed, his trial made famous the insanity defense.²¹⁸

Guiteau was of the view that killing Garfield was "not murder" but "political necessity," because it would "make [his] friend [Chester A.] Arthur president, and save the republic" from

²¹⁴ *Charles Guiteau*, OZARK FOLKSONG COLLECTION, <http://digitalcollections.uark.edu/cdm/singleitem/collection/OzarkFolkSong/id/601/rec/36> [<https://perma.cc/96WP-RQNC>].

²¹⁵ *Id.*

²¹⁶ *See id.*

²¹⁷ *Id.*

²¹⁸ *See United States v. Guiteau*, 10 F. 161 (D.C. 1882).

“the ex-rebels and their northern allies.”²¹⁹ So he bought an ivory handled .442 Webley caliber British Bulldog revolver,²²⁰ donned a suit he would later sell to a circus for \$250,²²¹ headed to the Baltimore and Potomac Railroad Station in Washington, D.C., and killed a sitting United States President.

While Guiteau was incarcerated awaiting trial, a prison guard charged with his care attempted to murder him,²²² making Guiteau—unlike the folkmurderer—both wrongdoer and victim.

At Guiteau’s trial, things were not cut-and-dry along the clear moral lines upon which the folkmurderer’s culpability is assessed. The court had difficulty keeping out references to some public opinion being in favor of Guiteau’s terrible act.²²³ Alienist Dr. Edward Charles Spitzka, who testified as an expert witness, stated “Guiteau is not only now insane, but that he was never anything else.”²²⁴ Another alienist witness, Allan McLane Hamilton (grandson of Alexander Hamilton), while not believing Guiteau to be insane, later wrote in a memoir that “the miserable wretch” had “[a]t the time of the killing of Garfield . . . about reached the end of his tether.”²²⁵ He noted a family history involving “a curious lot,” which included “his father being a half-crazy fanatic” and his “paternal grandfather claim[ing] intimate relations with the Deity, and believ[ing] he could cure disease by the laying on of hands.”²²⁶ Hamilton concluded that “members of the murderer’s family were . . . really insane persons, or epileptics.”²²⁷

²¹⁹ *Id.* at 173-74 (quoting Guiteau).

²²⁰ See ROBERT ELMAN, *FIRE IN ANGER: THE PERSONAL HANDGUNS OF AMERICAN HEROES AND VILLAINS* 166 (1968).

²²¹ See Gus Thomson, *Media Life: Auburn’s Mystery Hanging Photo Questions Answered*, AUBURN J., Nov. 4, 2016.

²²² Joshua Kastenber, *A Sesquicentennial Historic Analysis of Dynes v. Hoover and the Supreme Court’s Bow to Military Necessity: From Its Relationship to Dred Scott v. Sandford to Its Contemporary Influence*, 39 U. MEM. L. REV. 595, 649 n.246 (2009).

²²³ *Guiteau*, 10 F. at 162 (“The prisoner has taken repeated occasions to proclaim that public opinion, as evidenced by the press and by his correspondence, is in his favor.”).

²²⁴ CHARLES E. ROSENBERG, *THE TRIAL OF THE ASSASSIN GUILTEAU: PSYCHIATRY AND LAW IN THE GILDED AGE* 155 (1968).

²²⁵ ALLAN MCLANE HAMILTON, *RECOLLECTIONS OF AN ALIENIST: PERSONAL AND PROFESSIONAL* 351-52 (1916).

²²⁶ *Id.* at 351.

²²⁷ *Id.*

In more recent years, scholars have recognized “substantial grounds for believing that Guiteau suffered from paranoia,”²²⁸ and Lawrence M. Friedman and Vivek Vijay Tata have opined, more broadly, that it “seems abundantly clear that Guiteau was mentally ill and severely so.”²²⁹

During the charge to the jury on January 25, 1882, District of Columbia Judge Walter Smith Cox struggled mightily, and long-windedly, to describe for the jury how it should “view[] the moral as well as intellectual side of the man, in the effort to solve the question of sanity.”²³⁰ He explained the problem was complicated by uncertainty as to “[w]hether it is true or not that insanity is a disease of the physical organ, the brain”²³¹ and the fact that the “subtle essence which we call ‘mind’ defies, of course, ocular inspection.”²³² According to the expert testimony, he instructed that Guiteau might fall somewhere in the “debatable border-line between the sane and the insane,” even though “its existence, and at other times its limits, are doubtful and undefinable,”²³³ rather than in the realm of “raving mania, or absolute imbecility, in which all exercise of reason is wanting.”²³⁴

Along the way in Judge Cox’s dissertation on the nature of partial insanity and its assessment, superstition reared its head to confuse matters even further. Judge Cox struggled to explain the difference between beliefs that are incorrect, but based on reason, and those that are delusional. He resorted to the supernatural in providing examples of each:

A man talks to you so strongly about his intercourse with departed spirits that you suspect insanity. You find, however, that he has witnessed singular manifestations, that his senses have been addressed by sights and sounds, which he has investigated, reflected on, and been unable to account for, except as supernatural. You see, at once, that there is no

²²⁸ Abe Krash, *The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia*, 70 *YALE L.J.* 905, 921-22 n.82 (1961).

²²⁹ Lawrence M. Friedman & Vivek Vijay Tata, *A Crime of Passion: The Goldenson Case in San Francisco*, 37 *WHITTIER L. REV.* 147, 168 (2015).

²³⁰ *Guiteau*, 10 *F.* at 184.

²³¹ *Id.* at 183.

²³² *Id.* at 167.

²³³ *Id.* at 166.

²³⁴ *Id.*

insanity here; that his reason has drawn a conclusion from evidence.

* * *

Another man, whom you know to be an affectionate father, insists that the Almighty has appeared to him and commanded him to sacrifice his child. No reasoning has convinced him of his duty to do it, but the command is as real to him as my voice is now to you. No reasoning or remonstrance can shake his conviction or deter him from his purpose. This is an insane delusion, the coinage of a diseased brain, as seems to be generally supposed, which defies reason and ridicule, which palsies the reason, blindfolds the conscience, and throws into disorder all the springs of human action.²³⁵

With Judge Cox's valiant but convoluted description of insanity to go on, "[a] jury of twelve good men found Charles Guiteau guilty of killing President Garfield" and had him sentenced to death by hanging, despite a "sensational trial" in which Guiteau had displayed much "erratic and abnormal behavior."²³⁶ But Guiteau still held out hope that his "friend" President Arthur would exercise his new Pardon Power to spare his life.²³⁷ When told otherwise, Guiteau reportedly became enraged and declared that Arthur, along with—for good measure—"his cabinet," were "possessed of the devil."²³⁸

The next disappointment came when his request to have orchestral accompaniment for his hanging was denied.²³⁹ Nevertheless, Guiteau literally danced his way up the gallows steps before saluting spectators,²⁴⁰ shaking hands with his executioner,²⁴¹ and then descending into a long and tortured

²³⁵ *Id.* at 171-72.

²³⁶ Lawrence M. Friedman & Vivek Vijay Tata, *A Crime of Passion: The Goldenson Case in San Francisco*, 37 WHITTIER L. REV. 147, 168 (2015).

²³⁷ ROSENBERG, *supra* note 224, at 234.

²³⁸ ROSENBERG, *supra* note 224, at 234.

²³⁹ Thomson, *supra* note 221.

²⁴⁰ MICHAEL NEWTON, *FAMOUS ASSASSINATIONS IN WORLD HISTORY: AN ENCYCLOPEDIA*, Vol. 1 (ABC-CLIO 2014).

²⁴¹ Thomson, *supra* note 221.

soliloquy of last words, during which he wept and prayed²⁴² and read a rambling poem he had written for the occasion, cheerfully entitled *I am Going to the Lordy*.²⁴³

None of Guiteau's challenging and complex (not to mention morbidly entertaining) story made it into Hammontree's *Charles Guiteau*. There, the folkmurderer's tale did not take on any moral, ethical, and legal dimensions. There, the folkmurderer was defined only by his crime.

Little is said of the folkmurderer in Hammontree's *Guiteau*. The listener is told Guiteau's name, which he "ne'er deny," that he committed his crime while in his "youthful bloom," and that he leaves his "aged parents in sorrow for to die," along with his sister, who came to visit him in prison and "wept most bitterly."²⁴⁴ There are no hints as to his psychological and neurological health. There is no description of personal history or heritage. The folklore version of Guiteau is an empty shadow of the actual man, with all his inscrutabilities.

The moral and legal complexity of determining the actual Guiteau's guilt and punishment was profound enough to spark a heated national debate. But punishing the folkmurderer in *Charles Guiteau* is a turkey shoot, because Ozark lore edited out all the complex and mitigating features of Guiteau's story. That it did so despite there being such an unusual and rich body of facts to draw from seems almost to indicate a kind of purposefulness, more in the way of intentionally deceptive reductionism than omission. How can a singer tell the tale of Charles Guiteau and leave out everything that makes it so absurd and compelling? How misleading it is to teach the listener that the question of this human being's deservingness of death was a simple matter.

Mitigating considerations are also swept under the rug back in the fictional landscape where the folkmurderer normally resides. Like the listener is taught in *Charles Guiteau* to reject whatever claims were made in the complex legal defense of the

²⁴² See Kevin Francis O'Neill, *Muzzling Death Row Inmates: Applying the First Amendment to Regulations That Restrict A Condemned Prisoner's Last Words*, 33 ARIZ. ST. L.J. 1159, 1176 n.120 (2001).

²⁴³ *Id.*

²⁴⁴ *Charles Guiteau*, OZARK FOLKSONG COLLECTION, <http://digitalcollections.uark.edu/cdm/singleitem/collection/OzarkFolkSong/id/601/rec/36> [<https://perma.cc/96WP-RQNC>].

actual man, the listener is often encouraged by fictional narratives to reject any claims the folkmurderer might make that would make it more challenging to assess his deservingness of the death penalty. The fifth characteristic of the folkmurderer is his deceptiveness. What he says is a lie, especially if it tends to humanize him, and he is not ever to be trusted.

In addition to the boy in *Coat Sleeve*, who lied about his little brother's blood, and the filicidal mother in *Greenwood Side*, who lied to the children that she would dress them up in silk rather than burying them under a stone, the folkmurderer plays the deceiver as "handsome Edgar" in Nancy Philley's beautifully sung *Edgar and Ellen*, on Reel 310, at Item 8, recorded in Eudora, Arkansas, on June 2, 1959.²⁴⁵ Edgar puts the folkmurderer in one of his favorite roles—the "jealous lover"²⁴⁶—to kill his supposedly beloved Ellen, "[o]ne eve as the moon shone brightly."²⁴⁷ Early in the song, Edgar refers to Ellen as his "darling" and speaks of planning their wedding.²⁴⁸ He kisses her and "presse[s] her to his heart."²⁴⁹ But suddenly, without any apparent prompting, Ellen begins "ask[ing] him to spare her life."²⁵⁰ Whatever caused her to do so, she did well to at least ask, because just a few lines later the folkmurderer reaches yet again for his favorite weapon—a dagger—and gets down to his usual grisly business:

*When into her fair young bosom,
He plunged a dagger knife.
Oh Edgar I'll forgive you,
Although this be my last breath,
I never will deceive you,
Till I close my eyes in death.*²⁵¹

The next verse finds Ellen "[s]leeping in her tomb," "[d]own in a shady valley . . . where the violets bloom."²⁵²

²⁴⁵ *Edgar and Ellen*, OZARK FOLKSONG COLLECTION, <http://digitalcollections.uark.edu/cdm/singleitem/collection/OzarkFolkSong/id/1249/rec/65> [<https://perma.cc/3ZNK-5A8S>].

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

Despite all of Edgar's protestations of love and affection, he murdered Ellen in the space of a few lines, seemingly on a whim. The listener is thus encouraged to disbelieve whatever human emotions—like love—the folkmurderer may profess to have. In *Edgar and Ellen*, he acts out of capricious impulse, without any provocation, other than a passing reference to some "jealous quarrel"²⁵³ early in the song, long before Ellen's murder. But a lack of reason and false expressions of compassion never stop the folkmurderer from getting on with his singular objective. And in this way, Ozark murder ballads encourage the listener not only to deprive a murderer of human characteristics in the first instance, but also to distrust or reject whichever of those he might later claim or be attributed.

Reaching towards the end of the Collection, to Reel 427, Item 5, we find a stark example in *Down in the Willow Garden*, sung by Fleecy Fox on December 20, 1962, in Leslie, Arkansas.²⁵⁴ We encounter the folkmurderer as an unnamed villain, cradling his supposed "true love," a "pretty little miss [w]hose name is Rose Connie Lee," innocently enough, in a willow garden.²⁵⁵ When she "drop[s] off to sleep," we learn that she has done so because the folkmurderer has "poisoned [his] own true love" with "a bottle of burglar's wine."²⁵⁶ He did not go to any such trouble with poor Ellen! But even though he put more thought into his killing of Rose Connie Lee, the result is the same:

*I drew a sabre through her,
Which was a bloody knife.
I drew a sabre through her,
Which was a dreadful sight.*²⁵⁷

The fiend! How evil he is, to slay Rose Connie Lee as she lounged trustingly with him in a garden. How false his claim of

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Down in the Willow Garden*, OZARK FOLKSONG COLLECTION, <http://digitalcollections.uark.edu/cdm/singleitem/collection/OzarkFolkSong/id/2274/rec/61> [<https://perma.cc/KL8J-GDUC>].

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

true love. How pleased the listener is to hear the last line of the song place him back “[u]pon the scaffold,”²⁵⁸ where he certainly belongs.

Interestingly, in a derivation of *Willow Garden* titled *Down by the Weeping Willow*, found nearer the beginning of the Collection, on Reel 172, Item 7, the folkmurderer, who went unnamed in *Down in the Willow Garden*, plays out the same grisly crime against one “sweet Nellie,” cast as that scoundrel whose name we already know—Edgar.²⁵⁹ *Weeping Willow* is sung on November 13, 1953, by Della Kerr, in DeVall’s Bluff, Arkansas, the same town where we heard Zula Crymes sing about that devastating *Brinkley Storm*.

There are numerous other examples of the folkmurderer killing senselessly and unprovoked as a jealous lover. In Mrs. Eli Caudle’s *Fair Fanny Moore*, the folkmurderer plays Randall and spontaneously “burie[s] his knife in [Fanny’s] snowey [stet] white breast,” after which he is “tried” and “hung on the tree by the door [f]or shedding the blood of this Fair Fanny Moore.”²⁶⁰ In Attie Dillingham’s *Pearl Bryan*, the folkmurderer, under the name of Scott Jackson, does the same to the title character.²⁶¹ In fact, there are examples literally titled *Jealous Lover*, such as Drettie Smith’s version, in which the folkmurderer plays Edward, kills Floella, and even takes a moment to explicitly warn the listener in the last line of the song, “If you have a loving sweetheart [b]eware of jealousy.”²⁶²

The many songs that riff on the jealous lover narrative reflect the sixth and final defining characteristic of the folkmurderer: the senselessness of his crimes. He often kills suddenly, out of

²⁵⁸ *Id.*

²⁵⁹ *Down by the Weeping Willow*, OZARK FOLKSONG COLLECTION, <http://digitalcollections.uark.edu/cdm/singleitem/collection/OzarkFolkSong/id/2210/rec/59> [<https://perma.cc/R8X5-SGBR>].

²⁶⁰ *Fair Fanny Moore*, OZARK FOLKSONG COLLECTION, <http://digitalcollections.uark.edu/cdm/singleitem/collection/OzarkFolkSong/id/2624/rec/75> [<https://perma.cc/5CTQ-CPCT>].

²⁶¹ *Pearl Bryan*, OZARK FOLKSONG COLLECTION, <http://digitalcollections.uark.edu/cdm/singleitem/collection/OzarkFolkSong/id/1161/rec/29> [<https://perma.cc/GY8T-FJAF>].

²⁶² *Jealous Lover*, OZARK FOLKSONG COLLECTION, <http://digitalcollections.uark.edu/cdm/singleitem/collection/OzarkFolkSong/id/1148/rec/12> [<https://perma.cc/4BZ8-Z9YK>].

whimsy, out of wicked delight and cruelty. He is not a being subject to precipitating events in a causal chain of human experience. He is the reasonless originator of sudden violence, for the sake of violence. He is a creature of wild indulgence.

In his role of the jealous lover, the folkmurderer does not only go after the object of his affections. Sometimes he turns his attention to those that covet his sweethearts. But, when he does, he still acts on the spur of the moment, according to his base and petty desires. A noteworthy example is found on Reel 310, at Item 5, in *The Cowboy's Home Sweet Home*.²⁶³ Nancy Philley sings *Cowboy* in Eudora, Arkansas, on June 2, 1959, in the same sitting that produced *Edgar and Ellen*.²⁶⁴ Here, the folkmurderer—no doubt enjoying his stint as a rugged and mysterious cowboy—tells a tale of how he once “fell in love with a farmer’s girl [w]ith cheeks so fair and white,” but “[a]nother boy there loved her too.”²⁶⁵ The folkmurderer resolved the conflict in his usual way. He grabbed for his favorite weapon and “struck [this other boy] with [his] knife.”²⁶⁶

But then the folkmurderer did something very uncharacteristic. He “tried to stop the blood, [t]hat flowed from his side [i]n a crimson flood.”²⁶⁷ Not only that, but in the years following his crime, he was “compelled to roam” far from his “home sweet home,” seemingly to escape his regret and guilt.²⁶⁸

The restless cowboy is as close as the folkmurderer ever comes to a sympathetic character. But, with the overwhelming weight of Ozark murder ballads being in favor of viewing the folkmurderer as devoid of human emotion, the listener might very well be inclined to take the view that he attempted to stop the blood flow out of self-preservation, to save himself from that scaffold that he knows oh so well, and now avoids the jurisdiction of his home sweet home, not out of regret or shame, but to keep from being arrested and tried. That interpretation comes more

²⁶³ *The Cowboy's Home Sweet Home*, OZARK FOLKSONG COLLECTION, <http://digitalcollections.uark.edu/cdm/singleitem/collection/OzarkFolkSong/id/1246/rec/48> [<https://perma.cc/C96A-QFHF>].

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

easily to the listener, because she has learned from songs like *Edgar and Ellen* and *Down in the Willow Garden* that she must not ever trust whatever human emotions the folkmurderer represents himself to have, like regret or sorrow.

The listener knows him too well to fall for his tricks. She has seen each of his six unchanging characteristics time and time again: (1) his lack of humanity, personal virtues, or sympathetic traits, (2) his eternal damnation, justified by great evilness, (3) his utter deservingness of the death penalty, (4) his reductionism, being roughly sketched to edit out whatever complexities might complicate the assessment of his deserved punishment, (5) his deceptiveness when it comes to representing human emotions, making it wise never to trust what he says, and (6) his senselessness, and propensity to kill out of delight in the suffering of others. This is the Ozark folkmurderer.

Once he is recognized, he cannot be mistaken. But some songs make it easy, nonetheless. There are songs in the Collection that incorporate each of his six defining characteristics, in one fell swoop. For instance, in the heart of the Collection, on Reel 226, Item 2, we find an example in *The Export Girl*, sung as a duet by Mr. and Mrs. Barry Satterfield in Bluff Springs, Arkansas, on April 14, 1955.²⁶⁹ *Export Girl* presents us with one of the most extensively detailed and horrid murders in the Collection, made even more disturbing by the fact that a married couple sing it together, even though, in the narrative of the song, a man kills his betrothed:

*I used to live in Export Town,
I used to live and dwell,
I used to live in Export Town,
I owned a flouring mill.
I used to court an Export girl
With a dark and rolling eye,
I asked her if she'd marry me
And me she didn't deny.
I called in at her sister's house*

²⁶⁹ *The Export Girl*, OZARK FOLKSONG COLLECTION, <http://digitalcollections.uark.edu/cdm/singleitem/collection/OzarkFolkSong/id/3185/rec/69> [<https://perma.cc/9FN8-T79J>].

*At eight o'clock that night,
 I asked her if she'd walk with me
 And view the meadow gay.
 I asked her if she'd walk with me
 And appoint our wedding day,
 We walked along and we talked along
 Till we came to level ground.
 I picked me up a hedgewood stake
 And knocked this fair maid down,
 She fell upon her bended knee,
 Crying, "Willie, oh, Willie, don't murder me now,
 I am not prepared to die."
 But I minded not a word she said,
 But I beat her more and more,
 I beat her till the earth around
 Was in a bloody gore.
 I picked her up by the long yellow hair,
 And I slung her around and around,
 I carried her down to the deep water side
 And plunged her in to drown.
 I called in at my mother's house,
 Just twelve o'clock that night,
 My mother being old and feeble,
 She looked up in a fright.
 Crying, "Willie, oh, Willie, what have you done,
 What's bloodied your hands and clothes?"
 I made the quick reply,
 "Been bleeding at the nose."
 I called for a handkerchief
 To bind my aching head,
 And also a candlestick
 To light myself to bed.
 I rolled and I tumbled the whole night through,
 No rest for me to see,
 The flames of Hell all 'round my bed,
 No rest for me to find.
 About three weeks or later
 This fair maid was found,
 A-floating down by the deep water side
 That flows through Export Town.
 Her sister swore my life away,
 She swore without a doubt,
 She swore I was the very lad*

*That dragged her sister out.
Oh, now I am compelled to hang
Between the earth and sky,
Oh, now I am compelled to hang,
This death I dread to die.²⁷⁰*

Export Girl provides the finale to our journey through Ozark murder ballads by capturing the folkmurderer's entire aspect for the listener. The listener is given no indication of Willie's humanity, backstory, or personal characteristics, merely that he lived "in Export Town," where he "owned a flouring mill,"²⁷¹ which does nothing to humanize him. Yet, without knowing anything of his humanity, the listener can rest assured that he deserves eternal damnation. After all, the "flames of Hell" would surely not be "all 'round [his] bed" otherwise.²⁷² Of course, Willie deserves and will receive the death penalty as well—that terrestrial punishment actually differentiated here as occurring "[b]etween the earth and sky."²⁷³ Incidentally, hanging being a death Willie "dread[s] to die"²⁷⁴ suggests that he likely will not bear it as well as he did in *Fuller and Warren*. But no matter, the listener need not feel sympathy for him, because his claim to love and want to marry the girl "[w]ith a dark and rolling eye"²⁷⁵ is, of course, not to be trusted. It is in his nature to lie about human emotions. He is ever the deceiver, lying to his mother in *Export Girl* by attributing the blood to a nosebleed, just as the boy in *Coat Sleeve* attributed it first to his little guinea hawk at the beginning of our journey. Willie's lack of humanity is cemented by the brutal and morbidly indulgent murder of his fiancé, which appears to be utterly senseless and inexplicable. In fact, the lyrics suggest he quite reveled in the crime, and did it simply because it would be fun for him.

Such songs, capturing the folkmurderer's complete image, teach the listener how to fill in the blanks when other songs lack detail. One such song takes up a short bit of tape on Reel 305, at

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.*

Item 4, and serves as a fine encore. In one minute and eighteen seconds, Tommy Doyle, aided by the alternating base notes of his guitar, sings a quick *Bramble Briar* for the folks at the Hilltop Cafe, located between Diamond and Neoshe, Missouri, on January 2, 1965.²⁷⁶ The entirety of the song is as follows:

*She traveled over rocks and great tall mountains,
Through the hills and valleys below,
Till she came to the Lonesome Valley;
There she found him dead in the snow.
She went back home and saw her brother.
She said, "You done a terrible th[a]ng.
I'm going tell the local sheriff."
Now her brother's a-gonna hang.
He was her love before he was killed,
In the Lonesome Valley below,
But she's gone from this Lonesome Valley,
His body's buried six feet below.²⁷⁷*

In *Bramble Briar*, the folkmurderer, as the mysterious brother, is a blank canvas for the listener to project the attributes that she has learned elsewhere. She knows what he does in his role as sibling from *Coat Sleeve* and *Arthur Clyde*. She knows what he deserves in return—hanging and damnation—and that she need not feel compassion or sympathy for him, because he is, after all, nothing more than a monster.

Having learned enough to anticipate the folkmurderer's actions and attributes, and to interpret, as an Ozarker of the past likely would, songs that assume the listener already knows him well, our exploration of the Collection's murder ballads is complete. While the sampling of songs has served its purpose, it by no means exhausts the Collection's murder ballads. I encourage readers to take their own journeys through the Collection, and meet the folkmurderer for themselves, face-to-face.

²⁷⁶ *Bramble Briar*, OZARK FOLKSONG COLLECTION, <http://digitalcollections.uark.edu/cdm/singleitem/collection/OzarkFolkSong/id/1186/rec/3> [<https://perma.cc/PL9V-7L5R>].

²⁷⁷ *Id.*

II. ECHOES OF OZARK MURDER BALLADS AMIDST TWENTY-FIRST CENTURY EXECUTIONS

The murder ballads of the Ozark Folksong Collection reflect a certain image of a murderer—formed of six defining attributes—rooted deeply in the musical storytelling tradition of the region. Could it be that remnants of this image remain in the Ozark folk knowledge of modern times?

The question has grave implications. The Steiner Study, described in Part IV, left its researchers to wonder, “how can state law tolerate death as a punishment when folk understandings compromise the constitutional protections required of state law?”²⁷⁸ If the folkmurderer persists in Ozark folk knowledge, might he compromise the Eighth Amendment model of capital punishment, described in Part III? Of course, Ozark jurors would not notice that the folkmurderer appears to them when they look at a capital defendant if the folkmurderer is precisely who they expect to see.

Before examining whether the folkmurderer influences present-day jurors, we must first determine whether he persists in Ozark folk knowledge. Having learned his attributes so well in Part I, we may be sure to recognize his likeness if it appears in modern times. But where to look?

The Steiner Study points the way. The study found that “mass media play a key role in reinforcing and reproducing folk knowledge about crime and punishment”²⁷⁹ and that “themes in the news coverage of murder cases . . . appear to reinforce extant folk knowledge.”²⁸⁰ We can look to news coverage of Ozark murder cases to reflect whether the folkmurderer is still a feature of Ozark lore. It would have been in such media that the folkmurderer was carried into the modern age, after his previous home—the Ozark murder ballad—retreated from popular culture. And it would be there that he still resides.

Because it is a defining characteristic of the folkmurderer that he inevitably deserves to be put to death, news reports

²⁷⁸ Benjamin D. Steiner et al., *Folk Knowledge As Legal Action: Death Penalty Judgments and the Tenet of Early Release in A Culture of Mistrust and Punitiveness*, 33 L. & SOC'Y REV. 461, 498 (1999).

²⁷⁹ *Id.* at 477.

²⁸⁰ *Id.* at 478.

describing Ozark murderers at the time of their executions are a likely place to find him. There, at his story's end, he will appear completely, if at all.

At least one scholar has already spotted the folkmurderer in modern media. Criminal law and moral philosophy expert Paul Litton, who happens to be of the University of Missouri School of Law in the Ozark border county of Boone, wrote in 2005 that "the idea of a murderer for many people, created by the media, is that of a non-human, pure demonic agent, with 'no personal history, no human relationships, and no social context.'"²⁸¹ The modern media character perceived by Litton is precisely the same as the folkmurderer of the Ozarks' musical storytelling tradition.

There have been two dozen executions since the turn of the millennium in which the condemned defendant was tried and sentenced in a county situated in the Ozark regions of Missouri, Arkansas, or Oklahoma.²⁸² Amidst the more controversial can be found the sort of discourse, new reports, commentary, and prosecutorial arguments that expose the most deeply held attitudes, values, and beliefs of Ozarkers. There lies the rhetoric of Ozark grief, the rhetoric of Ozark vengeance, the rhetoric of Ozark murder and execution that reflects bone-deep understandings of what murderers are and what they deserve.

Like the folkmurderer, the defendants described below committed their crimes in the Ozarks and were put to death in Ozark jurisdictions. Missouri executed them at a facility in Bonne Terre,²⁸³ Arkansas executed them at a facility near Grady,²⁸⁴ and

²⁸¹ Paul Litton, *The "Abuse Excuse" in Capital Sentencing Trials: Is It Relevant to Responsibility, Punishment, or Neither?*, 42 AM. CRIM. L. REV. 1027, 1028 (2005) (citing Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 550 (1995)).

²⁸² I derived this figure from reviewing Death Penalty Information Center data representing Missouri, Oklahoma, and Arkansas executions from 2000 onward, and cross-referencing the counties of conviction against Milton Rafferty's map of the Ozark region, described *supra*, note 3. See *Searchable Execution Database*, DEATH PENALTY INFORMATION CENTER, <https://www.deathpenaltyinfo.org/views-executions> [<https://perma.cc/8U8X-X5FM>] (last visited Sept. 15, 2018).

²⁸³ See Sarah Kaplan, *The execution of Cecil Clayton and the Biology of Blame*, WASH. POST (Mar. 18, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/03/18/the-execution-of-cecil-clayton-and-the-biology-of-blame/?utm_term=.38b0fdf6c3a5 [<https://perma.cc/45CZ-B9MJ>].

²⁸⁴ See Roy Ockert, *37 Convicted Killers Await Fate on Arkansas' Death Row*, ARKANSAS NEWS (Sept. 3, 2013),

Oklahoma executed them at a facility in McAlester.²⁸⁵ Among the gray halls of the McAlester facility is a happily hued “daisy yellow” door, marking the entrance to the death chamber.²⁸⁶ Like the folks in Fair Grove, Missouri, of 1896 saw a devilish image on a church wall, “some people see the face of Jesus in the pattern of the concrete wall next to the yellow door.”²⁸⁷ It seems death and superstition—the earthly and the supernatural—still walk hand-in-hand in Ozark states. While the Bonne Terre facility is the only one actually in the Ozark region, each of these defendants’ crimes and trials, the reactions and commentary of those connected to their crimes and trials, their prosecutors, and the jurors that sat in judgment of them are of the Ozark hill country.

Thus, a journey through the stories of their crimes and executions, as was done above through the narratives of the Collection, keeping a weather eye out for the folkmurderer’s image, is likely to reveal whether he still lives in the minds of Ozarkers. But our second journey will be far more challenging, because the murders and executions are real events.

Comparing real tragedies to fictional narratives and characters is not done to diminish or trivialize the horror and devastation that they caused. It is not done to criticize the public statements of those who lost loved ones to violent crimes and then spoke out, in grief and despair, consistent with their best ways of understanding murder, murderers, and the great losses and traumas they suffered. It is not done to poeticize the death penalty, the operations of which are decidedly unlovely and stray disconcertingly often into a business-as-usual ethos. Rather, the comparisons are made because they illuminate how discourse surrounding present-day murders and executions can affirm certain folk knowledge that might then influence members of a community when they sit as jurors.

<http://www.arkansasnews.com/sections/columns/news/roy-ockert/37-convicted-killers-await-fate-arkansas-death-row.html> [<https://perma.cc/JH7U-X3U5>].

²⁸⁵ See Jeffery E. Stern, *The Execution of Clayton Lockett*, THE ATLANTIC (June 2015) <http://www.theatlantic.com/magazine/archive/2015/06/execution-clayton-lockett/392069> [<https://perma.cc/GNL3-LJZY>].

²⁸⁶ Kelly Kurt, *Death’s Yellow Door*, THIS LAND (Feb. 24, 2012) <http://thislandpress.com/2012/02/24/deaths-yellow-door> [<https://perma.cc/5XN2-KCFQ>].

²⁸⁷ *Id.*

With that in mind, let us get underway on our journey through the real-life stories of Ozark murders and executions, beginning with the most recent Ozark capital defendant to be put to death as of the writing of this Article, David Zink.

A. David Zink

Zink was put to death by the State of Missouri, with a lethal dose of pentobarbital,²⁸⁸ administered on July 14, 2015.²⁸⁹ He was tried in St. Clair County,²⁹⁰ on the northwestern edge of the Ozark region. But his 2001 crime, which “authorities described as an unspeakable act of violence,”²⁹¹ was committed nearer the heart of the Ozarks, in Green County.²⁹² Zink “kidnapped, raped and mutilated” a 19-year-old girl.²⁹³ He strangled her and stabbed her repeatedly.²⁹⁴ The Supreme Court of Missouri described the events in detail:

He took her to the cemetery and tied her to a tree. He told her to look-up, and then he broke her neck. He strangled her with his hands, and then with a rope, and stuffed her mouth with mud and leaves. He looked for a spot to bury her and then dragged her body to that spot with the rope. Because he was worried that she might revive, he stated that he stabbed the back of her neck with a knife to cut her spinal cord. He then covered the body with leaves, went home to get a shovel, and came back to the cemetery and covered the body with dirt.²⁹⁵

²⁸⁸ See Marshall Griffin, *David Zink Executed in Missouri for 2001 Murder; he Says ‘Celebrate Our True Liberation’*, ST. LOUIS PUBLIC RADIO (July 14, 2015), <http://news.stlpublicradio.org/post/david-zink-executed-missouri-2001-murder-he-says-celebrate-our-true-liberation#stream/0> [<https://perma.cc/2T9N-Z47J>].

²⁸⁹ See David Zink, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/node/6195> [<https://perma.cc/6P73-AZT7>] (last visited Sept. 15, 2018).

²⁹⁰ See *State v. Zink*, 181 S.W.3d 66, 66 (Mo. 2005).

²⁹¹ Rachael Herndon, *Republicans Vie for Death Penalty Reconsideration*, MO. TIMES, Jan. 18, 2016 (quotations omitted).

²⁹² See *Zink v. State*, 278 S.W.3d 170, 174 (Mo. 2009) (crime occurred in town of Stafford).

²⁹³ See Geoff West, *Death Row Inmates Turn to Neuroscience to Bolster Their Appeals*, COLUMBIA MISSOURIAN, June 24, 2015.

²⁹⁴ *Zink*, 278 S.W.3d at 175.

²⁹⁵ *Id.*

She was found with “eight broken ribs” and “50 [to] 100 blunt force injuries.”²⁹⁶

How terrible it is to find a real-life *Export Girl* in the Ozarks, whose murder was so much more horrific for having been a drawn out affair. In *Export Girl*, Ozarkers learned the tale of a girl who was knocked down and beaten “till the earth around [w]as in a bloody gore,” and then picked up “by the long yellow hair” and “[s]lung . . . around and around,” before being carried “down to the deep water side” to be killed.²⁹⁷ The songs examined in Part I reflect a great amount of crazed violence against young women, like Ellen, Fair Fanny Moore, Rose Connie Lee, Pearl Bryan, and Floella. There is a sad precedent in the fictional narratives of the Ozarks for this sort of crime. When an Ozark murderer kills a woman violently, he casts himself in the paradigm of the folkmurderer, inviting whatever remnants of that stereotype persist in the region to be ascribed to him. Those Ozarkers who have learned to think of murderers as evil monsters certainly may favor that explanation for crimes of this nature.

And that explanation is precisely what Ozarkers were given at the time of Zink’s execution. Press reported on statements of a Green County sheriff that Zink “was just a horrible monster” and “an evil man.”²⁹⁸ The sheriff said the victim “was a vibrant young lady with a great future and this monster took that away.”²⁹⁹ He believed Zink killed simply “because he wanted to do it,” because he was “very evil,” and that Zink was “[n]ot really concerned about emotion.”³⁰⁰

The sheriff’s statements recalled the argument of Zink’s prosecutor. During closing arguments, the prosecutor told jurors that they should have Zink executed in order to “remove the

²⁹⁶ *Id.*

²⁹⁷ See *The Export Girl*, *supra* note 269.

²⁹⁸ Jeff Bernthal, *Missouri Executes Convicted Killer David Zink*, FOX2NOW (July 14, 2015), <http://fox2now.com/2015/07/14/missouri-executes-man-for-killing-19-year-old> [<https://perma.cc/5PK2-HLR3>].

²⁹⁹ Mike Lear, *Missouri Sheriff Reacts to Execution of ‘Monster,’ David Zink*, MISSOURINET (July 15, 2015), <http://www.missourinet.com/2015/07/15/missouri-sheriff-reacts-to-execution-of-monster-david-zink-video> [<https://perma.cc/FM48-W75Q>].

³⁰⁰ *Id.*

predators from the sheep.”³⁰¹ In the State’s view, Zink was not a human being; he was a vicious animal to be put down.

The statements of the sheriff, harkening back to those of the prosecutor, grew out of the traumatic ordeal Zink had put the sheriff through. Zink led him to where the body was buried.³⁰² During his later statements, consumed by emotion, the sheriff would say simply that, until that moment, he had “wanted to find her alive.”³⁰³ The sheriff’s need to resort to thinking of Zink as something other than human in an attempt to make some sense out of what he had seen of Zink’s crime is palpable. Resorting to rhetoric of monstrosity and evil is commonplace. It is how some attempt to express the moral outrage and disgust they feel when faced with brutal killings. It seems the only language powerful enough to do the job.

But the effect of such statements on the community, and how they might implicate and perpetuate folk knowledge, is very important. Ozarkers trying to form some understanding of Zink’s horrific crime, his execution, murder itself, and the death penalty would look to the sheriff’s statements for guidance. He was an authority figure connected to the case, as was the prosecutor.

The sheriff and prosecutor ascribed the folkmurderer’s defining attributes to Zink, and offered him to Ozarkers as a subject that could fairly be understood thus. Zink was said to be a “monster,”³⁰⁴ not “concerned about emotion.”³⁰⁵ The inhumanity and unemotionality of the boy in *Coat Sleeve*, those deceivers Edgar of *Edgar and Ellen* and Willie of *Export Girl*, and many other of the folkmurderer’s roles are implicated by the statements of the sheriff and prosecutor. Similarly, Ozarkers were taught by the unnamed villain of *Down in the Willow Garden*, Randall of *Fair Fanny Moore*, and many other folk characters, that any human emotions the folkmurderer might claim are false. Certainly few of the Ozarkers reading the sheriff’s statements would actually know these songs; but the songs show the seeds of the ideas in the sheriff’s statements being planted in the minds of

³⁰¹ See *Zink v. State*, 278 S.W.3d 170, 188 (Mo. 2009).

³⁰² See *Lear*, *supra* note 299.

³⁰³ *Id.*

³⁰⁴ See *Berenthal*, *supra* note 298.

³⁰⁵ See *Lear*, *supra* note 299.

Ozarkers long ago, and shaping the cultural common sense of the region.

Zink was said to be a creature of “evil,”³⁰⁶ like the eternally damned mother of *Greenwood Side*, the sister of *Arthur Clyde*, the condemned of *Thirteen Steps Away*, and many other killers were portrayed in Ozark lore as inevitably deserving of infinite, spiritual punishment. There was no need to consider other explanations for their crimes. There was no need to doubt that evilness was the sole cause. Why would there be in Zink’s case?

Zink was said to kill only because “he wanted to do it.”³⁰⁷ That remark cast Zink as a simple creature, killing out of senseless delight, like Scott Jackson of *Pearl Bryan*, Randall of *Fair Fanny Moore*, Willie of *Export Girl*, and many others. It was their desire to revel in violence, and that alone, that led them to kill. Surely the same was true of Zink.

Given that Zink was attributed the folkmurderer’s characteristics, Ozark folk knowledge would hold that he also inevitably deserved the death penalty. Like the narrator of *Bad Companions*, the father of *Edward in the Lowlands Low*, and so many other of the folkmurderer’s roles, Zink could deserve nothing less.

Zink was understood in terms directly consistent with the narratives of Ozark murder ballads. But there was more to the story. As had been the case with Charles Guiteau so long ago, the full facts surrounding the question of Zink’s culpability were far more complex than could be accounted for by the paradigm of the Ozark folkmurderer.

A PET scan of Zink’s brain, conducted after his trial and sentencing, “revealed an abnormality in his amygdala,”³⁰⁸ which is involved in regulating emotions and aggression,³⁰⁹ as well as excessive activity in his frontal lobe,³¹⁰ “the area involved with thinking, executive functions, planning behavior and brain activity.”³¹¹ Mental health experts testified that Zink “suffer[ed]

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ See West, *supra* note 293.

³⁰⁹ See David Eagleman, *The Brain on Trial*, THE ATLANTIC (2011).

³¹⁰ See West, *supra* note 293.

³¹¹ *Zink*, 278 S.W.3d at 177.

from antisocial, narcissistic and paranoid personality disorders,”³¹² along with organic brain damage caused by a childhood fever.³¹³ Zink’s psychological disorders were described as being “rooted in his family history and poor emotional development,” which resulted from “inadequate parental attachment, parental alcohol abuse, chronic domestic conflict, emotional abuse, abandonment and sexually traumatic exposures.”³¹⁴ Zink had been victimized as a child, and taught the ways of violence and cruelty.

It is well-known that being victimized early in life can lead one to become a victimizer later. Litton has written extensively on the manner that “severe abuse and neglect *cause* criminal behavior.”³¹⁵ United States Department of Justice statistics reflect that “[s]exual assault offenders [a]re substantially more likely than any other category of offenders to report having experienced physical or sexual abuse while growing up.”³¹⁶ And the Seventh Circuit has recognized research establishing that “being a victim of child molestation is highly correlated with becoming a child molester.”³¹⁷ Whatever cognitive resources Zink could marshal to think his way past the lessons of violence and cruelty that shaped his early life were compromised by brain damage and psychological disorders.

All of Zink’s mitigating considerations were set aside by Ozarkers who accepted the sheriff’s simple explanation that Zink had killed merely because “he wanted to do it.”³¹⁸ For them, evil *felt* like the right explanation for murder. Ozark folk knowledge holds that murderers are not the product of a causal chain of human experience, but the sole originators of violent action.

Yet, neuroscientist David Eagleman explains that

³¹² See West, *supra* note 293.

³¹³ See Zink, 278 S.W.3d at 177.

³¹⁴ *Id.* at 182.

³¹⁵ Paul Litton, *The “Abuse Excuse” in Capital Sentencing Trials: Is It Relevant to Responsibility, Punishment, or Neither?*, 42 AM. CRIM. L. REV. 1027, 1048 (2005) (emphasis in original).

³¹⁶ U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *Sex Offenses and Offenders: An Analysis of Data on Rape and Sexual Assault* vi (1997).

³¹⁷ *United States v. Beier*, 490 F.3d 572, 574 (7th Cir. 2007).

³¹⁸ See Lear, *supra* note 299.

[t]he choices we make are inseparably yoked to our neural circuitry, and therefore we have no meaningful way to tease the two apart. The more we learn, the more the seemingly simple concept of blameworthiness becomes complicated, and the more the foundations of our legal system are strained.

* * *

MANY OF US like to believe that all adults possess the same capacity to make sound choices. It's a charitable idea, but demonstrably wrong. People's brains are vastly different.

* * *

The complex interactions of genes and environment mean that all citizens—equal before the law—possess . . . varied capacities for decision-making. The unique patterns of neurobiology inside each of our heads cannot qualify as *choices*; these are the cards we're dealt.

Because we did not choose the factors that affected the formation and structure of our brain, the concepts of free will and personal responsibility begin to sprout question marks.

* * *

It is problematic to imagine yourself in the shoes of someone breaking the law and conclude, "Well, *I* wouldn't have done that"—because if you weren't exposed to in utero cocaine, lead poisoning, and physical abuse, and he was, then you and he are not directly comparable. You cannot walk a mile in his shoes.³¹⁹

It seems rather obvious that the human brain is responsible for human behavior. But why then would it also seem obvious to some that evilness and a lack of humanity are to blame for murder? Perhaps bone-deep intuitions and ways of thinking about murderers play a role. In the Ozarks, those ways of thinking are traceable to a long folk tradition of musical storytelling.

There was also evidence presented in Zink's postconviction proceedings that Zink, unlike the monstrous paradigm of the folkmurderer, had virtuous human traits. He was said to be a

³¹⁹ Eagleman, *supra* note 309.

generally “caring person and a hard worker,” who “counseled other inmates in prison.”³²⁰ In Zink’s final statement, he wrote of regret and sorrow in a way that was inconsistent with his description as being devoid of emotion:

I can’t imagine the pain and anguish one experiences when they learn that someone has killed a loved one, and I offer my sincerest apology to [the victim]’s family and friends for my actions. I hope my execution brings them the peace and satisfaction they seek.

I also have to apologize to the second set of victims, my family and friends, that had the unfortunate circumstance of developing emotions which will now cause them pain and suffering upon my execution.³²¹

Of course, Ozarkers who inherited views on murder that grew out of stories like *Down in the Willow Garden* and *Fair Fanny Moore* would know exactly what to think of such statements—they are the lies of a deceptive monster.

The Columbia Missourian reported that Zink attempted “[t]o avoid execution” by arguing that his crime was a result of “neurological problems — not the cold calculations of a criminal mind.”³²² But the law enforcement officers connected to the crime represented to the public that Zink’s actions should be chalked up to evil, pure and simple.

B. Cecil Clayton

Rewinding four months through Ozark history, we find the execution of Cecil Clayton on March 17, 2015.³²³ Like Zink, Clayton committed his crime deep in the Ozarks but was tried in a border county. He stood trial in Jasper County, Missouri, for a murder in the quiet Ozark township of Purdy, in Barry County.³²⁴ Submitting himself to be cast in the paradigm of the folkmurderer, Clayton killed as a jealous lover. But Clayton, like

³²⁰ *Zink*, 278 S.W.3d at 182.

³²¹ See Bernthal, *supra* note 298.

³²² See West, *supra* note 293.

³²³ *Cecil Clayton*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/node/6081> [<https://perma.cc/HT5B-JLJ4>].

³²⁴ See *Clayton v. Roper*, 515 F.3d 784, 786 (8th Cir. 2008).

Fuller of *Fuller and Warren* and the lonesome cowboy from *The Cowboy's Home Sweet Home*, spared the object of his affection to instead lash out at another:

On November 27, 1996, Clayton met his estranged girlfriend, Martha Ball, at a store in Purdy, Missouri; while at the store, the couple argued loudly. So much so, in fact, that a store employee called police. After a Purdy police officer arrived at the store, Clayton and Ball left but not together. After the store dispute, Clayton went to Ball's mother's house in search of Ball. Concerned, Ball's sister, present at the house, called police and told them that Clayton was trespassing on their property. Officer Castetter responded to the call, and arrived on the scene in a marked patrol car. As Officer Castetter began to roll down his driver's side window, Clayton walked up to the patrol car and shot him in the head at point-blank range.³²⁵

Upon Clayton's execution, Ozarkers were provided the same explanation for his conduct—the same affirmation of the folkmurderer—that they were given at the time of Zink's. The victim's brother, having lived with his grief for nearly two decades, told the press that Clayton's execution would “destroy[] an evil person that would otherwise be walking this earth.”³²⁶ Ozarkers responding emotionally to the brother's pain and loss were provided with an abstract, evil figure to blame—the folkmurderer. *Charles Guiteau*, *Bad Companions*, *Export Girl*, and many other murder ballads once taught Ozarkers that evil was the sole cause of murder, and other, more complex explanations should be rejected. But, as with Zink, there was more to Clayton's story.

Clayton had a hole in his head.

Before Clayton's crime, “20 percent of his frontal lobe” had been “removed due to an accident at the sawmill.”³²⁷ After the accident, Clayton had “checked himself into a mental hospital,

³²⁵ *Id.*

³²⁶ Tracy Connor, *Missouri Executes Cecil Clayton, Cop Killer Missing Part of Brain*, NBC NEWS (Mar. 18, 2015), <http://www.nbcnews.com/news/us-news/missouri-executes-cecil-clayton-missing-part-brain-n325081> [<https://perma.cc/VSE9-94F9>].

³²⁷ See Kaplan, *supra* note 283.

frightened by his suddenly uncontrollable temper.”³²⁸ He sought medical treatment again later, going to a doctor “who examined him for extreme anxiety, depression and paranoia.”³²⁹ Clayton told the doctor, “I can’t get ahold of myself, I’m all tore up.”³³⁰ A clinical psychologist testified at Clayton’s trial that his “head injury created dementia and memory problems” and that “Clayton’s brain injury coupled with his alcohol use prevented Clayton from coolly reflecting, planning, or controlling his behavior when he [wa]s in an aggravated state.”³³¹

Prior to the accident, “Clayton had been an intelligent, guitar-playing family man,” who “abstained from alcohol, worked part time as a pastor and paid weekly visits to a local nursing home.”³³² After the accident, Clayton “broke up with his wife, began drinking alcohol and became impatient, unable to work and more prone to violent outbursts.”³³³ Not surprisingly, losing part of his brain made Clayton a different person.

If Clayton was evil, was he evil before the accident, and just waiting to reveal it? Was it just a coincidence that the accident coincided with his decision to begin acting in accordance with his true nature? Or could it be that he was not evil, but broken? Can any of us say that we, good folks that we are, would not commit murder after suffering the same brain injury that Clayton suffered?

Clayton was not the first to raise these questions. His story falls right in-line with that of Charles Whitman, the University of Texas Tower sniper and murderer of sixteen people in 1966, who to this day is referred to as a “monster.”³³⁴ Whitman’s story is instructive here.

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ See Clayton v. Roper, 515 F.3d 784, 787 (8th Cir. 2008).

³³² See Kaplan, *supra* note 283.

³³³ *Id.*

³³⁴ John Blake, *Making Peace with a Monster*, CNN (Jan. 22, 2015), <http://www.cnn.com/2012/07/26/us/mass-murder-survivors> [<https://perma.cc/YXW6-RVGU>].

Whitman is called “a ‘monster,’ a ‘madman,’ a murderer and nothing more.”³³⁵ But there was a time before his crime when he had been a happily married, college-educated, church-going, former marine, and volunteer for Austin’s Boy Scout Troop 5, with a measured IQ in the ninety-ninth percentile.³³⁶ At some point, he began experiencing violent impulses he could not explain.³³⁷ He had never before had an impulse to hurt or kill people, but now he did, even though he still understood it to be wrong.³³⁸ The desire just appeared. Imagine the horror of waking up one morning to find yourself yearning to commit murder, but still appreciating, with your remaining intelligence, how horrible that will be?

At the time, Whitman wrote, “I don’t really understand myself these days. I am supposed to be an average reasonable and intelligent young man. However, lately . . . I have been a victim of many unusual and irrational thoughts.”³³⁹ Whitman felt victimized by his violent thoughts. He did not revel in them like Scott Jackson of *Pearl Bryan*, Randall of *Fair Fanny Moore*, and Willie of *Export Girl*.³⁴⁰

Whitman, like Clayton, did the right thing and sought medical attention: “I talked with a Doctor once for about two hours and tried to convey to him my fears that I felt [] overwhelming violent impulses . . . and since then I have been fighting my mental turmoil alone, and seemingly to no avail.”³⁴¹ He went so far as to request in his suicide note that an autopsy be performed to determine what was wrong with his brain.³⁴²

After Whitman was killed by police on the day of his killing spree, he got his wish. As Eagleman put it, Whitman’s autopsy revealed that his “intuition about himself—that something in his brain was changing his behavior—was spot-on.”³⁴³ The medical

³³⁵ Joan Neuberger, *Charles Joseph Whitman (1941-1966)*, BEHIND THE TOWER, <http://behindthetower.org/charles-joseph-whitman> [<https://perma.cc/6SGD-7RQE>] (last visited Sept. 14, 2018).

³³⁶ See Eagleman, *supra* note 309.

³³⁷ *See id.*

³³⁸ *See id.*

³³⁹ *Id.*

³⁴⁰ *See id.* (quoting Whitman’s description of the “mental turmoil” he experienced while “fighting” his violent impulses).

³⁴¹ *Id.*

³⁴² *See id.*

³⁴³ *Id.*

examiner found a glioblastoma the diameter of a nickel beneath Whitman's thalamus, putting pressure on his amygdala,³⁴⁴ that same area of the brain that was damaged in Zink's case, which is involved in regulating emotions and aggression.³⁴⁵

Whitman had to guess at it, whereas Clayton knew exactly how his brain had been damaged.

It is revelations like Whitman's tumor that have led to a growing body of research into how developments in neuroscience and mental health research cast doubt on the propriety of the death penalty. For instance, one study published in *Hastings Law Review* in 2014 found that eighty-seven percent of individuals sentenced to death for murder have evidence of some type of mental illness; one-third are intellectually disabled, have borderline intellectual functioning, or traumatic brain injury; and over half have a severe mental illness such as schizophrenia, PTSD, or psychosis.³⁴⁶

Clayton's execution put the Ozarks at the center of the controversy. In an article titled *The Execution of Cecil Clayton and the Biology of Blame*, the Washington Post pointed to Eagleman's concerns, along with those of Duke law professor Nita Farahany, at the time of Cecil Clayton's execution:

Neuroscience has revealed that humans have a lot less control over their actions than they like to think, Eagleman said. Brain injuries — particularly ones to the frontal lobe, like Clayton's — can radically reduce the ability to make decisions and check impulses.

* * *

Then the inclusion of MRI and EEG scans as trial evidence is not just a scientific or legal question, Eagleman and Farahany believe, but a philosophical one. In a justice system predicated on the idea that people act with free will, what does it mean to recognize that so much of behavior is biological rather than rational?

³⁴⁴ See *id.*

³⁴⁵ See *id.*

³⁴⁶ See Robert J. Smith et al., *A Failure of Mitigation?*, 65 HASTINGS L.J. 1221 (2014).

“Criminal law is going to have to grapple much more seriously with why people do what they do,” Farahany said.³⁴⁷

But the Ozark prosecutor who tried Cecil Clayton did not grapple at all. During closing arguments, the prosecutor told the jurors that expert testimony from a clinical psychologist was—in keeping with the magical superstitions of the region—“voodoo.”³⁴⁸

And in the face of all this, we’re told that the defendant couldn’t deliberate. We’re told that by, well, Dr. Betty Back. And I’ll talk about her a little bit more. But, folks, I think she said something, and you notice that she didn’t want to deal with the facts surrounding this incident, did she? She wanted to deal with her nice little computer tests. She wanted to deal with her nice clean little numbers. This isn’t clean; it’s murder. It’s dirty and it’s ugly, and if you don’t look at the facts, you don’t know what happened. So he couldn’t plan. Well, ma’am, we pointed out to her, not only could he plan, he did plan “Well, they don’t have very good judgment.” Well, as far as I’m concerned somebody who buys a Toyota doesn’t have very good judgment because I don’t like Toyotas. That doesn’t mean there’s anything wrong with their ability to reason. Folks, it’s voodoo, that’s all it is. It’s an excuse.³⁴⁹

Consider the fact that the prosecutor’s remarks reflect a spokesperson for the State of Missouri in a death case teaching Ozarkers that science is voodoo, and a better explanation for the transgressive actions of a man who had a hole in his head was a reasoned choice to do an evil act. The prosecutor did not object to Dr. Black’s scientific methodology; he objected to her favoring science over unbridled moral outrage. And, ultimately, the State’s “dirty and [] ugly” view of murder won out over the “nice [] little” scientific one when Clayton was put to death.³⁵⁰

His execution was also a victory for Ozark folk knowledge. The folkmurderer’s culpability is not ever meaningfully mitigated by mental illness, and anything he may try to offer in the way of explanation—in a bid for compassion or understanding—is

³⁴⁷ See Kaplan, *supra* note 283.

³⁴⁸ See Clayton v. Roper, 515 F.3d 784, 787 (8th Cir. 2008).

³⁴⁹ *Id.*

³⁵⁰ *Id.*

undoubtedly false. He sought compassion in *Fuller and Warren*, when he claimed bravery, claimed the name “[p]oor Fuller,” and claimed to have killed out of love,³⁵¹ when he had really killed out of petty jealousy and bloodlust.

Clayton’s prosecutor also “referred to the criminal proceedings as legal niceties”³⁵² and went so far as to tell the jury that Clayton did not even deserve the usual human decency of having his punishment fit his culpability:

[The defense attorney] said the punishment should fit the criminal. You will find that nowhere in our law, nowhere in our tradition. Punishment should fit the crime. That’s what you’ll find in our law and in our tradition. The focus should not be on the criminal, but should be on the crime, and I think that is instructive.³⁵³

Clayton’s jurors deliberated after being encouraged by the State to view Clayton’s neurological and psychological conditions as voodoo and Clayton’s punishment as solely a function of the horror of his crime, not his human characteristics that explained why he did it. In this way, the prosecutor invoked the folkmurderer’s lack of humanity, evilness, inevitable deservingness of the death penalty, reductionism, and deceptiveness, all in one closing argument.

The Eighth Circuit concluded, “we cannot say that the [prosecutor’s] comments strayed impermissibly from the broad latitude afforded counsel in closing arguments.”³⁵⁴ But, in a dissent to the Eighth Circuit’s ruling, Circuit Judge Bye insisted that “[t]hese comments are directly contrary to well-established Supreme Court precedent emphasizing the importance of an individualized decision-making process in capital cases,” which does “not only permit, but *mandate[s]*, that the punishment fit the criminal.”³⁵⁵ The Eighth Amendment precedent is discussed in Part III, but, as to Clayton, it must be mentioned to clarify why

³⁵¹ *Fuller and Warren*, OZARK FOLKSONG COLLECTION, <http://digitalcollections.uark.edu/cdm/singleitem/collection/OzarkFolkSong/id/930/rec/92> [<https://perma.cc/U2G4-52T8>].

³⁵² *Clayton*, 515 F.3d at 788.

³⁵³ *Id.*

³⁵⁴ *Id.* at 792.

³⁵⁵ *Id.* at 793 (Bye, J., concurring).

Bye admonished that “[t]he prosecutor should have known better than to tell the jury this concept is not part of our law, not part of our tradition.”³⁵⁶ In Bye’s view, the prosecutor violated the Constitution in order to invoke the folkmurderer.

C. Walter Storey

Rewinding a month further to February 11, 2015,³⁵⁷ we arrive at the execution of Walter Storey. He was tried in St. Charles County, Missouri,³⁵⁸ straddling the northern border of the Ozark region. Lending himself to being cast in the same paradigm of Ozark folklore that Clayton fell into, Storey also killed as a jealous lover.

Upon being served with divorce papers from his estranged wife in February of 1990, he drank until he ran out of alcohol, and then went to steal from his neighbor to buy more.³⁵⁹ Storey also chose the folkmurderer’s favorite weapon. He “took a knife,” broke into the victim’s apartment, and “brutally murder[ed her] by beating and inflicting multiple slash and stab wounds.”³⁶⁰ Once again, an Ozark murderer played out a scenario that could have been pulled directly from the lyrics of the Collection’s murder ballads involving fatal violence against women.

Just as in the trials of Zink and Clayton, the Ozark prosecutor in Storey’s trial made questionable arguments. In fact, the Missouri Supreme Court wrote that the prosecutor “push[ed] the envelope of proper advocacy.”³⁶¹ The Eighth Circuit went further, explaining that the prosecutor “audaciously stated” that the State “knows what the line is” and does not cross it, and then making the profound acknowledgement that “the line is barely decipherable and rarely sacrosanct in these highly charged, emotional death penalty trials.”³⁶² This is a staggering acknowledgement from a high bench, brought on by Storey’s case:

³⁵⁶ *Id.* (Bye, J., concurring).

³⁵⁷ *Walter Storey*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/node/6050> [<https://perma.cc/F9U2-BCBM>] (last visited Sept. 15, 2018).

³⁵⁸ *See State v. Storey*, 40 S.W.3d 898, 898 (Mo. 2001).

³⁵⁹ *See Storey v. Roper*, 603 F.3d 507, 512 (8th Cir. 2010).

³⁶⁰ *Id.* at 512.

³⁶¹ *Id.* at 518.

³⁶² *Id.*

prosecutors of the Eighth Circuit rarely stay on the right side of the constitutional line in death cases.

Storey's prosecutor had overstepped the line by presenting a large amount of testimony as to the impact the victim's murder had on various individuals, both closely and peripherally related to the victim.³⁶³ The testimony improperly misdirected the jury's focus from the defendant and the crime to the ripples of consequence sent out into the community, beyond the scope of legal relevance at sentencing.³⁶⁴

A desire to tailor Storey's punishment to the moral outrage caused by his crime rather than a degree of culpability determined by examining Storey in an individualized sentencing determination was also evident in news reports of statements from the victim's brother. He addressed the controversy over whether Missouri's lethal injection protocol was cruel and unusual under the Eighth Amendment. The brother wrote,

Why do we continue to allow the argument about the secretive process of obtaining and using lethal injection drugs? Is it because this process might cause a brutal murderer to suffer a painful death? What is a painful death? . . . What is cruel and unusual punishment? Is it a twitch of a finger? Is it a squinting of an eyelid? Is it a curling of a savage killer's toes, or maybe violent tremors of the body for several minutes? . . . Or is cruel and unusual punishment when a man breaks into a woman's home in the middle of the night while she is in bed, proceeds to brutally beat and assault her, break six ribs, hit her in the face and head 12 times suffering injuries to her forehead, nose, cheek, scalp, lips, tongue and even her eyelid torn off?³⁶⁵

The brother's statement reflects the difficulty of extending humane consideration and decency to murderers. Ozarkers reading the statement would wonder, why should Clayton deserve any better than his victim? Why should the People of the State of Missouri not rip Storey's eyelid off and beat him to death as his

³⁶³ See *id.* at 519-20.

³⁶⁴ See *id.*

³⁶⁵ See Connor, *supra* note 326.

criminal punishment? Would not that be fair, his eye for hers, his violent death for hers?

We know very well where Ozark folklore comes down on the retribution issue. There was no concern for the brutality of the punishments the folkmurderer faced in *Bad Companions*, *Edward in the Lowlands Low*, *Fuller and Warren*, *Thirteen Steps Away*, *Fair Ellen*, *Charles Guiteau*, and so many other murder ballads. Why should there be in Storey's case?

Professor Robert Blecker of New York Law School has argued provocatively that such an approach to capital punishment would somehow "restore a moral balance."³⁶⁶ But lowering a society to doing collectively the most brutal acts that its most damaged members do individually is no way to preserve a civilization. Making society more like its murderers is not a balance we want to strike. That the inverse might be impossible is no good reason to do so. If we cannot even out murder, we can only get about the business of trying to prevent it by better understanding its causes.

Like love and justice, retribution is blind. So the Eighth Amendment floodlights human decency in criminal punishment, to restore its visibility.³⁶⁷ A desire for vengeance provoked by extreme moral outrage leads some to advocate for gauging the brutality of criminal punishment by the brutality of the crime, despite how that would lessen a society. Because the thing that *feels* right would be wrong, death sentencing is a prime area for folk knowledge to supplant the law.

D. Earl Ringo

A year before Storey, a similar argument was made by a family member of the victim of Earl Ringo. Ringo was executed on September 10, 2014.³⁶⁸ A court in Boone County, Missouri, along the northern edge of the Ozark region, imposed Ringo's death

³⁶⁶ Robert Blecker, *With Death Penalty, Let Punishment Truly Fit the Crime*, CNN (Aug. 22, 2013), <http://www.cnn.com/2013/08/22/opinion/blecker-death-penalty> [<https://perma.cc/D2KK-C77Z>].

³⁶⁷ See *infra*, Part III.

³⁶⁸ *Earl Ringo*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/node/5879> [<https://perma.cc/2TP4-L5AZ>] (last visited Sept. 15, 2018).

sentence in 1999.³⁶⁹ Local news reported that Ringo was “put to death by the state of Missouri for killing two people” during a robbery of a Ruby Tuesday.³⁷⁰ Ringo’s co-defendant had killed one of the victims,³⁷¹ and avoided the death penalty by bargaining with the State to trade testimony against Ringo for his life, pursuant to a plea agreement.³⁷²

The wife of one of the victims provided the press with a written statement in which she urged,

Please do not make this about how executions shouldn’t take place We must stop these senseless crimes, if we can’t, then we have to have punishment strong enough to make people think about the consequences of their actions. Remember he has been able to live another 16 years!! That is way too long for the State of Missouri to have supported him! Things have to change. People need to respect people and evil should not win!!³⁷³

Again, Ozarkers heard from a bereaved family member, pleading for them to ignore legal considerations relating to the humanity of the condemned. Why?—for the same reasons they once learned from Ozark folklore—murderers kill “senseless[ly]” out of “evil.”³⁷⁴ Ozarkers had yet another occasion to recommit themselves to their folk knowledge about murderers.

But was there truly no sense to be made out of why Ringo committed his crime, other than chalking it up to evil? As with Zink, Clayton, and Storey, there was ample explanation to be found. After Ringo was sentenced, a clinical psychologist

³⁶⁹ See *Scheduled Execution Case Has Ties to Jefferson City*, NEWS TRIBUNE (Jefferson City, Mo.) (Sept. 7, 2014), <http://www.newstribune.com/news/news/story/2014/sep/07/scheduled-mo-execution-case-ties-jefferson-city/447154> [https://perma.cc/C6HD-HD7G].

³⁷⁰ *Earl Ringo, Jr. Executed for 1998 Double Murder in Columbia*, ABC 17 (Sept. 10, 2014), <http://www.abc17news.com/news/crime/earl-ringo-jr-executed-for-1998-double-murder-in-columbia/53889919> [https://perma.cc/2X58-AXXJ].

³⁷¹ See *State v. Ringo*, 30 S.W.3d 811, 816 (Mo. 2000) (“Jones pointed the gun at her head and looked at defendant, who encouraged him to quit stalling and shoot her. Finally, Jones squeezed the trigger, shooting her in the head.”).

³⁷² *Id.*

³⁷³ *Earl Ringo, Jr. Executed for 1998 Double Murder in Columbia*, ABC 17 (Sept. 10, 2014), <http://www.abc17news.com/news/crime/earl-ringo-jr-executed-for-1998-double-murder-in-columbia/53889919> [https://perma.cc/2X58-AXXJ].

³⁷⁴ *Id.*

diagnosed him as suffering from PTSD,³⁷⁵ which resulted from childhood abuse.³⁷⁶ Ringo's father was an alcoholic, drug addict, pimp and drug dealer that brought home prostitutes and beat him and his mother.³⁷⁷ He was whipped with extension cords and once suffered a head injury that caused his head to swell to twice its normal size.³⁷⁸ Shockingly, there once appeared a "naked woman tied up in the basement" with "no explanation," and Ringo was "forced to feed her" until "she inexplicably disappear[ed]."³⁷⁹ When not being made to feed chained, naked women in the basement, Ringo would be locked in a closet for an entire day without food.³⁸⁰ His family lived in abandoned homes and brothels.³⁸¹ His mother was beaten and raped in front of him.³⁸² He was made to steal to support his father's drug habit,³⁸³ learning from a parental authority figure the behavior he would engage in years later at the Ruby Tuesday.

Could his personal history be unrelated to his violent actions later in life? That is exactly what his prosecutor argued to his Ozark jury.

Like the Ozark prosecutors of Zink, Clayton, and Storey, Ringo's prosecutor made an appeal to the jury consistent with Ozark murder lore. Astoundingly, the prosecutor was permitted to argue to Ringo's jury, "he is not a creature of his past circumstances. Ladies and gentlemen, he is the creator of his current circumstances."³⁸⁴ Just like the folkmurderer in *Fair Fanny Moore*, *Pearl Bryan*, and *Jealous Lover*, Ringo was cast as somehow existing outside the causal chain of his life experiences and biopsychosocial influences. In essence, the prosecutor denied the relevance of mitigating, explanatory evidence in capital sentencing, in a way consistent with Ozark murder ballads.

³⁷⁵ See *Ringo v. State*, 120 S.W.3d 743, 748 (Mo. 2003).

³⁷⁶ See *id.*

³⁷⁷ See Transcript of Oral Argument of Cheryl Ann Pilate on Behalf of the Petitioner, *Ringo v. Roper*, 2006 WL 6048186 (8th Cir. Sept. 25, 2006).

³⁷⁸ See *id.*

³⁷⁹ See *id.*

³⁸⁰ See *id.*

³⁸¹ See *id.*

³⁸² See *id.*

³⁸³ See *id.*

³⁸⁴ See *State v. Ringo*, 30 S.W.3d 811, 820-21 (Mo. 2000).

Could it be that Ringo was not the product of his morbidly abusive childhood? If Ringo had been nurtured and well-cared for, would he have committed the same crime? If not, his personal history *was* part of the cause of his crime.

The penalty phase of Ringo's trial was the place to sort it all out. But the proceeding only lasted one hour.³⁸⁵ And there were other troubling aspects to Ringo's trial. In-line with a 2012 study by the American Bar Association finding improper racial bias in Missouri capital trials, Ringo was a black man, sentenced to death for the killings of two white victims, in a trial before an all-white jury, with a white prosecutor, a white judge, a white defense attorney, and no other black person whatsoever involved.³⁸⁶

Amnesty International issued a press release, demanding a review of the role of race in Ringo's trial prior to his execution.³⁸⁷ Amnesty cited the 2012 American Bar Association study along with several other studies, which "concluded that in Missouri 'cases involving white victims were treated more severely than cases involving black victims'" and "that 'Missouri is no exception to the rule that race matters in the prosecution of murder and the use of the death penalty'."³⁸⁸ Missouri's four Roman Catholic Bishops also issued a press release, requesting the Governor of Missouri stop the execution.³⁸⁹ They wrote that "[o]nly four members of the 163 people selected for the jury were African-American," and that "[o]nly one prospective African-American juror was questioned to be on the jury and, in the end, was stricken from the panel"³⁹⁰

³⁸⁵ See Transcript of Oral Argument of Cheryl Ann Pilate on Behalf of the Petitioner, *Ringo v. Roper*, 2006 WL 6048186 (8th Cir. Sept. 25, 2006).

³⁸⁶ See *Scheduled execution case has ties to Jefferson City*, NEWS TRIBUNE (Jefferson City, Mo.) (Sept. 7, 2014), <http://www.newstribune.com/news/news/story/2014/sep/07/scheduled-mo-execution-case-ties-jefferson-city/447154/> [<https://perma.cc/8ZKZ-C5ZJ>].

³⁸⁷ *Urgent Action, Call For Race Inquiry As Execution Nears*, AMNESTY INT'L (Sept. 4, 2014), <https://www.amnestyusa.org/files/uaa22014.pdf> [<https://perma.cc/E7RB-XBKA>].

³⁸⁸ *Id.*

³⁸⁹ See *Scheduled Execution Case Has Ties to Jefferson City*, NEWS TRIBUNE (Jefferson City, Mo.) (Sept. 7, 2014), <http://www.newstribune.com/news/news/story/2014/sep/07/scheduled-mo-execution-case-ties-jefferson-city/447154/> [<https://perma.cc/8ZKZ-C5ZJ>].

³⁹⁰ *Id.*

Calls for prudence and a careful review of race in Ringo's trial echoed with the memory of Ozark folksongs like Ollie Riggins' *Big Black Nigger*.³⁹¹ In that song, which is also a murder ballad, the narrator "don't like [the black man's] aggravating ways," and assures the listener that "when the scrap is over and the corpse is on the ground [y]ou'll have to sweep the nigger up he'll be so Scattered around."³⁹² A folklore of racial hatred, violence, and murder also lived in the folksongs of the Collection. Might their echoes be heard in the racial bias of Missouri capital sentencing, along with the folkmurderer?

The folk tradition of racism that raised concerns at Ringo's trial puts a different complexion on the prosecutor's remarks. It was a white prosecutor, speaking to an all-white jury, in front of a white judge, in a room full of white people, who demanded that Ringo—a black figure sitting at the defense table—not be thought of as a human being that is shaped by his past human experience and circumstances. It was a room full of white people that adjudicated the life-or-death question of whether a black man's horrific upbringing in a black family had something to do with his later criminal actions. In that room, among those people, the prosecutor's view of Ringo, ascribing to him the traits of the folkmurderer of the Ozarks, carried the day, and Ringo was put to death based on their judgment of his human experience.

E. Michael Worthington

A month before Ringo, yet another assortment of severe mental illnesses lingered behind the scenes of the execution of Michael Worthington on August 6, 2014.³⁹³ Worthington, like Storey, was tried in St. Charles County, Missouri.³⁹⁴ In 1995, Worthington climbed into the kitchen window of a Lake Saint Louis condo, found his 24-year-old victim there, strangled her

³⁹¹ *Big Black Nigger*, OZARK FOLKSONG COLLECTION, <http://digitalcollections.uark.edu/cdm/singleitem/collection/OzarkFolkSong/id/2452/rec/5> [<https://perma.cc/3WV6-SRKZ>] (last visited Sept. 15, 2018).

³⁹² *Id.*

³⁹³ *Michael Worthington*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/node/5839> [<https://perma.cc/66ZV-R7X9>] (last visited Sept. 15, 2018).

³⁹⁴ See *Worthington v. State*, 166 S.W.3d 566, 566 (Mo. 2005).

unconscious, raped her, and, when she woke back up, strangled her again until she was dead.³⁹⁵ In an article with the capitalized subheading “TIME TO MEET MAKER,” local news reported that “he tore open a part of [the victim’s] body.”³⁹⁶

The victim’s mother told the press that when she learned Worthington would be tried before a judge who was a woman, “her first thought was, ‘Oh my God. A woman! She’ll never give the death penalty.’”³⁹⁷ Her concern is reminiscent of the many Ozark folksongs that portray women as the endlessly forgiving victims of murder. When Edgar killed Ellen, she cried, “Oh Edgar I’ll forgive you, [a]lthough this be my last breath.”³⁹⁸ When Jackson killed Pearl Bryan, Pearl cried, “But I’ll forgive you, Jackson, [w]ith my last and dying breath.”³⁹⁹

The victim’s mother also “believe[d] death is what men like Worthington fear most.”⁴⁰⁰ Murderers being most fearful of death is consistent with Ozark folklore. In the role of Willie, the folkmurderer referred to his execution in *Export Girl* as “[t]his death I dread to die.”⁴⁰¹ And so often in Ozark lore he finds himself vulnerable and scared upon the scaffold, in addition to obsessively counting, over and over, those thirteen steps of distance to his death in the Chair. Likewise, the victim’s mother believed that “[t]he only thing they are afraid of is to die and meet their maker.”⁴⁰² Murderers fearing spiritual judgment is consistent with Willie of *Export Girl* being haunted by the “flames of Hell all ‘round [his] bed,”⁴⁰³ and other murderers of Ozark

³⁹⁵ See Steve Pokin, *17 Years Later, Mother Waits for Murderer’s Execution*, ST. LOUIS POST-DISPATCH (Feb. 22, 2012), http://www.stltoday.com/suburban-journals/stcharles/news/stevepokin/pokin-around-years-later-mother-waits-for-murderer-s-execution/article_c19ddb7-29a6-5052-9fe9-2e769909b8d0.html [<https://perma.cc/M7XF-R3XD>].

³⁹⁶ *Id.*

³⁹⁷ *Id.*

³⁹⁸ *Edgar and Ellen*, OZARK FOLKSONG COLLECTION, <http://digitalcollections.uark.edu/cdm/singleitem/collection/OzarkFolkSong/id/1249/rec/65> [<https://perma.cc/3ZNK-5A8S>] (last visited Sept. 15, 2018).

³⁹⁹ *Pearl Bryan*, OZARK FOLKSONG COLLECTION, <http://digitalcollections.uark.edu/cdm/singleitem/collection/OzarkFolkSong/id/1161/rec/29> [<https://perma.cc/Y4AD-FY5G>] (last visited Sept. 15, 2018).

⁴⁰⁰ Pokin, *supra* note 395.

⁴⁰¹ See *supra* note 269.

⁴⁰² Pokin, *supra* note 395.

⁴⁰³ See *supra* note 269.

folklore agonizing over their inevitable damnation. Ozark murder ballads satisfied the listener's need for vengeance by placing the folkmurderer in fear of a state-sanctioned death followed by eternal damnation. Surely the same would be true of Worthington.

The victim's mother also provided remarks to the public that would reinforce a preexisting tendency to be unconcerned with Worthington's humanity. Responding to concerns that "three executions in recent months ha[d] renewed the debate over lethal injection,"⁴⁰⁴ she stated that "there's certainly no reason to wait for a drug that takes away the pain of execution," because "[w]e don't need to put them to sleep. We just need to get them from this world to the next . . ."⁴⁰⁵

Yet, as with each of the Ozark capital defendants that would be executed after him, there was more to Worthington's story. Worthington had been abused and neglected by his parents.⁴⁰⁶ They were criminals, who used him as a scapegoat for their crimes, thinking "they could get away with blaming him for the crimes because he was a juvenile."⁴⁰⁷ His parents plugged him into the criminal justice system early, where he would self-identify as a criminal wrongdoer. A neurologist diagnosed Worthington with a frontal lobe disorder, Tourette's syndrome, obsessive compulsive disorder, and bipolar disorder, and concluded that "Worthington could not deliberate and was under the influence of an extreme emotional disturbance at the time of the murder."⁴⁰⁸ A neuropsychologist reached the same diagnoses and "concluded that Worthington had significant frontal lobe dysfunction resulting in problems with his higher-level [sic] abstract reasoning, problem-solving, judgment, decision-making, and short-term functioning," which resulted from "genetics, head injuries, the abuse Worthington's mother suffered during pregnancy, and Worthington's substance abuse."⁴⁰⁹ A clinical

⁴⁰⁴ Jim Suhr, *Missouri Puts to Death First Inmate Since Botched Execution*, USA TODAY (Aug. 5, 2014), <http://www.usatoday.com/story/news/nation/2014/08/05/missouri-execution-lethal-injection/13647601> [<https://perma.cc/8642-PFHK>].

⁴⁰⁵ Pokin, *supra* note 395.

⁴⁰⁶ See *Worthington v. State*, 166 S.W.3d 566, 577 (Mo. 2005).

⁴⁰⁷ *Id.*

⁴⁰⁸ Opening Brief, *Worthington v. Roper*, 2009 WL 3269402, II.D.1 (8th Cir. Sept. 20, 2009).

⁴⁰⁹ *Id.*

psychologist and addiction specialist diagnosed Worthington with bipolar disorder, cerebral brain dysfunction, PTSD, and substance dependence and concluded that “Worthington was suffering from diminished capacity because of his disorders.”⁴¹⁰

Because Worthington’s biopsychosocial evidence was not presented to the jury that decided he deserved to die, a federal district judge concluded that a constitutional violation resulted, requiring Worthington have a new sentencing proceeding.⁴¹¹ But the Eighth Circuit disagreed, reversed the district court’s ruling, and set Worthington back on a course towards execution.⁴¹²

Leading up to the execution, one news report seemed to touch on the horrible personal history that had shaped Worthington by acknowledging that he “had a troubled life.”⁴¹³ But the report went on to describe that troubled life as follows: “when he was a boy he set fire to his own home twice and at age 8 burglarized houses with his father. He had a job bagging groceries. He loved drugs.”⁴¹⁴ The media portrayal of Worthington suggested to Ozarkers that assessing his culpability was far simpler than the complex evidence that should have been presented at his sentencing. It described his troubled life as entirely of his own making.

Before he was executed, Worthington lamented that even after his death his victim’s mother was “still going to have her broken heart,” and wished his “life would bring her peace”⁴¹⁵ But Ozarkers would know just what to think of such deceptively human sentiments.

F. Gary Welch

Jumping two and a half years back from Worthington and across the border to Oklahoma, we arrive at the execution of Gary Welch on January 5, 2012,⁴¹⁶ where he sits with his “thick body □

⁴¹⁰ *Id.*

⁴¹¹ See *Worthington v. Roper*, 619 F. Supp. 2d 661, 688 (E.D. Mo. 2009), *aff’d in part, rev’d in part*, 631 F.3d 487 (8th Cir. 2011).

⁴¹² See *Worthington v. Roper*, 631 F.3d 487 (8th Cir. 2011).

⁴¹³ Pokin, *supra* note 395.

⁴¹⁴ *Id.*

⁴¹⁵ Suhr, *supra* note 404.

⁴¹⁶ *Gary Welch*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/gary-welch> [<https://perma.cc/QX8W-L2YH>] (last visited Sept. 15, 2018).

bound to the gurney” with “[t]ubes run[ning] from his arms,” beside “three executioners . . . wearing hoods on their heads and faces to cloak their identities.”⁴¹⁷ Throughout the corridors outside the execution chamber are the echoes of a so-called Oklahoma death row sendoff: “a forceful clanging and rhythmic tapping . . . CLANG. CLANG. Ping. CLANG. CLANG. Ping,” which is “how other condemned men pay their respects.”⁴¹⁸ One reporter would later note the irony that “[d]eath row’s goodbye sounds like someone trying to break out.”⁴¹⁹

Welch was sentenced in Ottawa County, Oklahoma,⁴²⁰ where he beat and stabbed a man to death, during a fight in a ditch beside a public street.⁴²¹ There was evidence that the man was a drug dealer, and Welch claimed self-defense,⁴²² stating, “My intentions were never to kill him, . . . But I also didn’t intend for him to kill me either.”⁴²³ But there were multiple eye witnesses, “including a family taking their 11-year-old to football practice,”⁴²⁴ who described Welch as the aggressor. One witness had an especially horrible memory to share. The first police officer on the scene had “grown up playing Little League ball” with the victim.⁴²⁵ When the officer arrived, the victim sat upright in the ditch, covered in blood, lacerations, and stab wounds.⁴²⁶ He turned to the officer and said, “Gary Welch did this shit to me. Get that motherfucker,” and then “fell on his back and died.”⁴²⁷

Welch’s prosecutor, just like Storey’s prosecutor, put on victim impact evidence that was over the line. The Oklahoma Court of Criminal Appeals found that the testimony caused a Fourteenth Amendment violation, but found the violation harmless,⁴²⁸ and the federal district court found an Eighth and

⁴¹⁷ See Kurt, *supra* note 286.

⁴¹⁸ *Id.*

⁴¹⁹ *Id.*

⁴²⁰ See Welch v. Workman, 639 F.3d 980, 989 (10th Cir. 2011).

⁴²¹ See Kurt, *supra* note 286.

⁴²² Brief of Appellant, *Welch v. Sirmons*, 2008 WL 948999 at *10 (10th Cir. Jan. 14, 2008).

⁴²³ See Kurt, *supra* note 286.

⁴²⁴ *Id.*

⁴²⁵ *Id.*

⁴²⁶ See *id.*

⁴²⁷ See *id.*; see also Welch v. Workman, 639 F.3d 980, 988 (10th Cir. 2011).

⁴²⁸ See Welch, 639 F.3d at 1000.

Fourteenth Amendment violation, but deferred to the ruling of the state court.⁴²⁹

The prosecutor put on the victim's father, mother, brother, and "[e]ach family member characterized Welch as an 'animal' or a 'parasite' and implored the jury to impose death."⁴³⁰ The victim's brother characterized Welch's acts as "inhuman."⁴³¹ The victim's father characterized Welch as a "bloodthirsty animal[]" who had "no pity, mercy or feeling."⁴³² The father testified that Welch's lawyer was "gonna [sic] to ask you for a reduced sentence, for mercy," but that his son asked for mercy, "all he got was a knife."⁴³³ The victim's mother described Welch as a "murderous animal[]," and even specified, "and I do mean animal[]."⁴³⁴ After being sure that the jury would not take her characterization of Welch to be figurative, she addressed Welch's mitigating evidence:

Through the jury selection of this trial, [defense counsel] has tried to impress on us the unfortunate childhood that Gary had and asked each one of you do you think a person should be given a more lenient penalty. And if what we have been told is true, yes, he did have an undesirable early life. But does this give him the right to live above the laws of God and man, the right to brutally attack another human being, and the right to take a life?

I don't believe it does.

From the age of two until I was about nine I, too, had a very harsh childhood. My brother and I lived with a very brutal, drunken stepfather who physically abused our mother and both of us. But in spite of our unfortunate childhood, neither my brother [n]or I felt we had the right to disregard the law, to cause pain and suffering to other people through senseless means of brutal behavior So, no, I can't believe that Mr. Welch's childhood should excuse him from the things that he has done as an adult, including the murderous act that took my son's life. We are all capable of making choices in our lives

⁴²⁹ See *id.* at 1001.

⁴³⁰ *Id.* at 989-90.

⁴³¹ *Id.* at 996.

⁴³² *Id.* at 997.

⁴³³ *Id.*

⁴³⁴ *Id.* at 999.

... Gary Welch had a choice. He chose the path that brought him to this courtroom today. It was Gary Welch, not his family, not his mother, who took our son from us. And it is Gary Welch, not his family, who should be held responsible for his actions. We can now only put our faith first in God and then our courts, and you, the jury. And I would beg you, please, don't let this happen to another family. And, again, I say I feel that he should be imposed the death penalty.⁴³⁵

Once again, Ozarkers were told that murder is senseless, that murderers are animals, and that their lack of humanity removes them from the causal chain of human experience that would otherwise help explain their behavior. After all, some abused children do not grow to become murderers. The Eleventh Circuit has used the same logic to discount the mitigating effect of child abuse, when it “would have highlighted that [the defendant's sibling] grew up in the same environment . . . and still emerged as a successfully employed, law-abiding citizen.”⁴³⁶

But does it necessarily follow from the fact some abused children do not become murderers that the crimes of those that do are unrelated to their abuse? Eagleman argues that not all people “possess the same capacity to make sound choices,” but “varied capacities for decision-making,” meaning “[t]he unique patterns of neurobiology inside each of our heads cannot qualify as *choices*; these are the cards we're dealt.”⁴³⁷ Perhaps some manage to play similar hands better than others. But a bad hand still has something to do with losing the game.

Like so many Ozark defendants put to death before him, Welch was dealt a bad hand. The childhood that the victim's mother characterized as an “undesirable early life”⁴³⁸ involved Welch being chained up by his parents⁴³⁹ and “kept in isolation pretty much for the first six years of his life.”⁴⁴⁰ His family had a

⁴³⁵ *Id.* at 999-1000.

⁴³⁶ *Boyd v. Allen*, 592 F.3d 1274, 1301 (11th Cir. 2010). *See also Callahan v. Campbell*, 427 F.3d 897, 937-38 (11th Cir. 2005) (finding evidence that “none of Callahan's siblings had committed violent crimes,” to “further reduc[e] the value of abuse as mitigating evidence”).

⁴³⁷ *Eagleman*, *supra* note 309.

⁴³⁸ *Welch*, 639 F.3d at 999.

⁴³⁹ *Id.* at 1013.

⁴⁴⁰ Brief of Appellant, *Welch*, 2008 WL 948999 at *92.

history of mental illness.⁴⁴¹ Welch “suffered from blackouts and brain damage that made him more susceptible to aggressive impulses.”⁴⁴² He had “psychological problems,”⁴⁴³ “several areas of dysfunction,” was “chemically on a variety of drugs and alcohol,” and had been “abusing substances since age 13.”⁴⁴⁴ Welch’s mother testified about his childhood, but the Tenth Circuit characterized her testimony as “barely coherent” and “nonsense.”⁴⁴⁵

Foreknowledge of the evidence led the prosecutor to ask jurors during voir dire, “Do you feel like something like a poor childhood is a reason to not assess the death penalty?”⁴⁴⁶ It seems they did not. Even still, the Oklahoma Pardon and Parole Board split narrowly, 3-2, on its vote to deny clemency one month before Welch’s execution.⁴⁴⁷ Welch was one vote away from being allowed to live.

The folkmurderer still lives in the Ozarks. Each of the Ozark defendants considered above was attributed folkloric characteristics in support of his execution, despite the availability of neurological and psychological explanations for his crime. Each folkloric attribute of the folkmurderer is accounted for repeatedly in news reports and arguments surrounding modern Ozark executions. Old lore and new align on an element-for-element basis that is too exact to be merely coincidental.

These are not the only defendants from Ozark states whose cases show that contemporary folklore is a continuation of past folklore. The most recent two defendants executed by the State of Arkansas, though not sentenced in Ozark counties, were Eric Nance in 2005⁴⁴⁸ and Charles Singleton in 2004.⁴⁴⁹ A family

⁴⁴¹ See *Welch*, 639 F.3d 980 at 1013.

⁴⁴² Brief of Appellant, *Welch v. Sirmons*, 2008 WL 948999 at *19; see also *Welch*, 639 F.3d at 990 (a mental health expert testified that “drug and alcohol abuse caused [Welch’s] brain damage”).

⁴⁴³ *Welch*, 639 F.3d at 1015.

⁴⁴⁴ Brief of Appellant, *Welch v. Sirmons*, 2008 WL 948999 at *19.

⁴⁴⁵ *Welch*, 639 F.3d at 990.

⁴⁴⁶ *Id.* at 1012.

⁴⁴⁷ See *Oklahoma Board Closely Split on First Execution for 2012*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/oklahoma-board-closely-split-first-execution-2012> [https://perma.cc/8JNN-WSC7] (last visited Sept. 15, 2018).

⁴⁴⁸ *Eric Nance*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/eric-nance> [https://perma.cc/MJD6-KYGY] (last visited Sept. 15, 2018).

member of Nance's victim told the press "[w]e want to make sure the devil dies," even as the U.S. Supreme Court delayed Nance's execution to consider the possibility that executing Nance would be cruel and unusual because he was intellectually disabled.⁴⁵⁰ Singleton, a paranoid schizophrenic, actually had to be forcibly administered antipsychotics by court order so that he could be made sane enough to understand what was happening when he was put to death.⁴⁵¹ But, even as court-appointed mental health professionals were medicating Singleton, a family member of Singleton's victim told the community, "I don't believe it, . . . It's just something they use to prolong things to keep it in the court system."⁴⁵² Nance was represented as the devil and Singleton was represented as the deceiver. There are many more defendants beyond these.

In case after case, folkloric attributes are ascribed to Ozark defendants to explain their crimes, despite the complex neurological, psychological, moral, ethical, and legal considerations attendant to a full assessment of their culpability. In news story after news story, the folkmurderer's image is offered to Ozark communities, encouraging them to reject the mental illnesses and personal histories of actual defendants, who are often the products of their own tragedies and victimizations. Arguments of Ozark prosecutors appealing to folkloric notions about murderers continue to be successful in securing death sentences, because the narratives resonate deeply with Ozark jurors. And the cycle of reliance on folk knowledge continues to drive arguments justifying executions.

Surveying the stories of Ozark capital defendants reveals that the folkmurderer is a superstition, just like Jackson's gallows nails and Holder's ghost. He does not exist. There is no such thing

⁴⁴⁹ Charles Singleton, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/charles-singleton> [<https://perma.cc/7KPY-68D3>] (last visited Sept. 15, 2018).

⁴⁵⁰ See Francie Grace, *Arkansas Man Executed*, CBS (Nov. 29, 2005), <http://www.cbsnews.com/news/arkansas-man-executed> [<http://perma.cc/JY7S-43TK>].

⁴⁵¹ See Brian Cabell, *Arkansas Executes Mentally Ill Inmate*, CNN (Jan. 7, 2004), <http://www.cnn.com/2004/LAW/01/06/arkansas.executions/index.html?eref=sitesearch> [<https://perma.cc/8FD6-HELV>].

⁴⁵² Kevin Drew, *Executed Mentally Ill Inmate Heard Voices Until End*, CNN (Jan. 6, 2004), <http://www.cnn.com/2004/LAW/01/06/singleton.death.row/index.html> [<https://perma.cc/52UF-EPL5>].

as an inhuman, simple monster, driven only by evil, that kills inexplicably. That murderer is a boogieman. He is a figment the State presents to jurors while seeking death sentences, and media present to communities while seeking clicks. He is the extreme rhetoric of the grieving and the infuriated. But he is not real. There is always some explanation to be found by those who look deep enough.

Murder does not happen for no reason, but if it is punished as if it does, the question must be asked, do death sentences?

III. THE MURDERER-OF-LAW, WHO LIVES IN THE EIGHTH AMENDMENT

The law abhors a lack of reason nowhere more than in a death sentence. The Supreme Court has recognized that “[d]eath, in its finality, differs . . . in the need for reliability in the determination”⁴⁵³ because “execution is the most irremediable and unfathomable of penalties.”⁴⁵⁴ Thus, as observed by Justice Thurgood Marshall, “[t]ime and again the Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case.”⁴⁵⁵ The Court has proclaimed that “[f]rom beginning to end, judicial proceedings conducted for the purpose of deciding whether a defendant shall be put to death must be conducted with dignity and respect.”⁴⁵⁶ For whom?—none other than those convicted of committing horrible, brutal murderers. In the dignified, respectful proceedings of capital sentencing, ethical obligations are magnified.⁴⁵⁷ Courts must vacate death sentences if they do not feel confident about the outcomes of the proceedings.⁴⁵⁸ And courts must seek out constitutional errors

⁴⁵³ *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

⁴⁵⁴ *Ford v. Wainwright*, 477 U.S. 399, 411 (1986).

⁴⁵⁵ *Barefoot v. Estelle*, 463 U.S. 880, 913 (1983) (Marshall, J., dissenting).

⁴⁵⁶ *Wellons v. Hall*, 558 U.S. 220, 220 (2010).

⁴⁵⁷ See Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 317 (1983) (stating “defense counsel has additional responsibilities in capital cases that are unlike those of counsel in all other criminal trials”); Brian C. Duffy, *Barring Foul Blows: An Argument for A Per Se Reversible-Error Rule for Prosecutors’ Use of Religious Arguments in the Sentencing of Capital Cases*, 50 VAND. L. REV. 1335, 1382 (1997) (stating “prosecutors have a duty to be more thoughtful and not succumb to improper arguments particularly in capital cases”).

⁴⁵⁸ See *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

with painstaking care⁴⁵⁹ and heightened scrutiny.⁴⁶⁰ Alas, from top to bottom, the entire design of capital sentencing respects, dignifies, and honors the fair treatment of convicted murderers. Whether it follows through is a different story.

Moreover, the entire design of capital sentencing respects, dignifies, and honors the humanity of defendants. Jurors must regard capital defendants as “uniquely individual human beings.”⁴⁶¹ “[B]efore a jury can undertake the grave task of imposing a death sentence, it must be allowed to consider a defendant’s moral culpability and decide whether death is an appropriate punishment *for that individual* in light of his personal history and characteristics”⁴⁶² Not only must jurors be *allowed* to do so, they have to follow through: “Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence.”⁴⁶³ So the law does not only give each defendant a chance to tell his story,⁴⁶⁴ it demands that jurors sincerely consider it. Jurors are required to “engage with” a killer’s unique human experience.⁴⁶⁵ They must try to understand “where the defendant has come from and why he has become the man he is now.”⁴⁶⁶ They must be open to

⁴⁵⁹ *Burger v. Kemp*, 483 U.S. 776, 785 (1987) (“Our duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case.”).

⁴⁶⁰ *See Zant v. Stephens*, 462 U.S. 862, 885 (1983) (to overturn a state judgment in a capital case, “the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error.”); *Edelbacher v. Calderon*, 160 F.3d 582, 585 (9th Cir. 1998) (“[T]he severity of the death sentence mandates heightened scrutiny in the review of any colorable claim of error.”); *State v. Marshall*, 690 A.2d 1, 89 (N.J. 1997) (“[W]e consistently have recognized our obligation to subject capital case records to heightened scrutiny . . .”).

⁴⁶¹ *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

⁴⁶² *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 263–64 (2007) (emphasis added).

⁴⁶³ *Eddings v. Oklahoma*, 455 U.S. 104, 113–14 (1982).

⁴⁶⁴ Defense counsel “forms the story of his client, first for himself and then for judges and juries” MILNER S. BALL, *THE PROMISE OF AMERICAN LAW: A THEOLOGICAL, HUMANISTIC VIEW OF LEGAL PROCESS* 23 (1981).

⁴⁶⁵ Postconviction courts must “engage with” mitigating evidence not presented at trial, in order to determine how a jury would have done the same. *See Porter v. McCollum*, 130 S.Ct. 447, 455 (2009) (faulting the Florida Supreme Court for “fail[ing] to engage with what Porter actually went through in Korea”). This is because juries are expected to do so in the first instance.

⁴⁶⁶ WELSH S. WHITE, *THE DEATH PENALTY IN THE NINETIES* 76 (1991).

“empathy-evoking evidence,”⁴⁶⁷ to experiencing empathy for a killer, intuited from “any aspect of [his] character”⁴⁶⁸ and any “compassionate or mitigating factors stemming from the diverse frailties of humankind.”⁴⁶⁹ Jurors have to appreciate the frail humanity of murderers.

The heart of the American model for capital sentencing is the “the fundamental respect for humanity underlying the Eighth Amendment.”⁴⁷⁰ When it comes to death, the Eighth constitutionalizes the very respect for human life that its beneficiaries defy. It is the most magnificently enlightened ideal of American law.

But why should it be? Why should the entire capital justice system be designed to preserve respect for the humanity of killers? We saw why in Part II, reviewing Ozark death cases and news coverage of executions. As Litton put it, “the idea of a murderer for many people . . . is that of a non-human, pure demonic agent, with ‘no personal history, no human relationships, and no social context.’”⁴⁷¹ It is none other than the folkmurderer that necessitates the humanism of the Eighth. Ultimately, the capital defendant’s humanity is safeguarded for one very good reason—it needs to be. If jurors are not reminded that defendants are humans, jurors would be inclined to wander into superstition, and

⁴⁶⁷ See Russell Stetler, *The Mystery of Mitigation: What Jurors Need to Make A Reasoned Moral Response in Capital Sentencing*, 11 U. PA. J. L. & SOC. CHANGE 237 (2008).

⁴⁶⁸ *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (emphasis in original).

⁴⁶⁹ *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (capital sentencing cannot “exclude[] from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind”).

⁴⁷⁰ *Id.* (finding that this respect “requires consideration of the character and record of the individual offender”). *But see* Carol S. Steiker & Jordan M. Steiker, *Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing*, 102 YALE L.J. 835, 845 n.50 (1992) (arguing that individualized sentencing is grounded in the principle of equality, rather than the need to “appreciate the humanity of the defendant”).

⁴⁷¹ Paul Litton, *The “Abuse Excuse” in Capital Sentencing Trials: Is It Relevant to Responsibility, Punishment, or Neither?*, 42 AM. CRIM. L. REV. 1027, 1028 (2005) (emphasis in original).

think defendants are devils. As Friedman and Tata acknowledged, “[t]o the public, the issue [i]s simple: good versus evil.”⁴⁷²

But the Eighth Amendment model for capital sentencing is just lofty rhetoric if jurors do not follow it.

Do they in the Ozarks? Clayton’s prosecutor told the jury it is “nowhere in our law, nowhere in our tradition” that “the punishment should fit the criminal,”⁴⁷³ and insisted that the jury’s focus “should not be on the criminal.”⁴⁷⁴ The prosecutor’s argument could not stand if Eighth Amendment precepts about capital sentencing were treated as rules, rather than rhetorical aspirations. But the argument did stand. It carried the day. Clayton died from it.

Clayton’s case is not the only one in which a conflict between Eighth Amendment precepts and Ozark attitudes, values, and beliefs about capital sentencing can be seen.

Time and again, the U.S. Supreme Court has looked to scientific and medical evidence to understand how mental illness might help explain the crime of murder. The Court considered defendant Demarcus Ali Sears’ “frontal lobe brain damage” and “cognitive impairments” to be a constitutionally required component of his sentencing.⁴⁷⁵ It considered George Porter’s “psychological assessments” as necessary to his.⁴⁷⁶ It considered Ronald Rompilla’s “organic brain damage” and “extreme mental disturbance significantly impairing several of his cognitive functions” the same.⁴⁷⁷ So there is no questioning that mental illness is mitigating of murder. Accordingly, in a non-Ozark case, the Tenth Circuit granted relief by finding that mental illness “ranks among the most powerful types of mitigation evidence available.”⁴⁷⁸ But, in an Ozark case out of Muskogee County, Oklahoma—built on and embodying the Ozark attitudes, values, and beliefs that shaped the evidence, arguments, and issues of the case—the Tenth Circuit has also held that “evidence of low I.Q.

⁴⁷² Lawrence M. Friedman & Vivek Vijay Tata, *A Crime of Passion: The Goldenson Case in San Francisco*, 37 WHITTIER L. REV. 147, 168 (2015)

⁴⁷³ See Clayton v. Roper, 515 F.3d 784, 788 (8th Cir. 2008).

⁴⁷⁴ *Id.*

⁴⁷⁵ See Sears v. Upton, 561 U.S. 945, 945 (2010).

⁴⁷⁶ See Porter v. McCollum 558 U.S. 30, 36 (2009).

⁴⁷⁷ See Rompilla v. Beard, 545 U.S. 374, 379 (2005) (quoting mental-health experts).

⁴⁷⁸ Littlejohn v. Trammell, 704 F.3d 817, 864 (10th Cir. 2013).

and/or organic brain damage” “does not outweigh evidence supporting . . . multiple aggravating circumstances.”⁴⁷⁹ Mental illness is treated as being *responsible* for brutal acts in the first case, but, in the second, is *weighed against* the severity of those acts. Yet, if mental illness *causes* violent behavior, the brutality of the behavior does not make any difference as to the actor’s responsibility for it.

Likewise, the Supreme Court of Arkansas has held that “even if the evidence of [a] defendant’s mental illness [i]s uncontradicted, the jury [i]s not required to . . . find such a mitigating circumstance.”⁴⁸⁰ That is to say, not only might Arkansas jurors in Ozark cases disbelieve it, they might believe it and nevertheless choose not to think of it as mitigating. The Supreme Court of Arkansas reached the ruling despite the U.S. Supreme Court’s directive that sentencers must “consider, as a matter of law, any relevant mitigating evidence,”⁴⁸¹ and the Court’s repeated treatment of mental illness as mitigating.

The Supreme Court has repeatedly found that evidence of substance abuse must be presented so that a jury may consider its mitigating value,⁴⁸² yet in an Ozark case out of Butler County, Missouri, the Supreme Court of Missouri found that “evidence of substance abuse can be seen as an aggravating circumstance, as opposed to a mitigating circumstance.”⁴⁸³ Some defendants with substance abuse disorders are viewed as suffering from an illness, while Ozark defendants may be condemned as lousy drunks, all the more deserving of death. Which is it?

The Supreme Court has repeatedly treated child abuse as mitigating, often in cases where capital defendants had siblings who were also abused but did not grow up to be killers.⁴⁸⁴ But

⁴⁷⁹ *Foster v. Ward*, 182 F.3d 1177, 1189 (10th Cir. 1999).

⁴⁸⁰ *Echols v. State*, 936 S.W.2d 509, 520 (1996).

⁴⁸¹ *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982).

⁴⁸² *See, e.g., Porter v. McCollum* 558 U.S. 32, 40-42 (2009 (referring to Porter’s and finding unreasonable the conclusion that Porter was not prejudiced by the failure to present this mitigating evidence); *Rompilla*, 545 U.S. at 392 (referring to Rompilla’s drinking problem); *Sears*, 561 U.S. at 949 (referring to Sears’s “drug and alcohol abuse”).

⁴⁸³ *State v. Kenley*, 952 S.W.2d 250, 269 (Mo. 1997).

⁴⁸⁴ *See, e.g., Wiggins v. Smith*, 539 U.S. 510, 516-17, 535 (2003) (explaining that Wiggins’ mother left “Wiggins and his siblings” alone for days, forced “them” to beg for food, beat “the children,” and had sex with men while “her children slept in the same

Ozark courts permitted jurors to consider the testimony from Gary Welch's victim's mother that her childhood was difficult, yet she did not grow up to break the law. And the Tenth Circuit ruled, in that same Muskogee County case, that "evidence of a troubled childhood involving physical, emotional, sexual . . . abuse does not outweigh evidence . . . supporting multiple aggravating circumstances."⁴⁸⁵ Stated as a conclusion that the court has reached enough times for it to have become a general rule, the statement denies the mitigating value of child abuse.

There is a great conflict between the Eighth Amendment model for capital sentencing and the arguments and rulings that support Ozark death sentences. As seen in Part II, there is persistent lore relating to the nature of murderers that creates and affirms the attitudes, values, and beliefs underlying the conflict. There are Ozarkers that rely on folk knowledge to understand murderers. They do it as grieving family members. They do it as prosecutors. They do it as law enforcement officers. They do it as journalists. So, the question must be asked, do they do it as jurors?

IV. THE RIVALRY OF LORE AND LAW IN THE MODERN CAPITAL JURY BOX

The Supreme Court calls death "the most . . . unfathomable of penalties."⁴⁸⁶ But jurors have to fathom it somehow, in order to decide that it should be imposed. There are numerous studies, some directly involving Ozark jurors and some of which can fairly be extrapolated to the Ozarks, that suggest jurors look for help outside the law and the instructions from the court.

Jurors examined in the Steiner Study certainly had. The study used data from the Capital Jury Project, representing

bed," and that this information was "the kind of troubled history we have declared relevant to assessing a defendant's moral culpability"); *Rompilla*, 545 U.S. at 381 (noting that lawyers spoke to Rompilla's family, including "two brothers," and granting relief); *Sears*, 561 U.S. at 950 (noting the influence of Sears's "older brother," who was "a convicted drug dealer and user," but presumably not a murderer, and granting relief); *Williams v. Taylor*, 529 U.S. 362, 395 (2000) (noting that "Williams' parents had been imprisoned for the criminal neglect of Williams and his siblings," and granting relief).

⁴⁸⁵ *Foster v. Ward*, 182 F.3d 1177, 1189 (10th Cir. 1999).

⁴⁸⁶ *Ford v. Wainwright*, 477 U.S. 399, 411 (1986).

hours-long interviews with almost a thousand jurors in eleven states,⁴⁸⁷ including Missouri,⁴⁸⁸ to show that jurors relied on folk knowledge about early release—specifically, that life-sentenced defendants would soon be free to kill again—despite jury instructions reflecting state law to the contrary.⁴⁸⁹ The study concluded that constitutional rules of capital sentencing that “may make sense within the highly structured ideology of due process” will be “regularly resisted” if they “def[y] cultural common sense.”⁴⁹⁰ The lofty Eighth Amendment shibboleths about the humanism of death sentencing seem to fit the formula. In fact, they fit it far better than misconceptions about early release rules.

Poetically expressed constitutional ideals about humanism pitted against the strong impulse to condemn murderers will surely fare worse than blackletter state law about early release pitted against misconceptions of the rules. The impulse to condemn comes from a far deeper folk knowledge. Each of the folkmurderer’s defining characteristics are designed to inspire fear and condemnation. After all, he was once a songwriting and storytelling device, and his sole purpose was to evoke an emotional response in the listener. It worked well. And it still does, in ways unintended and destructive to criminal justice.

The folkmurderer is more likely to influence jurors at criminal sentencing than other folklore is in other legal contexts. Friedman perceives that laypeople “think they know far more about the basic contours of criminal justice than about other aspects of the legal system.”⁴⁹¹ Likewise, the Steiner Study recognizes that murder and the death penalty “have particular visibility and salience . . . in the popular legal imagination,” and thus they are “a rich subject for vernacularization and for the development of folk knowledges.”⁴⁹² The folkmurderer is just the sort of folk knowledge that can edge out the law.

⁴⁸⁷ Benjamin D. Steiner et al., *Folk Knowledge As Legal Action: Death Penalty Judgments and the Tenet of Early Release in A Culture of Mistrust and Punitiveness*, 33 LAW & SOC’Y REV. 461, 461 (1999).

⁴⁸⁸ *Id.* at 475.

⁴⁸⁹ *See id.* 461-64.

⁴⁹⁰ *Id.* at 498.

⁴⁹¹ *Id.* at 464.

⁴⁹² *Id.*

The cultural common sense of the Ozarks that would allow him to do so is shaped by sympathy for bereaved relations of murder victims. The brother of Storey's victim told the public that courts should not have been so concerned with whether Storey's execution would be brutal or involve suffering. The mother of Worthington's victim was incredulous that murderers should be put to sleep, rather than just transported from this world to the next by any means available. The wife of Ringo's victim urged the public not to make Ringo's execution about how executions should or should not take place. Their pleas were heartfelt and heartbreaking. They drive folk understandings about how murderers should be treated counter to the law. How can philosophically couched commands of law, encountered once in a lifetime during capital jury service, shake loose the emotional and psychological effects of such powerful pleas by such sympathetic figures?

The findings of the Steiner Study indicate they cannot. Folk knowledge "cannot readily be cabined or controlled by state law,"⁴⁹³ but rather "pushes against, as it pushes into, the domain of state law"⁴⁹⁴ effectuating constitutional rules of capital sentencing. Unavoidably, "[f]olk understandings substitute perceived legal realities for abstractions that the courts use to frame the decision-making process."⁴⁹⁵ Jurors "make recourse to their store of folk knowledge" when "[p]resented with what they regard as legal nonsense."⁴⁹⁶ Thus, jurors instructed by the law to decide between life and death will do so, "but not in the way required by the constitution as a condition for using death as punishment."⁴⁹⁷

Paradoxically, the law looks the other way when jurors ignore its dictates. Friedman observed that "[t]he jury's power to bend and sway, to chip away at the official rules, is built into the system. Juries are not supposed to be lawless; but the system is set up in such a way that lawlessness . . . cannot be prevented."⁴⁹⁸

⁴⁹³ *Id.* at 497.

⁴⁹⁴ *Id.* at 463.

⁴⁹⁵ *Id.* at 497.

⁴⁹⁶ *Id.* at 498.

⁴⁹⁷ *Id.* at 499-500.

⁴⁹⁸ *Id.* at 498.

Jurors are left to their own devices in the deliberation room. Behind closed doors, Ozark jurors can make recourse to the folkmurderer without the court looking over their shoulders while they do it.

And it is not only constitutional principles that fall victim to the power of folk knowledge. "Evidence dissonant with taken-for-granted assumptions about the right way of dealing with criminals and the dangers of deviating from those methods does not penetrate" either.⁴⁹⁹ Jurors will disregard not just law but facts that contradict what they know of the folkmurderer.

The folkmurderer's influence is also amplified by the political nature of the death penalty:

The public's apprehension about crime and punishment invites politicians to assume a "get tough" posture in their political campaigns and to tell stories of early release and what they will do about it as a way of garnering support from a public ever wary of crime. Especially when the crime is murder and early release is blamed, emotionally laden media accounts accompanied by allegations of the contributing role of early release will often be the vehicles for presenting the crime problem to the public. Such public pronouncements and media accounts appeal to the constituent elements of folk knowledge.⁵⁰⁰

A politics of punitiveness grows out of the folkmurderer's great influence, and, in return, redoubles his position in folk knowledge. Thus, folklore drives the media and politics, the media drive politics and folklore, politics drives folklore and the media, and everyone thinks they are just along for the ride.

The Steiner Study is not the only one to indicate that folklore, media, and politics have pathways into jury decision-making.⁵⁰¹ The American Bar Association has conducted its own

⁴⁹⁹ *Id.* at 499.

⁵⁰⁰ *Id.* at 467. (footnotes omitted).

⁵⁰¹ See, e.g., Douglas W. Maynard & John F. Manzo, *On the Sociology of Justice: Theoretical Notes from an Actual Jury Deliberation*, 11 SOC. THEORY 173, 173-93 (1993).

study of the efficacy of American capital sentencing regimes, including that of the State of Missouri.⁵⁰²

The Missouri Death Penalty Assessment Report describes a “significant risk that death sentences will be imposed arbitrarily,” due to Missouri’s “wantonly vile” aggravating circumstance being broad enough that Missouri jurors could find this circumstance to be present in most any case;⁵⁰³ prosecutorial misconduct, violating constitutional rules in order to secure convictions and death sentences by any means possible;⁵⁰⁴ the fact that “Missouri does not prohibit the death penalty for persons who, at the time of the offense, suffered from a mental disorder due to dementia or traumatic brain injury” or “for the severally mentally ill absent a finding of not guilty by reason of insanity;”⁵⁰⁵ and a lack of time for qualified defense counsel to build mitigation cases, telling the full stories of murderers to the jurors who are supposed to appreciate their unique human experiences.⁵⁰⁶

Most important to this Article, the Missouri Assessment found that jurors do not understand or follow jury instructions effectuating rules of law, including Eighth Amendment rules:

The Capital Jury Project’s survey of Missouri capital jurors revealed several common misunderstandings regarding capital sentencing law. For instance, 65.5% of surveyed Missouri jurors erroneously believed that the jury had to be unanimous on a finding of mitigating evidence, and 36.8% did not realize they could consider any evidence as mitigating—i.e., evidence tending to favor a sentence less than death. The Capital Jury Project’s findings further revealed that many jurors did not believe that a sentence of life in prison without parole means that the defendant will never be released from prison.⁵⁰⁷

⁵⁰² *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Missouri Death Penalty Assessment Report*, AM. BAR ASS’N (2012), http://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/final_missouri_assessment_report.authcheckdam.pdf [<https://perma.cc/HSU7-E9YJ>].

⁵⁰³ *Id.* at v.

⁵⁰⁴ *See id.* at vi.

⁵⁰⁵ *Id.* at vii.

⁵⁰⁶ *See id.* at viii.

⁵⁰⁷ *Id.* at ix.

Most Missouri capital jurors do not understand that they can believe certain facts are mitigating even if other jurors do not, that they can consider any facts to be mitigating, and, like the jurors of the Steiner Study, that a death sentence is not the only way to keep convicted murderers off the streets. If Missouri jurors did not follow the law, then, as seen in the Steiner Study, they followed folk knowledge. Misunderstandings of the law are openings where folk knowledge can easily enter capital sentencing.

Beyond studies of juror decision-making, there are those that reflect the power of cultural traditions to shape the workings of the law into the distant future. One remarkable example is the Equal Justice Initiative's 2015 study resulting in the report, *Lynching in America: Confronting the Legacy of Racial Terror*.⁵⁰⁸ The study uncovered and examined thousands of public lynchings between the Civil War and World War II, treated them for what they were—"violent and public acts of torture that traumatized black people throughout the country"—and examined how "[t]error lynchings" translate into modern society in many profound ways, including by "continu[ing] to contaminate the integrity and fairness of the justice system."⁵⁰⁹ Arkansas was one of the states examined by EJI. One of its counties, Phillips County, had 244 terror lynchings, which was 93 more than any other county in any other state.⁵¹⁰

The study demonstrated that "the decline of lynching . . . relied heavily on the increased use of capital punishment."⁵¹¹ EJI found that "the death penalty's roots are sunk deep in the legacy of lynching" because "public executions to mollify the mob continued after the practice was legally banned."⁵¹² Not surprisingly, fear-based superstitious folk beliefs dehumanizing black men, portraying them as monstrous sexual predators, drove the translation of lynchings into capital sentencing. The study

⁵⁰⁸ Report Summary, *Lynching in America: Confronting the Legacy of Racial Terror*, Second Edition, EQUAL JUSTICE INITIATIVE (2015), <http://eji.org/sites/default/files/lynching-in-america-second-edition-summary.pdf> [<https://perma.cc/ZJ4S-DG64>].

⁵⁰⁹ *Id.* at 3.

⁵¹⁰ *Id.* at 17.

⁵¹¹ *Id.* at 6.

⁵¹² *Id.*

explained that “a wildly distorted fear of interracial sex”⁵¹³ was one driver of terror lynchings. “The mere accusation of rape, even without an identification by the alleged victim, could arouse a lynch mob.”⁵¹⁴

Just as folk knowledge arises out of mythopoeic events like terror lynchings, it arises out of public executions, like Rosco Jackson’s. Indeed, EJI demonstrated that the two are not as different as once believed. Lynching is the death penalty’s heritage. And both plant seeds of lore that shape ways of thinking long into the future.

Study after study indicates that jurors are subject to the influence of folk knowledge when they make sentencing decisions, and there is no reason to believe Ozark jurors are any different. Ozark folk knowledge about murderers is potent and heavily circulated. It seeps into the subconscious, whether encountered in the folksongs of the past or contemporary media. Prosecutors rely on it because it gets results. Bereaved family members rely on it because it is part of their bone-deep understandings of the world. Journalists rely on it because it resonates with the public. The Ozarks are magical indeed if they can stop all this reliance on folk knowledge at the jury room door.

CONCLUSION

On February 20, 1950, with Merlin Mitchell recording onto Reel 6, old Fred High sang *The Penitentiary Song* from which the title of this Article is taken:

*May Heaven guide and protect you wherever you may go,
Twas the Devil snatched that jury that sent you far below.*⁵¹⁵

Indeed, the devil seems to play a major role on capital juries of the Ozarks. His image is that of the folkmurderer, and jurors see him when they regard capital defendants.

⁵¹³ *Id.*

⁵¹⁴ *Id.* at 12.

⁵¹⁵ *Penitentiary Song*, OZARK FOLKSONG COLLECTION, <http://digitalcollections.uark.edu/cdm/singleitem/collection/OzarkFolkSong/id/1307/rec/2> [<https://perma.cc/FZD2-5KQV>].

Randolph once wrote that “[t]he hillman is secretive and sensitive beyond anything that the average city dweller can imagine,” and that “[h]is mind moves in a tremendously involved system of signs and omens and esoteric auguries.”⁵¹⁶ Setting aside the flourish and overgeneralization, there is some lasting truth to the remark. Some Ozark jurors *feel* their way to death sentences when they should *reason* their way. They are influenced by a persistent folk belief in the mythological specter of an inhuman killer that does not exist among the actual capital defendants of the Ozarks.

In the critiques of Randolph’s essentialization of Ozarkers lies proof that the folklore-based constitutional infirmity in Ozark death sentencing exists elsewhere in the county. Those historians who have set about debunking Randolph’s Ozark exceptionalism have carried the day with the view that the Ozarks are not all that different than the rest of the country.⁵¹⁷ Indeed, as seen in Part I, the Collection includes folksongs from Appalachia and England that once travelled all over the nation. Much of Ozark lore is shared. The Ozarks were just one stop on the long road of American culture, and they still are. Thus, while the Ozark region happens to have a magnificent body of evidence in the Ozark Folksong Collection to tidily compare old folk knowledge about murderers to contemporary folk knowledge about murder cases, the Ozark region is not the only one where capital sentencing is vulnerable to a folklore-based constitutional infirmity. While two of the five most active death penalty jurisdictions are the Ozark states of Oklahoma and Missouri,⁵¹⁸ the other three have folklore traditions of their own.⁵¹⁹ Likewise, Appalachia has its own folklore,⁵²⁰ as does New England,⁵²¹ the Pacific Northwest,⁵²² and

⁵¹⁶ RANDOLPH, *supra* note 2, at 9.

⁵¹⁷ See BRONNER, *supra* note 13, at 226-27; BLEVINS, *supra* note 3, at 1-7.

⁵¹⁸ See *Number of Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976> [<https://perma.cc/G8GA-RTZ3>] (last visited Sept. 15, 2018).

⁵¹⁹ See FRANCIS EDWARD ABERNETHY AND KENNETH L. UNTIEDT, *BOTH SIDES OF THE BORDER: A SCATTERING OF TEXAS FOLKLORE* (2004); GREG JENKINS, *FLORIDA’S GHOSTLY LEGENDS AND HAUNTED FOLKLORE: NORTH FLORIDA AND ST. AUGUSTINE* (2005); THOMAS E. BARDEN, *VIRGINIA FOLK LEGENDS* (1991).

⁵²⁰ See PATRICK W. GAINER, *WITCHES, GHOSTS, AND SIGNS: FOLKLORE OF THE SOUTHERN APPALACHIANS* (2008).

other American regions.⁵²³ The Ozarks exemplify the vulnerability of the Eighth Amendment model of capital sentencing to corruption by folklore, but do not account for the extent of it.

Before he hanged, that scoundrel and horse thief Lewis Holder promised he would haunt all connected to the Western District of Arkansas, which, after my clerkship in that court, I suppose includes me. I am pleased to report that Holder never came for me in chambers. And, of course, I do not believe he could. I do not believe in such things as ghosts. As a person of the law, of reason, I do not go in for such superstition. But I am also of the Ozarks, and it is still a magical place for me. So perhaps I will keep an eye out for Holder all the same, just to be safe.

⁵²¹ See BENJAMIN ALBERT BOTKIN, *A TREASURY OF NEW ENGLAND FOLKLORE: STORIES, BALLADS, AND TRADITIONS OF THE YANKEE PEOPLE* (1949).

⁵²² See ELLA ELIZABETH CLARK, *INDIAN LEGENDS OF THE PACIFIC NORTHWEST* (1963).

⁵²³ See RICHARD M. DORSON, *AMERICAN FOLKLORE* (1959).